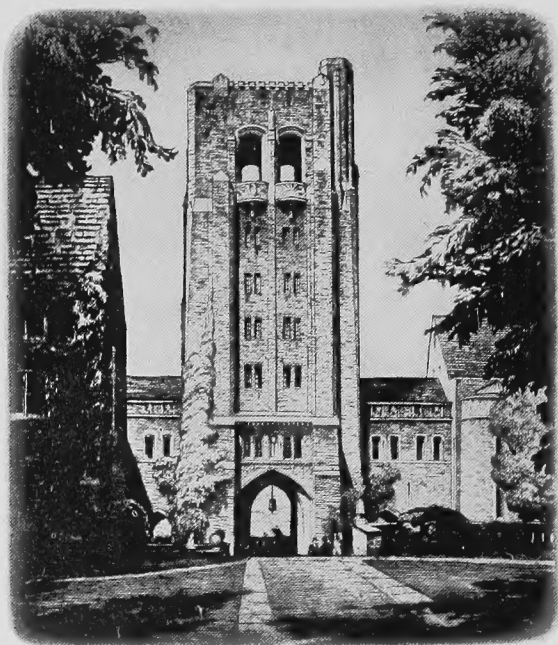


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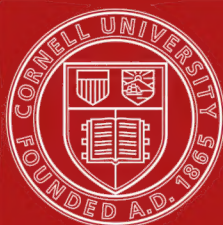
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A TREATISE
ON THE LAW OF
MUNICIPAL CORPORATIONS

By EUGENE McQUILLIN
AUTHOR OF MUNICIPAL ORDINANCES, AND
JUDGE OF THE EIGHTH JUDICIAL
CIRCUIT, MISSOURI.

IN SIX VOLUMES

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CHAPTER 31.

SEWERS AND DRAINS.

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(3015)

§ 1421. Sewer defined.

In its broader sense a sewer is a drain or passage to convey water or filth. In its more restricted and accurate sense it means a drain for carrying away by water excreta and other refuse, known, therefore, collectively as sewage.¹ A sewer may be covered or its channel concealed underground, or it may be open to the air when it is known as an open sewer.² As generally understood the term sewers has reference to underground canals or passages by means of which urban centers are drained and the filth and refuse liquids are carried away.³

A sewer has been variously described: as a subterranean passage for drainage, usually constructed and maintained by a municipal corporation;⁴ a drain or passage to convey water or filth underground; a subterraneous canal, particularly in cities and towns;⁵ a passage for foul drainage to run through;⁶ a large and generally, though not always, underground passage (or conduit) for fluid and feculent matter from a house or houses to some other locality, usually the place of discharge;⁷ a closed or covered waterway for conveying and discharging filth, refuse and foul matter, liquid or solid;⁸ a conduit or canal constructed, especially in a town or city, to carry

1. 24 *Encyclopedia Britannica* (11th Ed.), tit. "Sewer," p. 735.

2. *Century, Dict. and Cyc.*, tit. "Sewer;" *State Board of Health v. Jersey City*, 55 N. J. Eq. 116, 124, 35 Atl. 835.

The sewer is usually but not necessarily closed. *Aldrich v. Paine*, 106 Iowa 461, 76 N. W. 812.

3. *Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330.

4. 2 *Bouvier's Law Dict.*, tit. "Sewer."

5. *Iowa. Aldrich v. Payne*, 106 Iowa 461, 76 N. W. 812.

Missouri. Fuchs v. St. Louis,

167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136.

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New Hampshire. Gale v. Dover, 68 N. H. 403, 44 Atl. 535.

Rhode Island. Clark v. Peckham, 9 R. I. 455, 467.

6. *Johnson's Dict. (Latham)*, tit. "Sewer."

7. *Durham v. Eno Cotton Mills*, 144 N. C. 705, 708, 57 S. E. 465, 11 L. R. A. (N. S.) 1163, quoting from *New Jersey case*.

8. *State Board of Health v. Jersey City*, 55 N. J. Eq. 116, 124, 35 Atl. 835.

off superfluous water, soil, and other matter; a public drain;⁹ a conduit constructed and maintained by a municipality or by its authority, by means of which cities and towns are drained of superfluous waters, filth and other refuse matter.¹⁰

The term has also been applied to an underground structure for conducting the water of a natural stream.¹¹ A sewer may be used to conduct water from its natural course as well as surface water, and the fact that a sewer is used to divert the waters of a brook as well as to carry off the sewage from the streets and houses, does not render it any less a sewer.¹²

Originally the word "sewer" meant an artificially constructed fresh water trench, encompassed with banks on both sides to convey surface water into the sea and thereby preserve the adjacent lands from inundation.¹³ An underground structure built by a municipal corporation to convey sewage from houses and streets and also to divert the waters of a brook, is a *common sewer* within the meaning of a charter provision authorizing the local corporation to lay out common sewers.¹⁴

9. Century Dict., 3 Cyc., tit. "Sewer."

10. Com. v. Yost, 11 Pa. Super. Ct. 323, 339.

11. Aldrich v. Paine, 106 Iowa 461, 76 N. W. 812.

12. Bennett v. New Bedford, 110 Mass. 433.

13. Valparaiso v. Parker, 148 Ind. 379, 381, 47 N. E. 330; Callis, Sewers, 80, 99; 2 Bouvier's Law Dict., tit. "Sewers;" 24 Encyclopedia Britannica, tit. "Sewer," p. 735.

Derivation of word sewer, see 24 Encyclopedia Britannica, tit. "Sewer," p. 735.

14. Bennett v. New Bedford, 110 Mass. 433.

"Sewers are constructed, as sanitary measures, for the pub-

lic good, to carry off all sewage, consisting of human excrements and refuse animal and vegetable matter, which * * * constantly and continuously generates gases, noxious and dangerous, as the result of the constant and continuous process of nature. It is intended and is the object of sewers to carry off and guard the community against these gases, as much as it is to carry off the substances from which they spring. Sewers are supposed to be covered, and to be so constructed as to prevent the escape of gases generated in them. It is not intended that they be permitted to disseminate and breed disease, or to cause injury to personal or property rights. If this

§ 1422. Sewers, drains and ditches compared and distinguished.

The law often distinguishes sewers from drains and ditches. A *drain* has been defined as a trench; a watercourse; a sewer; a sink.¹⁵ It is an artificial conduit or channel designed to carry off water, sewage, filth, refuse, etc. It is sometimes applied to a natural watercourse which drains a tract of country, as well as to covered sewage drains or field drains.¹⁶ The word "drain" is said to have no technical or exact meaning, but as commonly understood, it means an artificial channel or trench through which water or sewage is caused to flow from one point to another.¹⁷ It may mean a hollow space in the ground, natural or artificial, where water is collected or passes off, and is synonymous with the word "ditch."¹⁸ The word *ditch*, as used in a drainage act, has been construed to include a drain or watercourse.¹⁹ And as generally used the words "drain" and "ditch" are synony-

is not so, then there is no need of sewers, and whilst it is necessary, in order that the city may, in the exercise of its ministerial function, properly repair and maintain its sewers, that there should be certain openings or manholes, to permit ingress thereto and egress therefrom, and hence it becomes necessary to remove occasionally the covers, the city would be remiss in its duty were it to remove deliberately the covers for the purpose of permitting the escape of all the vile, noxious, and dangerous gases which through nature's laws, are constantly produced therein." *Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136.

Sewer may include pumping works connected with a sewerage system. *Drexel v. Lake*, 127 Ill. 54, 20 N. E. 38.

As used in Statute 9 Victoria, c. 120, sewer was held to include a sea wall built to prevent the inundation of an island, and a drain. "Sewer in its general sense may mean the whole apparatus, and in its specific sense a drain as a part of that apparatus." *Board of Works v. Knight*, El. Bl. and El., 408, 429.

15. *Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330; *Johnson's Dict. (Latham)*, tit. "Drain."

16. 3 New English Dict., tit. "Drain."

17. *Valparaiso v. Parker*, 148 Ind. 379, 381, 47 N. E. 330.

18. *Goldthwait v. East Bridge-water*, 71 Mass. (5 Gray) 61.

19. *Briar v. Jobs Creek Drainage Dist. Com'r*, 185 Ill. 257, 56 N. E. 1042.

mous, but in reality each has a technical meaning that is distinct from the other when used in certain relations. The word drain is commonly used in connection with a sewer, sink or other undersurface drain; while the word ditch is generally used to designate a trench on the surface of the ground.²⁰

The difference between a sewer and a drain or ditch has been said to be largely a matter of location; a ditch or drain in the rural district being called a sewer in the urban center, and *vice versa*.²¹ The term sewers is ordinarily applied to drains in the city or town, whether of water or filth or both.²²

It has been said that "sewers are closed or covered waterways, and ditches are drains which are or may be open, and so arranged as to take surface water."²³ The term sewers has been held to include drains and ditches open or covered, within the meaning of a statute relative to the opening of streets and the creation of sewers and drains.²⁴ So a statute authorizing the construction of drains has been held broad enough to include sewers.²⁵ However, power to construct sewers has been adjudged not to confer authority to construct a drain or ditch.²⁶

20. "Outside of this we can find no distinctive difference in the meaning of the two words. But in order to constitute either, there must be a well-defined channel or receptacle for the drainage of water. A mere depression in the surface of the earth, or a swale, with no channel or bank, can not be called either a ditch or drain." *Bryne v. The Keokuk & Western R. R. Co.*, 47 Mo. App. 383, 389.

A ditch is a trench cut in the ground usually between fields; any long, narrow receptacle for water. *Johnson's Dict. (Latham)*, tit. "Ditch."

21. *Aldrich v. Paine*, 106 Iowa 461, 76 N. W. 812

22. *Aldrich v. Paine*, 106 Iowa 461, 76 N. W. 812.

23. *State Board of Health v. Jersey City*, 55 N. J. Eq. 116, 124, 35 Atl. 835.

24. *Strohl v. Ephrata*, 178 Pa. St. 50, 35 Atl. 713.

25. *Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985.

26. *Aldrich v. Paine*, 106 Iowa 461, 76 N. W. 812, citing *Bennett v. New Bedford*, 110 Mass. 433.

Culvert. A town was held liable under a statute making it responsible for damages happening to persons, vehicles or teams by the defective condition of any culvert, for injury caused by the breaking through of a sewer cover. "A culvert, as used in the

In English law under the Public Health Act, 1875, sewers include all pipes used for conveying sewage away from two or more houses or other buildings.²⁷ In London the definition of a sewer is the same.²⁸ If a pipe is merely used for the drainage of one building or premises within the same curtilage, and conveys the sewage into a cess-pool or sewer it is a drain.²⁹

§ 1423. Sewage and sewerage defined and distinguished.

In its primary sense the term *sewage* means that which passes through a sewer. But in a secondary sense it takes its meaning from the usual character of the contents of a sewer, and signifies the refuse and foul matter, solid or liquid, which is so carried off.³⁰

Broadly speaking sewage is the general drainage of a city or town by means of sewers.³¹ "Sewage includes the water by which the foul matter, which passes through the drains, conduits, or sewers of a town, is carried off, the waste water of baths, washhouses, and other domestic operations, and of the greater part of the surface drainage of the area drained. Water polluted by the filth from buildings and streets is sewage."³²

statute, is a covered drain, under a road, designed for the passage of water." *Gale v. Dover*, 68 N. H. 403, 44 Atl. 535.

27. 24 *Encyc. Britannica* (11th Ed.), tit. "Sewers," p. 735.

Distinction mentioned in *Black's Law Dict.*, tit. "Sewer."

28. *Bradford v. Eastbourne* (1896), 2 Q. B. 205; *Kershaw v. Taylor* (1895), 2 Q. B. 471; *St. Martin's Vestry v. Bird* (1895), 1 Q. B. 428; *Humphries v. Cousins* (1877), 2 C. P. D. 239.

29. In England the distinction is important since the occupier or owner of the premises is responsible for a drain, while sewers vest

in law under the control of the local sanitary authority. 11 *Encyc. of the Laws of England*, tit. "Sewer;" 6 *Encyc. of the Law of England*, tit. "Drain."

30. *Morgan v. Danbury*, 67 Conn. 484, 494, 35 Atl. 499, per Baldwin, J., citing *Century Dict.* and *Webster's International Dict.*, approved in *Winchell v. Waukesha*, 110 Wis. 101, 111, 85 N. W. 668, 84 Am. St. Rep. 902.

31. *Valparaiso v. Parker*, 148 Ind. 379, 381, 47 N. E. 330.

32. *Ulmen v. Mt. Angel*, 57 Ore. 547, 550, 112 Pac. 529, quoting from *Universal Dict.*

The terms sewage and sewerage are frequently used interchangeably. *Sewerage is usually applied to the system of sewers, and sewage to the matter carried off.*³³ Sewerage is a general term applied to the process or system of methodically collecting and removing sewage or the fouled water-supply of a community by means of sewers.³⁴

Some laws define sewage or sewerage "as any substance that contains any of the waste products, or excrementitious or other discharges from the bodies of human beings or animals."³⁵ By other laws it is confined to the liquid and solid matter flowing from water-closets through sewers and drains.³⁶

§ 1424. Sewage and drainage distinguished.

When the term "drainage" is used with reference to urban centers it usually includes sewage or sewerage, storm and surface water, the overflow of fountains, cisterns, public hydrants, water-troughs, water closets, sinks, all filth and refuse liquids, and the diversion of natural watercourses.³⁷ And, while it is true that "drainage"

33. Century Dict., tit. "Sewerage."

34. 24 Encyclopedia Britannica (11th Ed.), tit. "Sewerage," p. 735.

Contents of, foul matter carried away by, a sewer; system of carrying off the same. Johnson's Dict. (Latham), tit. "Sewage."

Sewerage is sometimes classified: (1) Excreta, consisting of urine and faeces; (2) slop-water, or the discharge from sinks, basins, baths, etc., and the waste water of industrial processes; (3) surface water due to rainfall. 24 Encyclopedia Britannica, tit. "Sewerage," p. 735.

35. Commonwealth v. Emmers, 221 Pa. St. 298, 301, 70 Atl. 762, giving statutory definition.

36. Durham v. Eno Cotton Mills, 144 N. C. 705, 708, 57 S. E. 465, 11 L. R. A. (N. S.) 1163.

Sewerage plant, what is within the meaning of the constitution of Louisiana authorizing a municipal corporation to purchase. Brennan v. Sewerage & Water Board, 108 La. 569, 32 So. 563.

37. Valparaiso v. Parker, 148 Ind. 379, 381, 47 N. E. 330.

See Ulmen v. Mt. Angel, 57 Oregon 547, 550, 112 Pac. 529.

Sewage or sewerage is not necessarily, although it is generally, intended merely as an escape for filthy water. It includes all kinds of drainage and water discharge. Clay v. Grand Rapids, 60 Mich. 451, 458, 27 N. W. 596, per Campbell, C. J.

may include sewerage, yet when used as appurtenant to lands, the most obvious suggestion is a drainage of water, and an agreement for drainage which did not include house drainage in its terms, was held not to cover it by implication.³⁸

38. *Wetmore v. Fiske*, 15 R. I. 354, 5 Atl. 375.

Drainage is the process or channel by which land is drained. *Johnson's Dict.* (Latham), tit. "Drainage."

The term drainage is applied generally to all operation involving the drawing off of water or other liquid, but more particularly to those connected with the treatment of the soil in agriculture, or with the removal of water and refuse from streets and houses. 8 *Ency. Britannica* (11th Ed.), tit. "Drainage of Land."

Sewerage and drainage, historical note. The present system of sewerage and drainage dates from the middle of the last century. Some of the ancient cities had sewers, especially those of Rome which were subterranean passages generally constructed of stone and designed to carry off the spring or waste water and the refuse. In the ancient city of Rome important sewers or drains existed. The water and sewage flowed into the Tiber through three main channels, the chief one of which was known as the Cloaca Maxima, or great sewer whose mouth is still visible at the Tiber.

As early as 1225 London began legislating relating to drainage; however, it was not until 1847

that the first act was passed compelling houses to be drained into the sewers. Twelve years later a system of intercepting sewers and storage tanks was begun to be established, to prevent the flow of sewage into the Thames within the corporate limits.

In Paris anterior to 1536 a few drains and sewers were constructed, however for more than a century thereafter their total length did not exceed six miles, of which more than four were open channels. In 1893 a comprehensive sewerage plan was inaugurated and now all house sewage is discharged into the sewers.

In the colonial days drains were found in Boston, many of which had been built by private persons. During the first half of the eighteenth century the local authorities assumed ownership and control of all sewers and drains within the municipal area.

Berlin has an extensive and splendid sewerage system which marks a decided epoch in the science of engineering. § 73, p. 166 *ante*, vol. 1.

Hamburg's system of sewers, § 73, p. 167 *ante*, vol. 1; 11 *Encyc. Britannica* (9th Ed.) 407; Shaw, *Mun. Gov. in Continental Europe*, ch. 7, p. 378 *et seq.*

Budapest, § 75, p. 170 *ante* vol. 1.

§ 1425. Classification of sewers—public and district.

Some municipal charters classify sewers into *public*, *district*, *joint district* and *private*; the classification being determined by the authority of its construction irrespective of the area drained, the size, character or purpose of the sewer.³⁹

Public sewers are such as benefit the municipality generally and are paid for wholly out of the general revenue.⁴⁰ Ordinarily, it is a sewer open and available to the whole city and not limited to any particular part.⁴¹ It is one which serves the public and not the individual and which connects with and receives the discharges from district sewers and the surface waters which fall upon the streets near it or under which they run. However it is not necessary that a sewer drain the entire city in order to be a public sewer. If the contrary were true it would be impossible to build more than one public sewer in a city, and in many cities none at all.⁴²

39. St. Louis Charter, Art. 6, § 20; The Revised Code of St. Louis (1907, Woerner), p. 407.

Classification and several kinds defined in *Prior v. Buehler*, etc. Const. Co., 170 Mo. 439, 71 S. W. 205.

Public sewers, under some charters can be created by ordinance only, not by user alone. *Heman v. Payne*, 27 Mo. App. 481, 486.

Public, district and private sewers. *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114; *Heman v. Allen*, 156 Mo. 534, 542, 57 S. W. 559; *Eyerman v. Blakely*, 78 Mo. 145.

40. The Revised Code of St. Louis (1907, Woerner), p. 408.

41. *South Highland Land & Improvement Co. v. Kansas City*, 172 Mo. 523, 534, 72 S. W. 944, where it is said: "In a sense a sewer that drains one-fourth of a

large city is of benefit to the whole city. But that is true in the same sense of a small district sewer, or even of a private sewer. For if a small district, or even an inhabited private house, becomes in an unsanitary condition, its injurious influence is extended beyond its own limits. If a sewer is available as a means of drainage to an area less than the whole, even if it were physically possible to drain the whole into it, it is not a public sewer. And this is so regardless of its dimensions." Quoted with approval in *State ex rel. v. Wilder*, 217 Mo. 261, 269, 116 S. W. 1067.

42. *State ex rel. v. Wilder*, 217 Mo. 261, 274, 116 S. W. 1087; *Southworth v. Glasgow*, 232 Mo. 108, 128, 132 S. W. 1168.

A sewer not constructed or maintained by a municipal cor-

District sewers are those constructed or acquired under proper municipal authority, within the limits of an established sewer district, and drain a limited area and are usually paid for by special taxation or local assessments.⁴³

*The difference between a public and district sewer is not a mere difference in name, but it is a physical fact, so that the municipal legislative body cannot authorize what is in fact a public sewer and by merely denominating it a district sewer tax the cost of its construction on the lots in the districts named. Such an act would be a fraud and the special tax bills issued in pursuance of it would be void.*⁴⁴

§ 1426. Joint district sewer.

A sewer created by ordinance uniting more than one district and providing a main outlet or intercepting sewer for the joint benefit of such districts, to be paid for by special taxes assessed upon all property in a joint sewer district, was held in Missouri, to be a joint district sewer, within the meaning of the amended charter of St. Louis, which defines a joint district sewer to be a sewer constructed or acquired under the authority of ordinances,

poration and over which the municipality has no control, is not a public or common sewer. *Com. v. Yost*, 11 Pa. Super. Ct. 323; *Kansas City v. Ratekin*, 30 Mo. App. 416, 422.

Sewer, held to be a public sewer though not established by ordinance where it was built pursuant to resolution of council, paid for with money in the city treasury, raised for that purpose by vote of the inhabitants. *Akers v. Kolkmeyer*, 97 Mo. App. 520, 71 S. W. 536.

43. District sewers. An ordinance was held valid which provided for a district or branch

sewer in accordance with the provisions for the main sewer. *Akers v. Kolkmeyer*, 97 Mo. App. 520, 71 S. W. 536.

Power to divide city into sewer districts and sub-divide such districts under particular law. *St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713.

Necessary prerequisites to validity of tax bill for construction of district sewer. *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982. See *Kansas City v. Ratekin*, 30 Mo. App. 416, 421 *et seq.*

44. *Hill v. Swingley*, 159 Mo. 45, 50, 60 S. W. 114.

uniting one or more districts or unorganized territory, for the purpose of providing main outlet or intercepting sewers for the joint benefit of such districts or territory, to be paid for by special taxes assessed against all property in said joint sewer district. And such sewer is none the less a joint district sewer because the purpose of its construction is to supplement an inadequate sewer, which, under the charter prior to its amendment, was a public sewer constructed out of public revenues.⁴⁵

§ 1427. Private sewers and drains and private rights therein.

Private sewers are usually defined to be those built with or without permits, paid for by the persons, associations or corporations constructing the same.⁴⁶ They are those constructed by and for the use of a private individual or corporation. They may connect with other sewers.⁴⁷

The owner of a private drain is not estopped from denying that it is a public drain where it was constructed by him solely for his own benefit and he never consented

45. *Prior v. Buehler & Cooney Construction Co.*, 170 Mo. 439, 448, 71 S. W. 205.

Joint district sewer under Kansas City charter; authorized the grouping of 105 sewer districts, embracing one-fourth the area of the city into a joint district sewer to be paid for by special taxation. The terms "public," "joint district" and "private" sewer as employed in charter defined and explained. *South Highland Land & Imp. Co. v. Kansas City*, 172 Mo. 523, 72 S. W. 944.

46. St. Louis Charter, art. 6, §§ 20, 23; *The Revised Code of St. Louis* (1907, Woerner), pp. 408, 412.

47. *Heman v. Payne*, 27 Mo. App. 481.

Private sewer. Action of proper municipal authorities in declaring a sewer a private sewer is conclusive, no matter how beneficial it is to the public. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, aff'd in *Shumate v. Heman*, 181 U. S. 402, 21 Sup. Ct. 645, 45 L. Ed. 922.

Where an individual, of his own motion, procured title and an employee from a municipality and constructed a sewer across his own land, which sewer was never accepted by the municipality, it was held to be a private sewer and the owner liable to the municipality for the value of the title and labor. *St. Albans v. Noble*, 56 Vt. 525.

to have it used for public sewage purposes.⁴⁸ But where he plats his land, constructs sewers in the streets, and sells lots with easements in the sewers, he thereby parts with control over the sewers, although still retaining technical ownership of the soil in the street.⁴⁹

As mentioned elsewhere as a street includes so much of the depth as may not unfairly be used as streets are used,⁵⁰ it is competent for the municipal corporation to grant the right to private individuals or corporations to construct private drains and sewers in streets and alleys under reasonable terms and regulations relating to construction, connections and maintenance,⁵¹ even without the consent of the abutting owner, since such use is not an additional servitude;⁵² and such grant or permit is usually revocable,⁵³ depending, of course, on its nature, terms, the public necessity or convenience and the effect of such action upon contracts and property rights.⁵⁴

Furthermore the municipal corporation may deny the use of its streets and alleys for private drains and sewers in all proper cases where such use would interfere with their proper use by the public or abutting owners, or where such use might injuriously affect the public health.⁵⁵ And it has been held that power to lay sewers for the public good and at public expense does not include authority by grant or license to permit the use of the public streets for a private sewer.⁵⁶

48. *Kansas City v. Ratekin*, 30 Mo. App. 416.

49. *Moore v. Langdon*, 2 Mackey (13 D. C.) 127, 47 Am. Rep. 262.

50. § 1281 *ante*, vol. 3.

51. *Boyden v. Walkley*, 113 Mich. 609, 71 N. W. 1099.

See *Sullivan Realty & I. Co. v. Crockett*, 158 Mo. App. 573, 138 S. W. 924, denying right if nuisance results.

52. § 1314 *ante*, vol. 3; *Wood v. McGrath*, 150 Pa. St. 451, 24 Atl. 682, 16 L. R. A. 715.

53. § 1319 *ante*, vol. 3; *Ainley*

v. Hackensack Imp. Com., 64 N. J. L. 504, 45 Atl. 807.

54. § 1008 *ante*, vol. 3; *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 77.

55. *Belding v. North Hampton Sewer Com'rs*, 177 Mass. 39, 58 N. E. 156.

56. *Hutchinson v. Trenton*, 39 N. J. Eq. 569, 571, 572, holding that such right can be granted by ordinance only, distinguishing *Hunt v. Lambertville*, 45 N. J. L. 279.

Under power to make drains, and compel the owners of occupied lots to construct private drains or sewers therefrom to connect with some public sewer or drain, it has been held that a municipal corporation has the power to grant the right to a property-owner to construct at his expense, a private sewer in the street for his exclusive use free from interference by other citizens.⁵⁷ A property-owner who is required to drain his lot and to do so constructs a sewer along a street, with the permission of the municipality, is entitled to the exclusive use of such sewer.⁵⁸ And where the owner has an exclusive right an abutting owner will be enjoined from connecting with such sewer, where the result would be to clog the sewer and to flood the basement of the owner's house.⁵⁹

Courts will not permit the arbitrary exercise of a power by a municipal corporation whereby an individual will be deprived of rights in a private drain. The mere power to fill up drains and ditches when necessary to prevent or abate a nuisance, does not justify a municipal corporation in filling up a drain thereby depriving the owner of its use, when the result desired could be obtained by making a proper outlet or drainage for the ditch.⁶⁰

Private sewers and drains may become the property of the municipal corporation by purchase or by dedication and acceptance by the constituted municipal authorities;⁶¹ however, they cannot be taken by the public, or

57. *Boyden v. Walkley*, 113 Mich. 609, 71 N. W. 1099, 4 Det. Leg. N. 420.

58. *Carroll v. Connor*, 93 N. Y. S. 1077.

59. *Boyden v. Walkley*, 113 Mich. 609, 71 N. W. 1099, 4 Det. Leg. N. 420.

60. Of course, if filling the drain were the only means of abating the nuisance it created the city would be justified in filling it, and any invasion of the private interests of the owner by a reasonable

exercise of the power must be submitted to by him. But a reasonable use of the power in question would require the abatement of the nuisance in such a way as to do the least injury to the owner of the drain. *State (Rodwell) v. Newark*, 34 N. J. L. 264.

See §§ 1429, 1430 *post*.

61. See chapter 33, *Dedication*, § 1561 *post*.

A sewer constructed by a private person is not dedicated by being placed in a public street,

damaged in the construction of other sewers by the municipality without compensation to such private owners, since such private sewers and drains are viewed as property within the meaning of the constitutional provisions relating to the exercise of eminent domain.⁶²

§ 1428. Municipal power to construct and maintain sewers.

Usually the power to construct and maintain necessary and desirable sewers and drains is conferred in express terms by charter or statute which power should receive a liberal construction in favor of the municipality.⁶³

unless there was an intention to dedicate it. *Oak Cliff Sewerage Co. v. Marsalis*, 30 Tex. Civ. App. 42, 69 S. W. 176.

62. See chapter 32, *Eminent Domain*, *post*.

63. *Indiana*. *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531.

Maine. *Googin v. Lewiston*, 103 Me. 119, 68 Atl. 694.

Massachusetts. *Carr v. Dooley*, 122 Mass. 255.

New Hampshire. *Granite State Land Co. v. Hampton* (N. H. 1911), 79 Atl. 25.

New York. *In re De Peyster*, 80 N. Y. 565.

Oregon. *Beers v. Dalles City*, 16 Ore. 334, 18 Pac. 835.

Pennsylvania. *Anderson v. Lower Merion Twp.*, 217 Pa. St. 369, 66 Atl. 1115; *Fisher v. Harrisburg*, 2 Grant Cas. 291.

In *Maine* the power to construct sewers for the benefit of towns is given the municipal officers, which body is distinct from the town itself and for whose actions the town is not liable. And in that state municipal corporations have

no power to construct sewers unless it is expressly delegated to them. *Atwood v. Biddeford*, 99 Me. 78, 58 Atl. 417; *Brunswick Gas Light Co. v. Brunswick*, 92 Me. 493, 43 Atl. 104.

"Provision being made by general statute law for the laying out and construction of public drains and sewers by the municipal officers, no such authority can properly be claimed as necessarily incident to the town in the exercise of its corporate powers, or the performance of its corporate duties." *Bulger v. Eden*, 82 Me. 352, 356, 19 Atl. 829, 9 L. R. A. 205.

In the city of *Chicago* the power is vested in the city and not in the Sanitary District of *Chicago*. *Chicago v. MacChesney*, 240 Ill. 174, 88 N. E. 560.

See § 1432 *post*, also chapter on *Public Improvements*, *post*.

Irrigating ditches. Municipal corporation cannot construct irrigating ditches on its streets unless expressly or impliedly authorized to do so by charter. *Baker City Mut. Irrig. Co. v. Baker City*, 58 Ore. 306, 113 Pac. 9.

However, authority to construct sewers is usually considered a general one, and to reside in all municipal corporations unless expressly denied to them by the legislature.⁶⁴ And it has been said that power may be deduced from the inherent faculties of the corporation and from statutes relating to the specific subject.⁶⁵ So the power may be implied from a general grant of power. Thus it has been declared that the power is included in the power to make local improvements.⁶⁶ So power to construct and maintain streets is authority to construct and maintain sewers and drains as incidents thereto.⁶⁷ And under the provisions of an act authorizing the construction of drains, ditches, levees, and dykes, a municipal corporation may construct sewers.⁶⁸

Sewer district. An ordinance creating a district to construct and establish a system of sewers, and to maintain and operate the same, is not rendered wholly void by the fact that the city had no authority to maintain and operate the sewers, but will be upheld for the former purpose. *Webster v. Ferguson*, 95 Ark. 575, 130 S. W. 513.

Power granted to municipalities in which there is a public water supply to construct sewers, is not limited to municipalities in which the ownership of the water system or plant is in the public but applies to all in which the supply of water is available to the public. *State v. Northampton*, 52 N. J. L. 496, 19 Atl. 975.

A statute providing that "any" city shall have full power to construct sewer systems, held to mean "every" city in the state, whether organized under special charter or under the general laws of the state. *Heyler v. Watertown*, 16 S. D. 25, 91 N. W. 334.

Power to construct sewers may include pumping works connected with a sewerage system. *Drexel v. Lake*, 127 Ill. 54, 20 N. E. 38.

64. *Ft. Wayne v. Combs*, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711; *Fisher v. Harrisburg*, 2 Grant (Pa.) 291.

65. *Philadelphia v. Tryon*, 35 Pa. 401.

66. *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

67. *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556; *Johnson v. Milwaukee*, 88 Wis. 383, 389, 60 N. W. 270; *Aldrich v. Payne*, 106 Ia. 461, 76 N. W. 812; *Kelsey v. King*, 32 Barb. (N. Y.) 410, 11 Abb. Cr. 180.

Sewers as improvement of the highway. *Cone v. Hartford*, 28 Conn. 363; *Kirland v. Board of Public Works*, 142 Ind. 123, 41 N. E. 374.

68. *Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985; *Valparaiso v. Parker*, 148 Ind. 379, 47 S. E. 330.

The establishment and maintenance of a sewer system by a municipality is usually regarded as an *exercise of its police power*,⁶⁹ and so is an ordinance requiring property-owners to make connections therewith.⁷⁰ The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The right of a municipality to exercise such power is considered of such importance to the welfare of the public that it cannot be contracted or granted away.⁷¹

The power vested in municipal authorities to construct sewers and drains is not exhausted when once exercised, but is a *continuing power* that may be exercised to supply needed facilities at any time.⁷² Hence a mere permission granted by a borough to a sewer company to construct sewers in its streets which the company did, will not pre-

"Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to construct and maintain them has been granted by the charter, but rather only to see whether by possibility the power had been expressly denied." *McBean v. Fresno*, 112 Cal. 159, 163, 44 Pac. 358.

Power to "design, order and construct for the improvement" of any public street confers power to order the construction of a drain to carry off the surface water from a street. *Kirland v. Indianapolis Board of Public Works*, 142 Ind. 123, 41 N. E. 374.

Power to regulate, drain and otherwise improve a specified street gives authority to construct a sewer therein. *In re Leake and Watts Orphan Home*, 92 N. Y. 116.

Power to construct sewers and drains applies not only to the wants of the city as a private

owner of lands mentioned wherein such drains and sewers may be constructed, but also to sewers for general use. *Child v. Boston*, 4 Allen (86 Mass.) 41, 81 Am. Dec. 680.

69. *Metz v. Asheville*, 150 N. C. 748, 64 S. E. 881; *New Orleans Gas Co. v. Drainage Com.*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831.

70. *Allman v. Mobile*, 162 Ala. 226, 50 So. 238; *Branch v. Gerlach*, 94 Ark. 378, 127 S. W. 451.

See §§ 1448-1450 *post*.

71. *New Orleans Gas Light Co. v. Drainage Com.*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831, affirming 111 La. 838, 35 So. 929; *Weaver v. Cannon Sewer Co.* (Colo. App. 1902), 70 Pac. 953.

See § 382 *ante*, vol. 1.

72. *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281; *Thurston v. St. Joseph*, 51 Mo. 510; *McKevitt v. Hoboken*, 45 N. J. L. 432; *Re Fowler*, 53 N. Y. 60.

vent the borough from subsequently constructing its own system.⁷³

Where a village is empowered to construct sewers, such power cannot be abridged by an order of the health board for the construction of a sewer under authority to require the same for the protection of a water supply.⁷⁴

The power given a municipal corporation to construct sewers in its streets is not, like the power to keep its streets in repair, and the like, given to the corporation for governmental purposes, but is a special grant to the corporation for private purposes.⁷⁵

§ 1429. Same—right as affected by existence of private sewer.

Municipal power to construct a sewer is not affected by the fact that persons charged with a special tax for its construction have a private sewer already in operation.⁷⁶

In a New York case an owner of land adjacent to a village platted his land and constructed a system of sewers unconnected with the sewers of the village. Afterwards the village was incorporated and his land was included within the boundaries. The municipality then constructed a sewer through his land that rendered the private sewers useless. It was held that the municipality was liable for the value of the private sewers because the owner had only dedicated the highways for highway purposes and had reserved every other right.⁷⁷

73. *Olyphant Sewage Drainage Co. v. Olyphant*, 211 Pa. St. 526, 61 Atl. 72. affirmed in 167 N. Y. 541, 60 N. E. 1123.

74. *Mead v. Turner*, 112 N. Y. S. 127, 60 Misc. Rep. 145.

75. *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78.

76. *St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713.

77. *Wright v. Mt. Vernon*, 60 N. Y. S. 1017, 44 App. Div. 574,

Objection on the part of abutting owners to the construction of a sewer because the owners had made prior arrangements for carrying off their sewerage, held not good. *Johnson v. Avondale*, 1 Ohio Cir. Ct. Rep. 229.

See § 1427 *ante*.

§ 1430. Same—interfering with private property.

Unless duly authorized to condemn or otherwise appropriate private property upon giving just compensation therefor, or unless the owner's consent is obtained a municipal corporation has no power to construct and maintain sewers or drains through private property.⁷⁸

In the construction of sewers and drains the rights of private property-owners are sought to be carefully

78. *Georgia*. *Butler v. Thomasville*, 74 Ga. 570; *Smith v. Atlanta*, 92 Ga. 119, 17 S. E. 981.

Massachusetts. *Hildreth v. Lowell*, 11 Gray (Mass.) 345.

Missouri. *St. Louis v. Armstrong*, 56 Mo. 298.

New York. *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622.

Ohio. *Reeves v. Wood County*, 8 Ohio St. 333; *McDonald v. Cincinnati*, 4 Ohio N. P. 253.

A municipality has no right to construct drains across private property without the owner's consent, and if permitted by the owner for a time to have water drained across his land, must discontinue the same upon the objection of the owner. *Hart v. Adams*, 125 N. Y. S. 652, 140 App. Div. 663.

If the owner of private property will not consent to the use of his property for drainage purposes, the municipality must resort to legal proceedings to acquire such a right. *Hart v. Adams*, 125 N. Y. S. 652, 140 App. Div. 663.

Assessment of compensation. A statute which provides that township trustees may locate ditches and drains upon lands adjoining or lying near a public road whenever in the judgment of the trustees they are necessary, but which

makes no provision for compensation to the owner, in money, to be assessed by a jury, for the land appropriated, is unconstitutional. *Watson's Ex'r v. Pleasant Tp.*, 21 Ohio St. 667.

Outlet. Power to construct sewers, gives implied power to acquire an easement in land as an outlet for its sewers or drains. *Schipper v. Aurora*, 121 Ind. 154, 22 N. E. 878, 6 L. R. A. 318.

Owner obstructing drain established without compensation. Where a city constructs a drain through private land without condemning the land, or the acquisition of the right in any other way, which resulted on several occasions, in the flooding of the owner's premises, it was held that the owner was not justified in obstructing the drain so that the street was flooded and made insecure, although the obstruction was placed on his own land. In this case the owner of the land was prosecuted for the violation of an ordinance which prohibited the obstruction of drains. The court held that he was properly convicted regardless of any civil remedy he might have for the appropriation and injury of his land. *State v. Wilson*, 107 N. C. 865, 12 S. E. 320.

guarded by the law, and hence restrictions are often imposed upon the public authorities. For example, municipal charters provide that no sewer shall run diagonally through private property when it is practicable to construct the same parallel with the lines of such property, nor shall any public sewer be constructed through private property when it is practicable to construct the same along a street, alley or public highway.⁷⁹

§ 1431. Same—right to contract for sewers.

Power granted municipal authorities to survey, lay out and ordain common sewers, does not authorize them to provide a sewage system by contract.⁸⁰

79. St. Louis Charter, art. 6, § 20; The Revised Code of St. Louis (1907, Woerner), p. 408.

Invading private property. A municipality may protect its sewers and drains from obstructions, improper uses and decay. However this must be done in a reasonable manner, and so as not to affect private rights further than is necessary for that purpose. If it becomes necessary to invade private property, it must be done with the consent of the owner, or under the doctrine of eminent domain, when the owner will receive just compensation. The municipality cannot interfere with the rights of the owner over his property, nor with his personal rights, when it is not necessary to do so for the public benefit. *Slaughter v. O'Berry*, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

See § 1427 *ante*.

80. *Olyphant Sewage Drainage Co. v. Olyphant*, 211 Pa. St. 526, 61 Atl. 72.

Power to provide for the construction of sewers does not include power to make a contract for water for flushing such sewers. *Pine Bluff Water and Light Co. v. Sewer District No. 1*, 56 Ark. 205, 19 S. W. 576.

Contract for sewer outlet authorized under express power to provide drainage. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

Authority to maintain a system of sewers confers power to contract for the disposition of the outflow of the sewers within the limits of the city. *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794.

City can not contract for the maintenance of drains for private lands. *Peru v. Gleason*, 91 Ind. 566; *Hamilton v. Shelbyville*, 6 Ind. App. 538, 33 N. E. 1007.

Power to make contracts, § 1167 *ante*, vol. 3; chapter 37, Public Improvements, *post*.

§ 1432. Same—authorities empowered to construct.

The authority to decide upon the necessity for, and the location of, sewers and drains, and the power to order their construction is generally vested in the council, or similar legislative body, and sometimes in such body and the mayor.⁸¹ But sometimes the authority is vested in a particular board, such as the department of public works, or board of sewer commissioners,⁸² and such power cannot be delegated.⁸³

Where the duty of laying out and constructing public drains and sewers in a municipality is imposed by general statute law upon particular municipal officers, such officers act upon their own responsibility in the performance of such duties and are not subject to the control or direction of the municipality, although they are chosen and paid by the municipality.⁸⁴

§ 1433. Use of land taken for sewers.

A municipality is not restricted in its use of land which it has acquired for sewer purposes to that one use. It

81. *Ton v. Chicago*, 216 Ill. 331, 74 N. E. 1044; *Lingle v. Chicago*, 172 Ill. 170, 50 N. E. 192; *Anderson v. Endicott*, 101 Ind. 539; *Draper v. Fall River*, 185 Mass. 142, 69 N. E. 1068; *Dorey v. Boston*, 146 Mass. 336, 15 N. E. 897; *Child v. Boston*, 86 Mass. (4 Allen) 41, 81 Am. Dec. 680; *Woodbridge v. Cambridge*, 114 Mass. 483.

82. *In re Wheelock*, 3 N. Y. S. 890, 51 Hun 640, affirmed in 121 N. Y. 664, 24 N. E. 380; *In re Alexander*, 3 N. Y. S. 892, 51 Hun 640; *In re New York Institution for Instruction of Deaf and Dumb*, 7 N. Y. S. 860, 55 Hun 606, affirmed in 121 N. Y. 234, 24 N. E. 378; *St. Louis Charter*, Art. VI, §§ 20 to 23; *The Revised Code of St. Louis* (1907, Woerner), p. 408 *et seq.*

In *Chicago* it appears that power to construct a sewer by special assessment in a boulevard lies in the city as it is for the benefit of adjoining property, and not in the park commissioner who has control of improving the boulevard. *Lingle v. Chicago*, 172 Ill. 170, 50 N. E. 192.

See § 1428 *ante*.

83. § 383 *ante*, vol. I.

See chapter 37, *Public Improvements*, *post*.

Power may be vested by the legislature in officers other than those in charge of highways. *Kiley v. Bond*, 114 Mich. 447, 72 N. W. 253; *Elliott, Roads and Streets*, § 20.

84. *Bulger v. Eden*, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205.

may, for instance, supplement the area of a schoolhouse yard by allowing the use therefor of land so acquired, provided such latter use does not interfere with its use for sewer purposes. "The sewer itself, so far as it crosses a portion of the property, is of course, under the surface of the ground, leaving the entire surface without obstruction in any form or manner whatever, and capable of being used for the object to which it is proposed to devote it, without entrenching in the least degree upon the trust to which the property acquired is primarily to be applied, and where that may be done the fact that the property may have been obtained for a different purpose will not prevent the city from adding to that purpose an additional use of the property so far as it leaves the original design undisturbed and unimpaired."⁸⁵

§ 1434. Sewer outlet beyond corporate limits.

It is usual for municipal charters, or legislative acts applicable, to provide for the construction of sewers which extend or drain territory beyond the corporate limits.⁸⁶ And it has been held that a municipality having power to construct sewers may extend the same beyond its boundaries when necessary or manifestly desirable to afford a proper outlet for the disposal of its sewage.⁸⁷ This forms an exception to the general rule that a municipal corporation cannot acquire land beyond its boun-

85. *Winkler v. Summers*, 5 N. Y. S. 723, 51 Hun 636, 22 Abb. N. Cas. 80.

86. St. Louis Charter, art. 6, § 22; *The Revised Code of St. Louis* (1907, Woerner), p. 411.

87. *Georgia*. *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

Idaho. *Wilson v. Boise City*, 6 Idaho 391, 55 Pac. 887.

Illinois. *Callon v. Jacksonville*, 147 Ill. 113, 35 N. E. 223; *Maywood*

Co. v. Maywood, 140 Ill. 216, 29 N. E. 704; *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939; *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815.

Michigan. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

United States. *Minnesota, etc. Land and Imp. Co. v. Billings*, 111 Fed. 972, 50 C. C. A. 70.

Such a sewer is to be regarded as an improvement within the municipality. *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939.

daries, or perform any lawful act beyond the same, unless expressly empowered to do so.⁸⁸ So a municipality having power to maintain a system of sewers may, as an incident to such power, contract for the disposition of the outfall of the sewers beyond its limits.⁸⁹ But authority to extend its sewers into and across the territory of an adjoining township does not authorize the extension of sewers into a township that nowhere adjoins the municipality.⁹⁰

Unless authorized by statute a municipal corporation cannot extend its sewers into the territory of another municipality without its consent.⁹¹ But it has been held that a municipality empowered to construct its sewers within and beyond its limits and to acquire outlets for its sewage beyond its limits, has power to construct its sewers within the limits of an adjoining municipality to secure such an outlet.⁹²

88. Exercise of municipal power beyond corporate limits. §§ 351, 410 *ante*, vol. 1; § 657 *ante*, vol. 2; §§ 897, 1108 *ante*; vol. 3.

89. McBean v. Fresno, 112 Cal. 159, 163, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191.

Power to provide for the health and cleanliness of the city carries with it power to cause sewers to be constructed to such points outside of the city as may be necessary to rid the city of its waste. Wilson v. Boise City, 6 Idaho 391, 55 Pac. 887.

90. South Orange v. Whittingham, 58 N. J. L. 655, 35 Atl. 407.

91. Deyo v. Newburgh, 122 N. Y. S. 835, 138 App. Div. 465.

Borough, held authorized to acquire land in an adjoining township for a sewage disposal plant without the latter's consent. Philadelphia Trust, etc. Co. v. Merchantville, 75 N. J. L. 451, 68 Atl. 170.

Power may be given to erect

sewage disposal plant within the limits of another municipality without its consent. Frelinghuysen v. Morristown (N. J. Sup., 1908), 70 Atl. 77.

92. Butler v. Montclair, 67 N. J. L. 426, 51 Atl. 494.

Power to secure the protection of persons and property within a city is sufficient authority for the construction of a canal to carry off the waters of a natural stream which frequently overflows to the injury of property, although part of the canal is constructed outside the city's boundaries. Wilson v. Boise City, 6 Idaho 391, 55 Pac. 887.

But power to municipal authorities to construct a sewer in the city does not authorize its construction beyond the limits of the city. Deyo v. Newburgh, 122 N. Y. S. 835, 138 App. Div. 465.

An ordinance authorizing construction of sewers may provide

§ 1435. Nature of power to construct sewers—discretionary.

In the absence of mandatory legislative action imposing the duty, the prevailing rule is that the municipality is the sole judge of the necessity or desirability of sewers and drains; therefore the power to construct and maintain is discretionary as to when and where to be exercised, the nature, capacity, location, number and cost, and the exercise of the power will not be interfered with by the courts, so long as its limits are not exceeded.⁹³

for the purchase by the municipality of lands outside its limits for the purpose of extending the sewer to its outlet. *Callon v. Jacksonville*, 147 Ill. 113, 35 N. E. 223.

93. *Colorado*. *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62; *Daniels v. Denver*, 2 Colo. 669.

Kentucky. *Bain v. Lexington*, Ky. (1909), 121 S. W. 620.

Minnesota. *St. Paul, etc. R. Co. v. Duluth*, 56 Minn. 494, 58 N. W. 159, 23 L. R. A. 88, 45 Am. St. Rep. 491; *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322.

New York. *Barton v. Syracuse*, 37 Barb. (N. Y.) 292; *Mills v. Brooklyn*, 32 N. Y. 489.

Pennsylvania. *Carr v. Northern Liberties*, 35 Pa. St. 324, 78 Am. Dec. 342; *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Fair v. Philadelphia*, 88 Pa. St. 309, 32 Am. Rep. 455.

Tennessee. *Horton v. Nashville*, 4 Lea (Tenn.) 39, 40 Am. Rep. 1.

Vermont. *St. Albans v. Noble*, 56 Vt. 525.

West Virginia. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

United States. *Columbia v.*

Brooke, 214 U. S. 138, 29 Sup. Ct. 560, 53 L. Ed. 941; *Clensay v. Norwood*, 137 Fed. 962.

Discretion of municipality. Charter authority to construct sewers and drains does not impose upon the municipality the duty of constructing the same. *St. Albans v. Noble*, 56 Vt. 525.

Where the construction of sewers is committed to the judgment of the municipal authorities, their acts are not subject to judicial review so long as they keep within their powers. *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281.

Courts have no power to issue a mandatory injunction requiring a municipality to construct a sewer in a particular manner and location, irrespective of the exercise of discretion vested by law in the municipal authorities to determine the practicability of the sewer agreed upon, the availability of taxation for the purpose, and like matters, since the exercise of this power is primarily vested in the municipality and not the courts. *Vicksburg v. Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102.

Discretion as to location of branch or lateral sewers. State

The rule has been held to be different, however, when the necessity for the sewer or drain has been created by the municipality itself.⁹⁴ But the fact that private property-owners have interfered with the flow of surface-water by improvements made on their property does not impose any additional duty on the municipality to construct sewers.⁹⁵

Where a municipal corporation undertakes to construct a system of sewers, it must make provision for the increase that may reasonably and naturally be expected in its population.⁹⁶

The exercise of discretionary power in constructing and maintaining sewers and drains is viewed as municipal as distinguished from the exercise of governmental power.⁹⁷ Municipal action in deciding to establish and construct and in determining on the plans, etc., is usually regarded as legislative or (as sometimes said) *quasi-judicial*.⁹⁸ But the actual work of constructing, maintaining or repairing is characterized as ministerial.⁹⁹

ex rel. v. St. Louis, 56 Mo. 277; *Eyermann v. Provenchere*, 15 Mo. App. 256.

A municipal corporation authorized to construct sewers is not obliged to construct them throughout its territory, or throughout all of a sewer district, at one time. *St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713.

Thus power to divide the city into sewer districts within which district sewers shall be established, authorizes the city council to construct a sewer in part only of a district. *St. Joseph v. Owens*, 110 Mo. 445, 19 S. W. 713.

May construct sewer without adopting plan for entire city. *Re New York Pro. E. Pub. School*, 47 N. Y. 556.

Where municipality is authorized to construct sewers its failure to do so renders its officers sub-

ject to indictment, but no civil action will lie. *Wilson v. New York*, 1 Denio 595, 43 Am. Dec. 719.

94. *Byrnes v. Cohoes*, 67 N. Y. 204.

95. *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86.

96. *Louisville v. Leezer*, 143 Ky. 244, 136 S. W. 223.

97. *Ostrander v. Lansing*, 111 Mich. 693, 70 N. W. 332; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Donahue v. Kansas City*, 136 Mo. 657, 38 S. W. 571.

98. *New York. Mills v. Brooklyn*, 32 N. Y. 489.

Ohio. Springfield v. Spence, 39 Ohio St. 665.

Pennsylvania. Fair v. Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455.

99. *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

§ 1436. Use of streets and alleys for sewers and drains.

The right to the use of a public street or alley by a municipal corporation for sewer and drainage purposes is necessarily incident to the use for which streets and alleys are opened and laid out. Such use is proper and lawful, is not inconsistent with the object of their establishment, and is not an additional burden on the easement, entitling the abutting owners or the owners of the fee to compensation.¹ However, a sewer exclusively for

See chapter on Municipal Liability for Torts, *post*, vol. 5.

"When a municipality determines to change the natural order of things by altering the surface drainage and collecting it in artificial channels, it cannot fail to use ordinary good judgment in adopting the plan of work without liability to any injured thereby." *Louisville v. Norris*, 111 Ky. 903, 23 Ky. L. Rep. 1195, 64 S. W. 958.

1. *Arkansas*. *Hope v. Shiver*, 77 Ark. 177, 90 S. W. 1003.

California. *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556; *Kramer v. Los Angeles*, 147 Cal. 668, 82 Pac. 334.

Connecticut. *Cone v. Hartford*, 28 Conn. 363.

Illinois. *Barrows v. Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 37 N. E. 1096, 41 Am. St. Rep. 400.

Indiana. *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711.

Massachusetts. *Lawrence v. Nahant*, 136 Mass. 477; *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519; *Boston v. Richardson*, 13 Allen (Mass.) 146.

Michigan. *Paul v. Detroit*, 32 Mich. 108; *Warren v. Grand Haven*, 30 Mich. 24; *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777; *Boyden v. Walkley*, 113 Mich. 609, 71 N. W. 1099; *Kiley v. Bond*, 114 Mich. 447, 72 N. W. 253.

Mississippi. *White v. Yazoo*, 27 Miss. 357; *Theobald v. Louisville, etc. R. Co.*, 66 Miss. 279, 6 So. 230, 4 L. R. A. 735.

New Jersey. *Stoudinger v. Newark*, 28 N. J. Eq. 187; *Traphagen v. Jersey City*, 29 N. J. Eq. 206, 650; *Ainly v. Hackensack Imp. Co.*, 64 N. J. L. 504, 45 Atl. 807; *Hunt v. Lambertville*, 45 N. J. L. 279; *Glasby v. Morris*, 18 N. J. Eq. 72.

New York. *Van Brunt v. Flatbush*, 128 N. Y. 50; *Re Yonkers*, 117 N. Y. 564, 23 N. E. 661; *Kelsey v. King*, 32 Barb. (N. Y.) 410, 11 Abb. Pr. 180.

Ohio. *Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73; *Taylor v. Wapakoneta*, 26 Ohio Cir. Ct. 285; *Malone v. Toledo*, 28 Ohio St. 643, 661.

Oregon. *Huddleston v. Eugene*, 34 Ore. 343, 55 Pac. 868, 43 L. R. A. 444.

Pennsylvania. *Wood v. McGrath*, 150 Pa. St. 451, 24 Atl. 682, 16 L.

the benefit of the inhabitants of one town cannot be laid in the streets of another town without the payment of additional compensation to abutting owners.²

Municipal corporations may lay sewers in public streets, whether the land for the street was acquired by dedication or by condemnation proceedings.³ But in New York it has been held that the dedication of land to a municipal corporation for a public street does not authorize the municipality to construct a sewer therein, without compensation to the owner.⁴ However, the owner in such case can recover only nominal damages for the ad-

R. A. 715; *Michene v. Philadelphia*, 118 Pa. 535, 12 Atl. 174.

United States. *Swart v. District of Columbia*, 17 App. D. C. 407.

Power to regulate, grade and otherwise improve a street authorizes the municipality to construct sewers therein. *Re Leake and Watts Orphan Home*, 92 N. Y. 116.

See § 1428 *ante*.

"It is a part of the purpose in view when land is taken or dedicated for use as a public street in a city, that it shall be used not only for the purposes of mere passage and repassage, but for all incidental purposes, including the building of sewers therein, as may be necessary, appropriate and usual for the proper enjoyment of such street." *Re Yonkers*, 117 N. Y. 564, 23 N. E. 661.

The drainage of the streets is necessary to their safe and proper use as highways. "On ordinary country roads the gutters upon their sides are usually deemed sufficient to carry off the water and filth upon them. In populous places, however, where they accumulate in greater quantities, or

where it may be necessary for the public to use for passing and other proper purposes every part of the highway, it is frequently requisite to make the drains of the highway beneath its surface, and the safety as well as the commodiousness of the public travel, and the healthfulness of the people in its vicinity, may also require it." *Cone v. Hartford*, 28 Conn. 363, 373.

See § 1314 *ante*, vol. 3; 1 *Ellcott, Roads and Streets*, § 490.

2. *Van Brunt v. Flatbush*, 13 N. Y. S. 545, 37 N. Y. St. R. 824.

3. *Warren v. Grand Haven*, 30 Mich. 24; *Stoudinger v. Newark*, 28 N. J. Eq. 187; *Re Yonkers*, 117 N. Y. 564, 23 N. E. 661.

One who dedicates land to a municipality for a street assumes the custom to lay sewers thereunder, and the act of dedication is a waiver of any claim to compensation he might otherwise have, had a sewer been laid across his premises. *Warren v. Grand Haven*, 30 Mich. 24.

4. *Kelsey v. King*, 33 How Pr. (N. Y.) 39.

ditional burden imposed by the construction of the sewer.⁵

§ 1437. Natural watercourses.

Non-navigable natural watercourses within the corporate limits on private property and not appropriated to public uses as, for example, sewers or drains, are subjects of private ownership and the dominion of the owner extends to all legitimate private uses. The public control of such property without express grant of power is restricted to necessary and desirable police regulations.⁶

Under power to drain, improve, and repair its streets and alleys, a municipal corporation may contract for straightening a creek to conform to the direction of its streets, which runs in a zigzag course through its limits.⁷

Where a municipality changed the direction of a natural watercourse and for a consideration gave permission to the owner of land thereunder to fill up the old channel, it was held that it could not thereafter reopen the old course without instituting proceedings to acquire the property for such purpose.⁸

5. *Re Wells Ave.*, 22 N. Y. S. R. 648, 4 N. Y. S. 301.

6. *Connecticut*. *Fisk v. Hartford*, 69 Conn. 375, 37 Atl. 983, 38 L. R. A. 474.

Michigan. *A. L. Lakey Co. v. Kalamazoo*, 138 Mich. 644, 101 N. W. 841, 67 L. R. A. 931, 110 Am. St. Rep. 338.

New Jersey. *Hutchinson v. Trenton Board of Health*, 39 N. J. Eq. 569; *Sparks Mfg. v. Newton*, 60 N. J. Eq. 399, 45 Atl. 596.

New York. *Schenectady v. Furman*, 61 Hun (N. Y.) 171, 15 N. Y. S. 724; *Rochester v. Osborn*, 5 Lans. (N. Y.) 37.

Pennsylvania. *Commonwealth*

v. Stevens, 178 Pa. St. 543, 36 Atl. 166; *Scranton v. Scranton Steel Co.*, 154 Pa. St. 171, 26 Atl. 1.

Utah. *Fisher v. Bountiful City*, 21 Utah 29, 59 Pac. 520.

7. *McGuire v. Rapid City*, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752.

See § 1444 *post*.

The legislature may properly empower a municipal corporation to convert the channel of a stream into a common sewer. *Butler v. Worcester*, 112 Mass. 541; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458.

8. *Strohl v. Euphrata Borough*, 178 Pa. St. 50, 35 Atl. 713.

A municipal corporation may bring an action, either in its public character in the public interest or in its capacity as a private property owner, where it owns property, to abate an obstruction of a natural watercourse, the consequence of which is to damage or to threaten injury to neighboring property.⁹

Power to establish and define the boundaries and grades of the natural watercourses in the municipal limits, and to provide for and compel the removal of obstructions, encroachments and deposits, it has been held, does not authorize a city to require a property owner to clean out a non-navigable, natural watercourse, not a public highway, further than to the natural and normal banks and bed thereof.¹⁰

A watercourse does not lose any of its characteristics because houses are built on its banks, or because they increase in number so as to become a borough.¹¹

Outside the limits of its streets a city has no interest in a lake partly located in its boundaries that will entitle

9. *Sioux City v. Simmons Warehouse Co.*, 151 Iowa 324, 129 N. W. 978, 980, 131 N. W. 17.

A municipality having been authorized to widen and deepen the channel of a stream, is thereby impliedly empowered to apply to the courts for process to prevent the obstruction of the stream. *Commonwealth v. Stevens*, 178 Pa. St. 543, 36 Atl. 166.

Under a statute authorizing a city to require the owner of any lot, through or adjoining which a hollow or ravine constituting a watercourse extends, when grading such lot so as to obstruct such course, to construct a sufficient drain through the lot, a city cannot require the owner to construct a drain to carry off water, the accumulation of which was caused by the improvement of a street, as

the statute refers to natural watercourses. *Hoffman v. Muscatine*, 113 Iowa 332, 85 N. W. 17.

Obstructing watercourse. Power given a city to prevent "the construction of any encroachment upon, or obstructions in the bed of" a specified river within the city's limits, authorizes the city to prohibit absolutely the erection of any such encroachments or obstructions regardless of the question whether they retard the flow of water through the arches of any bridge established in the city. *Rochester v. Osborn*, 5 Lans. (N. Y.) 37.

10. *Schenectady v. Furman*, 145 N. Y. 482, 40 N. E. 221, 45 Am. St. Rep. 624, affirming 78 Hun 87, 29 N. Y. S. 269.

11. *Commonwealth v. Yost*, 11 Pa. Super. Ct. 323.

it to restrain riparian owners from filling the lake outside such streets.¹²

§ 1438. Disposal of sewage.

The power to construct a sewage disposal plant, it has been held, is implied from a grant of power to construct sewers, connections therewith, appurtenances, etc.¹³

Sometimes the control of the disposal of sewage is in the state through its board of health.¹⁴

In Massachusetts the legislature may properly determine that the whole or a part of the cost of a system for the disposal of sewage from a number of cities and towns shall be borne by the commonwealth, or it may impose such cost wholly upon the counties or towns benefited, or a part upon each.¹⁵

Where the location of a sewage disposal plant is committed to the discretion of the municipal authorities, to be determined by public necessity and convenience, their decision is conclusive because it is the exercise of a discretion imposed in them by law.¹⁶

§ 1439. Mode of exercise of power of sewer construction.

A substantial compliance on the part of the municipal authorities with controlling legal provisions relating to the construction of sewers and drains is of course necessary. Municipal charters usually regulate this matter; however, it may be controlled by statute.¹⁷ Thus

12. *Madison v. Mayers*, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635, 65 Am. St. Rep. 127.

13. *Hall v. Sedalia*, 232 Mo. 344, 134 S. W. 650.

14. *Rahway v. New Jersey Board of Health*, 80 N. J. L. 166, 77 Atl. 86.

15. *Re Kingman et al.*, 153 Mass. 566, 27 N. E. 778.

16. *Philadelphia Trust, etc. Co. v. Merchantville Borough*, 75 N. J. L. 451, 68 Atl. 170, affirmed 76 N. J. L. 822, 74 Atl. 1135.

17. The legislature may, at its discretion, regulate the manner in which a municipal corporation shall exercise its power to construct sewers. *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.

the legislature may authorize a municipality to convert the channel of a natural stream into a common sewer.¹⁸ Under a statute providing that public sewers shall be established along the principal courses of drainage to such extent and under such regulations as may be established by ordinance, a municipality may use a stream for a sewer by having a sewer emptied into it.¹⁹

A municipal corporation empowered to construct a sewer system, part of which is located in one county and part in another, may take soil from land which it has appropriated in one county and remove it to the other county for use in the construction of the system.²⁰

Usually sewer construction is instituted by formal action evidenced by ordinance or resolution and sometimes required to be recommended by a specified officer, department or board.²¹ And ordinarily a separate proceeding must be taken for the construction of a sewer,²² but this topic is fully considered in a subsequent chapter.²³

§ 1440. Same—sewers and drains as nuisance.

Manifestly, power to construct a system of sewers and drains does not authorize the municipal corporation to create a nuisance.²⁴ And it is settled law that a mu-

A statute authorizing the laying of necessary pipes from the sewer to the curb line for connection with abutting property, and charging the cost of the same against adjoining property has been held constitutional in New Jersey. *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

18. *Butler v. Worcester*, 112 Mass. 541; *Washburn, etc. Mfg. Co. v. Worcester*, 116 Mass. 458; *McGuire v. Rapid City*, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752.

19. *Joplin Consolidated Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

20. *Titus v. Boston*, 149 Mass. 164, 21 N. E. 310.

21. *St. Louis Charter*, art. 6, § 20; *The Revised Code of St. Louis* (1907, Woerner), p. 408; § 1432 *ante*.

22. "A sewer is not a necessary part of the street, and when action is taken to lay out, establish, grade, and pave a street, the construction of a sewer is not included within these terms." *Peck v. Grand Rapids*, 125 Mich. 416, 84 N. W. 614.

23. Chapter 37, Public Improvements, *post*.

24. *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622; *Stod-*

municipality cannot deposit sewage so as to create a public or private nuisance unless the power is granted in express words, or words from which it is necessarily implied.²⁵ So the use by individuals of a city's drains and gutters, intended primarily to carry off surface water, cannot be used as private drains if such use will create a nuisance.²⁶

Where a municipality constructed part of a sewer outside its limits and within the limits of an adjacent town, it has been held that the latter had power to suppress a nuisance created by that part of the sewer within its limits.²⁷

§ 1441. Same—prescriptive right to maintain nuisance.

The right to pollute the waters of a stream by discharging sewage into it is in the nature of an easement,

dard v. Saratoga Springs, 127 N. Y. 261, 27 N. E. 230; *Dierks v. Com'rs of Highways*, 142 Ill. 197, 31 N. E. 496; *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9.

25. *Connecticut*. *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703.

Georgia. *Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577; *Atlanta v. Warnock*, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301, 44 Am. St. Rep. 117.

New Jersey. *Grey ex rel. v. Paterson*, 58 N. J. Eq. 1, 42 Atl. 749.

New York. *Hooker v. Rochester*, 37 Hun 181, aff'd in 107 N. Y. 676, 14 N. E. 610; *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622.

Oregon. *Ulman v. Mt. Angel*, 57 Ore. 547, 112 Pac. 529.

Texas. *Donovan v. Royal*, 26 Tex. Civ. App. 248, 63 S. W. 1054.

Wisconsin. *Winchell v. Waukesha*, 110 Wis. 101, 85 N. W. 668.

"The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create and maintain a nuisance and that it matters not whether such nuisance results from negligence or the plan adopted." *Winchell v. Waukesha*, 110 Wis. 101, 85 N. W. 668.

26. *Municipality v. New Orleans Gaslight Co.*, 5 La. Ann. 439.

27. *Deyo v. Newburgh*, 122 N. Y. S. 835, 138 App. Div. 465.

Authority from the legislature to extend a sewer, does not justify the city in using it in such a manner as to create a nuisance. *Moody v. Saratoga Springs*, 45 N. Y. S. 365, 17 App. Div. 207.

which can be created only by grant or by prescription.²⁸ The period requisite to establish such right is that which, under the statute of limitations, bars a right of entry.²⁹ The user upon which the prescriptive right is founded must be adverse in its character; mere permissive user cannot create such a right.³⁰

The right of a municipality* to pollute the water of a stream cannot be acquired by prescription if the pollution is such as to be injurious to the public health.³¹

The rule that the right of a municipality to pollute streams with its sewage may be acquired by adverse user is subject to the limitation that if the pollution is substantially increased the prescriptive right is lost, as the use must continue and be the same as it was when the period of prescription commenced.³²

Where a city, upon authority of resolutions of its legislative body, has made exclusive, adverse and uninterrupted use of a culvert for fifty years as a part of its sewer system, it was held that its title to the culvert

28. *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218.

29. *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.

30. *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; *Chillicothe v. Bryan*, 103 Mo. App. 409, 77 S. W. 465.

31. *Alabama*. *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

Connecticut. *Platt v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335.

Illinois. *Litchfield v. Whitenack*, 78 Ill. App. 364.

Indiana. *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610.

Oregon. *Ulman v. Mt. Angel*, 57 Ore. 547, 112 Pac. 529.

Pennsylvania. *Com. v. Yost*, 11 Pa. Super. Ct. 323, 340; *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858.

Irish. *Blackburne v. Somers*, 5 Ir. L. R. 1.

32. *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610; *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.

Prescriptive rights. In one case where an artificial ditch had been used more than ten years by a city to carry away water from a certain area within its limits, it was ruled that the city had a prescriptive right to maintain the ditch for that purpose; however, that this right was limited by the character and extent of the right exercised during the period of prescription, and hence, the city could not enlarge the ditch nor increase the flow of water. *Sturges v. Meridian*, 95 Miss. 35, 48 So. 620.

was as perfect as if it had acquired the same by express grant.³³

Mere oral consent of a riparian owner to the pollution of the waters of the stream by the discharge of sewage therein vests in the municipal corporation no right which is not in the power of such owner at any time to recall.³⁴

§ 1442. Same—surface water.

A municipality will be held liable if it collects surface or other water in sewers or drains and deposits it, either immediately or by the force of gravity, on to the land of an individual.³⁵ And it is equally chargeable with wrong if a street railway which it has authorized to be built in a street has the effect of diverting surface water on to private property to its injury.³⁶

However, there is no liability if the collection of the water on the property in question is due wholly or in part to the fact that the property is on a lower level than the street.³⁷

33. *Richmond v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877.

34. *Dwight v. Hays*, 150 Ill. 273, 37 N. E. 218.

35. *Ulman v. Mt. Angel*, 57 Ore. 547, 112 Pac. 529.

Surface water. Cannot divert the natural flow of water, and cast the same in volume upon private property. *Guest v. Church Hill*, 90 Md. 689, 45 Atl. 882. See also, *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Slack v. Lawrence Twp.*, N. J. Eq. (1890), 19 Atl. 663.

Has no power in the improvement of its streets to collect surface water in an artificial channel and discharge it onto private property. *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

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Liability for surface water resulting from improvements. *Hay v. Lexington*, 24 Ky. L. Rep. 1495, 71 S. W. 867; *O'Donnel v. White*, 24 R. I. 483, 53 Atl. 633.

May obstruct or repel the flow of surface water to the same extent that private property-owners may. *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473.

36. *Damour v. Lyons City*, 44 Iowa 276.

If such a nuisance is shown to exist, though the damage flowing therefrom is inconsiderable, equity will enjoin its further maintenance. *Ulman v. Mt. Angel*, 57 Ore. 547, 112 Pac. 529; *Gould, Waters*, § 546; § 1446 *post*.

37. *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

Municipal corporations are generally held not bound to provide drains or sewers to carry off surface waters.³⁸ But that they have power to do so is beyond question.³⁹

§ 1443. Same—grant by state.

A municipal corporation may acquire by implication the right to discharge its sewage into the waters of the state, as, for example, from a grant of power to construct an ordinary sewer system.⁴⁰ But power granted by the legislature to a municipal corporation to empty its sewage into a stream, may be revoked whenever the public health demands it.⁴¹

A grant of power to a municipality to discharge sewage from a sewer into tide water does not authorize it to do so in such manner as to create a nuisance.⁴² The fact that a city is vested by statute with plenary powers over the subjects of streets, sewers, drainage, water supply, and sanitation, does not authorize it to create

38. *Colorado*. Aicher v. Denver, 10 Colo. App. 413, 52 Pac. 86.

Georgia. Americus v. Eldridge, 64 Ga. 524, 37 Am. Rep. 89.

Kansas. Atchison v. Challis, 9 Kan. 603.

Minnesota. Henderson v. Minneapolis, 32 Minn. 319, 20 N. W. 322; Alden v. Minneapolis, 24 Minn. 254.

Pennsylvania. Carr v. Northern Liberties, 35 Pa. 324; Fair v. Philadelphia, 88 Pa. 309, 32 Am. Rep. 455.

Virginia. Miller v. Newport News, 101 Va. 432, 44 S. E. 712.

West Virginia. Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 266.

Wisconsin. Waters v. Bay View, 61 Wis. 642, 21 N. W. 811.

39. Americus v. Eldridge, 64

Ga. 524, 37 Am. Rep. 89; Bohan v. Avoca, 154 Pa. 404, 26 Atl. 604; Alden v. Minneapolis, 24 Minn. 254.

Surface water from the public streets may be diverted and carried off. Weis v. Madison, 79 Ind. 241, 39 Am. Rep. 135.

The right of a municipal corporation to obstruct or repel the flow of surface water is the same as that of private owners. Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473.

40. Wilson v. East Jersey Water Co., 78 N. J. Eq. 329, 79 Atl. 440.

41. Van Cleve v. Passaic Valley Sewerage Commissioners, 71 N. J. L. 183, 224, 58 Atl. 571.

42. Haskell v. New Bedford, 108 Mass. 208.

and maintain a nuisance dangerous to health and life.⁴³

Moreover, the state cannot authorize a municipal corporation to discharge its sewage on the land of a private person, nor in any other way to create a nuisance which damages him.⁴⁴ So, the right given a town to construct a street does not give it the right to construct a drain through the land of a private owner for the purpose of conducting and discharging water there.⁴⁵

§ 1444. Same—diversion of streams.

Power to deepen, widen, dock, cover, wall, or change the channel of watercourses, authorizes a municipal corporation to change the entire bed of a stream.⁴⁶

A grant of power to a city to "construct any drain as an inlet or an outlet leading into or out of said city" when necessary for the drainage of the city, which was required by statute to be given a liberal construction, was held to justify a diversion of a natural watercourse so as to constitute either an inlet or an outlet.⁴⁷

In one case a city which had been diverting a substantial part of the water of a stream for sewage purposes had been returning the greater part to the stream above a mill, but finally diverted the water so used from a stream entirely. The remedy of the mill owner it was held was by injunction to restrain the diversion of the water or an action for damages, and not an action to restrain the diversion of the sewage, as it appeared that the disposal of the sewage was under the exclusive control of the city.⁴⁸

43. The nuisance in this instance consisted of poisonous gases which were allowed to escape in large quantities through perforated covers placed over manholes in a public street contiguous to a private dwelling. *Atlanta v. Warnock*, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301, 44 Am. St. Rep. 17.

44. *Carmichael v. Texarkana*, 94 Fed. 561.

45. *Daley v. Watertown*, 192 Mass. 116, 78 N. E. 143.

46. *Prairie du Rocher v. Schoening-Koenigsmark Milling Co.*, 248 Ill. 57, 93 N. E. 425.

47. *Huntington v. Amiss*, 167 Ind. 375, 79 N. E. 199.

48. *Fisk v. Hartford*, 69 Conn. 375, 37 Atl. 983, 38 L. R. A. 474.

See § 1437 *ante*.

§ 1445. Same—discharge of sewers—polluting streams.

A municipality may discharge its sewers into a stream flowing within its limits in order to relieve its streets from floods.⁴⁹ But it may not increase materially the flow of water in a natural watercourse by emptying its sewage or surface water therein.⁵⁰ However it may empty its sewers and drains into a natural watercourse if the flow is not unreasonably increased thereby.⁵¹

A city which connects a sewer with a natural channel is not on that account obliged to keep the channel open to its mouth. And this is true although the owners of property through which the channel passed had constructed an artificial culvert to confine the flow of the water.⁵²

Sewage deposited in a navigable stream may become a nuisance not only because of injury to health but by impeding navigation, and when such is the case it will be enjoined. And the fact that such sewage is carried from private property through a private sewer thence through a sewer belonging to a municipality, does not make it any less the act of the owner of the private sewer.⁵³

Without charter power a municipal corporation cannot authorize an individual to discharge filth from a private sewer into an open watercourse not a public sewer.⁵⁴

A municipal corporation which has constructed a system of sewers according to the most approved plan and

49. *Sioux City v. Simmons Warehouse Co.*, 151 Iowa 334, 129 N. W. 978, 131 N. W. 17.

50. *Flanders v. Franklin*, 70 N. H. 168, 47 Atl. 88; *Finley v. Williamsburg*, 24 Ky. L. Rep. 1336, 71 S. W. 502; *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703; *O'Brien v. St. Paul*, 18 Minn. 182; *McBride v. Akron*, 12 Ohio Cir. Ct. 610, 6 O. C. D. 739. But see *Nile's*

Work v. Cincinnati, 2 Disney (Ohio) 400, 13 Ohio Dec. 245.

51. *Flynn v. Shenandoah*, 19 Pa. Co. Ct. 622; *Wheeler v. Worcester*, 10 Allen (Mass.) 603.

52. *Dalton v. Towanda Borough*, 215 Pa. St. 402, 64 Atl. 547.

53. *New York v. Baumberger*, 30 N. J. Super. Ct (7 Rob.) 219.

54. *Hutchinson v. State*, 39 N. J. Eq. 569.

in conformity with the natural drainage of the land, and discharges the sewage into a stream that would naturally receive the drainage from that area is not liable for polluting the waters of the stream to a lower riparian owner.⁵⁵ A riparian owner cannot insist that the waters of the stream shall come to him in their natural pure state, but he must submit to the natural wash and drainage coming from cities and towns. But a city has no right to gather its sewage and cast it into a stream so as to injure the lower proprietor.⁵⁶

Power of a municipal corporation to construct sewers or to use a natural stream as a sewer does not authorize it to so construct the sewers or to use the stream as to create a nuisance to the damage of a lower riparian owner.⁵⁷

55. *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610; *Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305.

56. *Joplin Consolidated Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

57. *Connecticut*. *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499.

Illinois. *Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. 878; *Jacksonville v. Lambert*, 52 Ill. 519.

Indiana. *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909.

Massachusetts. *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Haskell v. New Bedford*, 108 Mass. 208.

Maine. *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1.

Minnesota. *O'Brien v. St. Paul*, 18 Minn. 176.

Missouri. *Edmondson v. Moberly*, 98 Mo. 523, 11 S. W. 990.

New York. *Hooker v. Rochester*, 37 Hun (N. Y.) 181; *Butler v. Edgewater*, 6 N. Y. S. 174, 53 Hun (N. Y.) 633, 25 N. Y. S. Ct. 315; *Shriver v. Johnston*, 24 N. Y. S. 1083, 71 Hun 232; *Butler v. White Plains*, 69 N. Y. S. 193, 59 App. Div. 30; *Moody v. Saratoga Springs*, 45 N. Y. S. 365, 17 App. Div. 207; *Chapman v. Rochester*, 110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 296.

Pennsylvania. *Blizzard v. Danville*, 175 Pa. 479, 34 Atl. 846; *O'Brien v. St. Paul*, 18 Minn. 176; *Commonwealth v. Yost*, 11 Pa. Super. Ct. 323, 340; *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858; *Good v. Altoona*, 162 Pa. 493, 29 Atl. 741.

Texas. *New Odorless Sewer Co. v. Wisdom*, 30 Tex. Civ. App. 224, 70 S. W. 354.

Rhode Island. *Clark v. Peckham*, 9 R. I. 455.

Wisconsin. *Winchell v. Waukesha*, 110 Wis. 101, 85 N. W. 668.

It has been held in some cases that where the construction of sewers and outlets is conferred upon the municipality by statute the discharge of sewage into a stream in accordance with such statute will not constitute a nuisance *per se*, public or private.⁵⁸

"The use of a stream for drainage may under some circumstances be reasonable, although the water is thereby rendered unfit for its primary use; but the concentration of the filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the river in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive of the value of his property, must be unreasonable." ⁵⁹

The view of some courts is that the pollution of a river by sewage constitutes a taking of property of the riparian owners, which the legislature cannot authorize

United States. Missouri v. Illinois, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497; Carmichael v. Texarkana, 94 Fed. 561.

Unless such stream affords the only practicable outlet or is the natural way of drainage. Richmond v. Test, 18 Ind. App. 482, 48 N. E. 610. See also Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305; Morse v. Worcester, 139 Mass. 389, 2 N. E. 694.

Statutes sometimes forbid the dumping into any river above the source of a city's water supply of any matter which will pollute the water. Board of Health v. Phillipsburg (N. J. Ch., 1909), 71 Atl. 750.

A statute prohibiting the discharge of sewage into the waters of the state is not violative of

the fourteenth amendment of the federal constitution as being an abridgement of the privileges and immunities of citizens, and taking property without due process of law. Commonwealth v. Emmers, 221 Pa. St. 298, 70 Atl. 762.

Under power to abate nuisances, etc., a municipal corporation cannot fill up private ditches, seriously interfering with private rights, where objections to the ditch could be removed by providing a proper system of drainage. Rodwell v. Newark, 34 N. J. L. (5 Vroom.) 264.

58. Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707; Richmond v. Test, 18 Ind. App. 482, 48 N. E. 610.

59. Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 547, 45 Atl. 154, 48 L. R. A. 691.

except upon just compensation.⁶⁰ The lessening of the value of the property of a riparian owner by the discharge of sewage into a stream under legislative sanction is held in Indiana not to amount to such a taking of property as must be preceded by just compensation.⁶¹

But in a Missouri case the court said: "The facts that sewers are necessary to a city, and that the statute directs that they shall follow as near as practicable the natural drainage of the country, afford no justification to the action of a city in emptying its sewers on the land of an individual, to his damage. Our constitution declares that private property shall not be taken or damaged without payment of just compensation. The legislature, therefore, could not, if it so intended, confer authority on a city to injure private property for the public good without first paying the damage. But subject to this qualification private interest must yield to the public good."⁶²

§ 1446. Same—injunction.

Injunction will lie upon the application of a riparian owner to restrain a municipal corporation from fouling or polluting the water of the stream by discharging sewage therein.⁶³ So injunction will ordinarily lie to re-

60. *Sammons v. Gloversville*, 70 N. Y. S. 284, 71 N. Y. S. 986, 35 Misc. Rep. 465; *Grey ex rel. v. Paterson*, 58 N. J. Eq. 1, 41 Atl. 749, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717; *Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628; *Huffmire v. Brooklyn*, 162 N. Y. 584, 57 N. E. 176; *Winn v. Ruthland*, 52 Vt. 481.

61. *Valparaiso v. Hagan*, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707. See also *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610.

62. *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.

63. *California*. *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557.

Illinois. *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218; *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77.

Massachusetts. *Woodward v. Worcester*, 121 Mass. 245.

Minnesota. *O'Brien v. St. Paul*, 18 Minn. 176.

New York. *Demby v. Kingston*, 60 Hun (N. Y.) 294, 14 N. Y. S. 601; *Bolton v. New Rochelle*, 32 N. Y. S. 442, 84 Hun 281; *Shriver v. Johnston*, 24 N. Y. S. 1083, 71 Hun 232; *Hooker v. Rochester*, 12 N. Y. S. 671, 59 Hun (N. Y.) 181.

strain a municipal corporation from discharging its sewage upon private property.⁶⁴

Equity will restrain the continuance of a public nuisance created by the discharge of filth and offensive matter through a private pipe or sewer laid in a public street.⁶⁵ Thus boards of health charged with the protection and preservation of the public health and abatement of nuisances may maintain a bill in equity to restrain the continuance of a public nuisance created by private sewers or drains.⁶⁶ And where a statute provided that the drainage and plumbing of all buildings in the municipality must be erected in accordance with plans previ-

Pennsylvania. *Martin v. Philadelphia*, 22 Wkly. No. Cas. (Pa.) 120; *Albertson v. Philadelphia*, 12 Wkly. N. Cas. (Pa.) 158.

"The pollution of water by the flow of sewage from towns or cities into streams whose waters are thereby injured or rendered unfit for use has frequently been a ground for the preventive aid of equity by injunction. The doctrine is well established that the fouling or pollution of water in a stream by such sewage constitutes a nuisance and affords sufficient ground for relief by injunction." *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557.

See *High on Injunctions*, § 810.

64. *Danbury, etc. Co. v. Norwalk*, 37 Conn. 109; *Butler v. Thomasville*, 74 Ga. 570; *Dierks v. Addison Tp. Com'rs*, 142 Ill. 197, 31 N. E. 496; *Vick v. Rochester*, 46 Hun (N. Y.) 607; *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030; *Beach v. Elmira*, 22 Hun (N. Y.) 158.

A city diverted surface water and drainage from houses, which it collected in an underground tile

drain, into a gully which passed close to plaintiff's well and affected the water therein. The city was enjoined from discharging the sewage in the gully, although the water in plaintiff's well was not good at best. *Ulmen v. Mt. Angel*, 57 Ore. 547, 112 Pac. 529.

Where a nuisance results from defective execution in the plan of sewer construction as where such nuisance consists of "man-holes" in a sewer which are allowed to emit poisonous gases in large quantities through perforated covers the city will be enjoined. *Atlanta v. Warnock*, 91 Ga. 210, 18 S. E. 135, 44 Am. St. Rep. 17, 23 L. R. A. 301.

65. *Hutchinson v. Board of Health*, 39 N. J. Eq. 569.

66. *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 15 So. 164; *State v. Hutchinson*, 39 N. J. Eq. 218; *Board of Health v. Casey*, 3 N. Y. S. 399, 18 N. Y. St. Rep. 251; *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275; *Bell v. Rochester*, 11 N. Y. S. 305, 33 N. Y. St. Rep. 739, 58 Hun 602.

ously approved by the board of health, the board was held entitled to an injunction to restrain a property owner from executing plumbing and drainage in violation of the statutory provision.⁶⁷

§ 1447. Municipal power to control and regulate.

The express power to regulate the construction of sewers in the public streets is sometimes conferred on municipal corporations by the constitution of the state.⁶⁸ But in the absence of such grant the usual rule enforced is that a municipal corporation has power to control and regulate the construction, maintenance and use of its sewers and drains,⁶⁹ and protect them from invasion or injury by proper penalties.⁷⁰

Courts generally regard public sewers and drains as the property of the municipal corporations in which they are built, and may be protected and controlled as any other property of the municipality, and no private person has the right to interfere with them. They belong to the city in its corporate capacity, as distinguished from the general public of the state.⁷¹ If a part of the territory of one municipal corporation becomes the territory of another the latter has the right to use and control the sewers located therein.⁷² A municipality cannot surrender its power to control and regulate sewers and drains within its limits.⁷³

67. *Health Dept. v. Lalor*, 38 Hun (N. Y.) 542.

68. *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556.

69. *Melrose v. Cutter*, 159 Mass. 461, 34 N. E. 695; *Platt & D. Canal & M. Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036.

70. *Fisher v. Harrisburg*, 2 Grant (Pa.) 291, 295.

Regulation of sewers and drains as police power, § 916 *ante*, vol. 3.

71. *Detroit v. Corey*, 9 Mich. 165, 80 Am. Rep. 78; *Fergus Falls v. Boen*, 78 Minn. 186, 80 N. W. 961; *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 472, 41 S. W. 943.

See § 174 *ante*, vol. 1.

72. *Bloomfield Twp. v. Glen Ridge Borough*, 54 N. J. Eq. 276, 33 Atl. 925.

73. An ordinance attempting to grant to a private individual for

Whenever the public interests demand the *municipal corporations may regulate private sewers and drains*.^{73a} However, in exercising such power it cannot invade vested rights under a mere pretense of a regulation in the interest of the public welfare, when in fact the regulation has no substantial relation to the end which it purports to serve.⁷⁴

§ 1448. Same—sewer connections.

Power to regulate and control sewers and drains carries with it as a necessary incident thereto authority to compel, regulate and control all indispensable, desirable or convenient connections subject, of course, to the observance of private property rights.⁷⁵ Accord-

twenty years the exclusive right to construct, maintain and operate a sewer system within its limits and to collect from persons using the same a reasonable annual compensation, not exceeding a sum per year for each lot, is invalid since the city has no power to turn its sewer system, present or prospective, over to private ownership. *Weaver v. Cannon Sewer Co.* (Colo. App., 1902), 70 Pac. 953.

See § 382 *et seq.*, *ante*, vol. 1.

73a. *Rodwell v. Newark*, 34 N. J. L. 264.

74. Where an individual constructed a ditch for drainage purposes across lands then a part of the United States and subsequently the land was included in the limits of a municipal corporation, it was held that the owner, who had maintained the ditch since its construction, had a vested right therein which could not be invaded by the municipality requiring the ditch to be boxed and con-

fined merely to prevent the washing away of property along its course which belonged to others, although the ordinance requiring the same recited that the public welfare and safety required the boxing of the ditch. *Platte, etc. Canal, etc. Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036.

Private sewers and drains and private rights therein, § 1427 *ante*.

Where a land owner divides the land into lots, streets, etc., and after sewerage it sells the lots each lot being sold with an easement in sewers he thereby parts with his right to control the sewer. *Moore v. Langdon*, 2 Mackey Dist. 127, 47 Am. Rep. 262.

A drain on private lands may be repaired by the city. *Melrose v. Hiland*, 163 Mass. 303, 39 N. E. 1031.

75. While an ordinance providing for the construction of a district sewer must connect it with a public sewer, another district sewer, or the natural course of

ingly it has been judicially affirmed that express power to "construct, establish and maintain drains and sewers" includes power to make reasonable regulations for tapping and connecting with the sewers.⁷⁶

Laws sometimes confer upon persons entitled to connect with municipal sewers a right of action to enforce the privilege.⁷⁷

Municipalities are generally authorized to compel property owners to make connection with a sewer within a reasonable distance when the public health requires it,⁷⁸ at their own expense,⁷⁹ and may enforce the require-

drainage, and if it fails to do so it is void, it need not specify in express terms that it does so connect. *St. Joseph v. Wilshire*, 47 Mo. App. 125.

Manufacturers may be permitted to use drains and gutters. *Municipality No. 1 v. New Orleans Gas-light Co.*, 5 La. Ann. 439.

A mere contract whereby a city obtains the easement for a sewer in private property, does not give the city a right to enter on such property to connect other property with the sewer. *State v. District Court*, 90 Minn. 540, 97 N. W. 425.

76. *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556.

"Connections with public sewers are necessary incidents to their use and the power to permit them to be laid is implied from the power to lay sewers." *Hutchinson v. Board of Health*, 39 N. J. Eq. 569.

77. *Evans v. Portland*, 97 Me. 509, 54 Atl. 1107.

78. *Martin v. Hilb*, 53 Ark. 300, 14 S. W. 94; *Ginter v. St. Mark's Church*, 95 Minn. 14, 103 N. W.

738, 69 L. R. A. 621, 111 Am. St. Rep. 438.

79. *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

Unless the duty is put upon the municipality to pay for connecting private premises with a public sewer, the cost must be borne by the owner of the premises, and after making such connection he cannot recover from the municipality. *O'Brien v. Worcester*, 172 Mass. 348, 52 N. E. 385.

A municipality may require persons making connections with a public sewer to pay for the privilege of using the sewer, on the ground of reimbursement for the amount expended by it in constructing or maintaining the sewer. *Fergus Falls v. Edison*, 94 Minn. 121, 102 N. W. 218, 70 L. R. A. 238; *Carson v. Brockton Sewerage Com'rs*, 175 Mass. 242, 56 N. E. 1, 48 L. R. A. 277, affirmed in 182 U. S. 398, 21 Sup. Ct. 860, 45 L. Ed. 1151; *Belding Bros. v. Northampton Sewer Com'rs*, 177 Mass. 39, 58 N. E. 156.

Power to make house connections with sewers. *Corderman v. Cincinnati*, 23 Ohio St. 499.

ment by appropriate ordinance penalties.⁸⁰ So the municipal corporation may require property owners on sewerred streets to connect their closets,⁸¹ bath tubs, etc., with the sewer, and may enforce the observance of such a regulation by fine.⁸²

The municipality may fix the charge at which private persons or corporations may connect with its sewers and drains.⁸³ But the charge for the privilege of making connections must be reasonable, not arbitrary,⁸⁴ and uniform, not discriminatory.⁸⁵

80. *Allman v. Mobile*, 162 Ala. 226, 50 So. 238.

81. *Hill v. St. Louis*, 159 Mo. 159, 60 S. W. 116.

82. *Allman v. Mobile*, 162 Ala. 226, 50 So. 238.

An ordinance requiring that a separate sewer connection for each lot is a reasonable exercise of the police power. *Branch v. Gerlach*, 94 Ark. 378, 127 S. W. 451.

A statute authorizing cities to provide for drainage, and enforce proper connections to be made is not invalid as compelling the improvement of property against the owner's will. *Allman v. Mobile*, 162 Ala. 226, 50 So. 238.

It is no defense for a failure to comply with a requirement to connect premises with a sewer, that part of the sewer is located on land for which the permission of the owner was improperly given. *Commonwealth v. Abbott*, 160 Mass. 282, 35 N. E. 782.

83. *Fisher v. Harrisburg*, 2 Grant (Pa.) 291.

Pay for entering sewers authorized. *Patton v. Springfield*, 99 Mass. 627.

84. A sewer company owning a sewer built partly on private property had the right to rent

connections therewith, but refused in one instance to rent to an applicant at a reasonable rental. It was held that the business of the sewer being impressed with a public interest it could not refuse to permit the connection upon reasonable terms, and that, while the court could not fix the rates to be charged for connections generally, as that would be a legislative act, it could determine what was a reasonable charge in the particular case. *Pulaski Heights Sewage Co. v. Loughborough*, 95 Ark. 264, 129 S. W. 536.

Five dollars, held not to be an unreasonable fee. *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556.

While a municipal corporation may require abutting property owners to contribute to the construction of a sewer when it proceeds according to law, it cannot arbitrarily assume that property has been benefited and exact for such benefit an excessive charge for the privilege of connecting with the sewer. *Bowser v. Philadelphia*, 41 Pa. Super. Ct. 515.

85. A charge of \$7.50 to a person who had not contributed to the original construction of the

The municipality may establish a uniform charge for building lateral or connecting sewers from the property line to the public sewer, and the fact that some property is closer to the sewer, therefore requiring less work, than others, does not render the charge unreasonable.⁸⁶

Where the fee for connecting with a municipal sewer is fixed by ordinance, the authorities have no right to demand more than the amount so fixed.⁸⁷

A municipality may reserve in itself the exclusive right to construct the lateral sewers or connections between the property line and the public sewer.⁸⁸ So a municipality may connect a district drainage system, which has been constructed at the expense of the inhabitants of that district with other systems and thus devote its use to the inhabitants generally of the municipality.⁸⁹

Furthermore a municipal corporation has the right to say what is a proper connection with its sewers and to require that connections be made by its authorized agent

sewer, and \$3 to one who had so contributed was held invalid either as a police regulation or as an exercise of the taxing power as it is an improper classification. *Bowser v. Philadelphia*, 41 Pa. Super. Ct. 515.

Where private parties construct a sewer in a public highway and give it to the city it becomes a public sewer, and all abutting owners have the right to connect therewith under a statute giving them the right of connecting with a public sewer under such rules as may be prescribed by the board of public works. The city cannot deprive an abutting owner of his right to connect therewith because he had contributed nothing towards its construction; nor can it charge him an unreasonable and discriminatory fee for such con-

nection. *Springmyer v. State*, 1 Ohio Cir. Ct. 501, 1 Ohio Cir. Dec. 279, *aff'd* 23 Wkly. L. Bul. 281.

Where a city exacted from the customers of a water company the same amount for connecting with its sewers as it charged others for both such connection and water supply its acts were held to be without authority and discriminatory and could be enjoined. *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379, 30 So. 445.

86. *Harter v. Barkley*, 158 Cal. 742, 746, 112 Pac. 556.

87. *Springmyer v. State*, 1 Ohio Cir. Ct. 501, *affirmed* 23 Wkly. L. Bul. 281.

88. *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556.

89. *Springer v. Walters*, 37 Ill. App. 326, *affirmed* in 139 Ill. 419, 28 N. E. 761.

and under the direction of its inspector and that only suitable material be used in making the connection. But it cannot require those desiring to connect their premises with a sewer to purchase the material from the municipality nor employ the city to do the work.⁹⁰

Laws often provide that public sewers may be connected with any other sewer of any class, or with some natural course of drainage.⁹¹ Under a charter requirement that every district sewer shall connect with a public sewer or some natural course of drainage, a district sewer may be connected with another district sewer if the latter connects with a public sewer.⁹² But such a requirement is not complied with by a connection with a stream or ravine which is not the base or basin of any part of the sewer system.⁹³ Nor is it complied with by a connection with an abandoned creek bed which the construction of streets had converted into a pond.⁹⁴

§ 1449. Same—permit to make connections.

As the municipal corporation has full control of its sewers and drains,⁹⁵ property owners have no right to connect private sewers with a public sewer without the consent of the municipality,⁹⁶ which may prohibit the connection without written permission from designated officers.⁹⁷ But the municipality may waive such require-

90. *Slaughter v. O'Berry*, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

91. St. Louis charter, art. 6, § 20; *The Revised Code of St. Louis* (1907, Woerner), p. 408.

92. *Eyerma v. Blaksley*, 78 Mo. 145; *Heman v. Payne*, 27 Mo. App. 481.

93. *Bayha v. Taylor*, 36 Mo. App. 428.

94. *Kansas City v. Swope*, 79 Mo. 446.

Failure to connect creates lia-

bility on bond, when. *St. Louis v. Thierry*, 100 Mo. 176, 13 S. W. 344.

95. § 1447 *ante*.

96. *Ranlett v. Lowell*, 126 Mass. 431; *Barton v. Syracuse*, 37 Barb. (N. Y.) 292; *Baxter v. Tripp*, 12 R. I. 310.

97. *Ranlett v. Lowell*, 126 Mass. 431.

If it is necessary to secure the permission of the city to connect with a sewer, the fact that the sewer is constructed on an owner's land and the connecting drain is wholly located on his land will

ment either expressly or by a course of conduct which indicates an intention to do so.⁹⁸

A permit to connect with a sewer in a designated street cannot be used as authority for connecting with a sewer in a different street.⁹⁹ So when a permit is granted to connect with a sewer for certain specified purposes, that is the limit of the rights of the person securing the permit. Thus where one secured a permit to connect with a sewer to carry off surface drainage but used the connection to carry off all the drainage from his premises, the connection was held illegal.¹ So where a bond is given in compliance with an ordinance

not relieve the owner of the necessity of securing the city's permission. *Livingstone v. Taunton*, 155 Mass. 363, 29 N. E. 635.

Where municipal authorities placed blank permits for sewer connections in the hands of the sewer inspector, to be signed and issued as applied for, it cannot object that a permit to a property owner was not issued by the secretary as required by ordinance, where it has received such property owner's money for the permit, and the owner in good faith has made the connection at the place designated by the inspector, has completed his drain, and the inspector has approved the work. *Allen v. Swarthmore Borough*, 25 Pa. Super. Ct. 410.

Where a board is merely authorized to allow private drains to be connected with the city's sewers, but no duty is imposed upon it to permit the same, it cannot be compelled by *mandamus* to do so. *State v. Board of Public Works*, 6 Ohio Dec. 769, 4 Wkly. L. Bul. 293.

Sometimes it is made an essential prerequisite to the granting of a permit by the municipal

authorities to connect with a sewer that application in writing be made therefor describing the land desired to be connected with the sewer. *Evans v. Portland*, 97 Me. 509, 54 Atl. 1107.

While it is true that a permit to connect with a sewer runs with the land, still a permit granted to a stranger to the title is invalid and no one can subsequently claim under it. *Evans v. Portland*, 97 Me. 509, 54 Atl. 1107.

98. Where the street commissioner of a city testified that he granted a property owner a permit, and the records of the board of aldermen showed that the commissioner had reported that he had issued such owner a valid permit, it was held that the city had waived the requirement that such permit be in writing. *Sheridan v. Salem*, 148 Mass. 196, 19 N. E. 172.

99. *Evans v. Portland*, 97 Me. 509, 54 Atl. 1107.

1. *Assay v. Baldwin*, 7 Wkly. N. Cas. 160.

The privilege or license granted an individual by a municipality to connect a private drain with a

requiring a bond to be given before a permit is issued to connect a private with a public sewer, the bond conditioned that the regulations of the sewer commissioners and of the ordinance be complied with, and the person to whom the permit is issued to connect certain premises connects other premises instead, the terms of the bond are broken.²

As a rule the right given a property owner to connect with a municipal sewer is in the nature of a license only, and does not become a vested right merely because he was put to considerable expense in constructing a drain from his premises and connecting with the sewer. The municipality has a right, therefore, if the sewer with which the connection is made becomes a nuisance, to require such drain to be disconnected therefrom, without being liable to the owner of the drain in damages.³

§ 1450. Same—prepayment of special tax or local assessment as condition to make connection.

The rule has been announced that as a condition to make the connection the prepayment of a valid special tax bill or local assessment may be required.⁴ And such a regulation it is held in Missouri is not invalid because it gives the contractor an additional remedy for enforcing the payment of the assessment, there being nothing in the charter providing a remedy for the collection of such assessments making that remedy exclusive.⁵

public sewer does not give such person the right to use the sewer for any purpose, but only for a proper and legitimate purpose. And in this regard a use of the sewer to carry off the refuse of a brewery has been held not to be a proper use. *New York v. Baumberger*, 30 N. Y. Super. Ct. (7 Rob.) 219.

2. *St. Louis v. Thierry*, 100 Mo. 176, 13 S. W. 344.

3. *Camp v. Barre*, 66 Vt. 563, 29 Atl. 1022.

4. *Hill v. St. Louis*, 159 Mo. 159, 60 S. W. 116; *Ranlett v. Lowell*, 126 Mass. 431.

Contra. *State v. Hermann*, 84 Mo. App. 1.

5. *Hill v. St. Louis*, 159 Mo. 159, 60 S. W. 116, overruling *State v. Hermann*, 84 Mo. App. 1.

See comments on these cases in § 727 *ante*, vol. 2.

So in Ohio it has been held that where a sewer was constructed and assessments levied on abutting property to pay therefor, some of which were paid while others were successfully resisted, a rule requiring those who had not paid the assessment to pay a sum for the privilege of connecting their premises with such sewer, equal to the amount paid by those who had paid the assessment, was not unreasonable.⁶

On the other hand a municipality cannot make the payment of a void assessment a condition of making the connection.⁷

§ 1451. Duty to keep sewers in proper condition.

While as stated a grant of power to a municipal corporation to construct sewers and drains does not require it to do so,⁸ the municipality is bound to use ordinary care or exercise due diligence to keep such sewers and drains as it constructs in proper condition and repair and free from obstructions,⁹ and will be held liable for

6. *Hermann v. State*, 54 Ohio St. 506, 43 N. E. 990, 32 L. R. A. 734.

7. *Meyler v. Meadville*, 23 Pa. Co. Ct. 119.

The mere fact that an assessment levied to pay for a sewer was void does not affect the right of an abutting property owner to connect with such sewer by complying with the reasonable regulations of the municipality. And he cannot be required to pay the void assessment before connecting with the sewer. *State v. Graydon*, 6 Ohio Cir. Ct. 634.

It has been held in Pennsylvania that where a property owner has paid the municipality for a permit and has made a proper connection with the sewer, he can maintain a bill in equity to enjoin the municipality from cutting off

his connection, as a means of compelling him to pay an assessment for which either the owner is not liable, or which was enforceable in a mode prescribed by ordinance. *Allen v. Swarthmore Borough*, 25 Pa. Super. Ct. 410.

The right to connect with a sewer is not necessarily confined to those owning property in the district assessed for such sewer. In any event, an owner in such district whose property was assessed for the sewer cannot bring a suit to enjoin the connection of drains outside the district with such sewer unless he shows that his property will be specially injured thereby. *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761.

8. § 1435 *ante*.

9. *Colorado*. *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

damages to property resulting from its failure to do so.¹⁰

Illinois. Kankakee v. Illinois Eastern Hospital, 66 Ill. App. 112; Chicago v. Seben, 165 Ill. 371, 46 N. E. 244.

Indiana. Fort Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82.

Kentucky. Louisville v. Leezer, 143 Ky. 244, 136 S. W. 223; Louisville v. Knighton, 30 Ky. L. R. 1037, 100 S. W. 228, 8 L. R. A. (N. S.) 478.

Maryland. Kurrle v. Baltimore, 113 Md. 63, 77 Atl. 373; Frostburg v. Dufty, 70 Md. 47, 16 Atl. 642.

Missouri. Fuchs v. St. Louis, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118.

New York. New York v. Furze, 3 Hill (N. Y.) 612; Barton v. Syracuse, 36 N. Y. 54, affirming 27 Barb. 292; Evers v. Long Island, 28 N. Y. S. 825, 78 Hun 242.

Pennsylvania. Boehm v. Bethlehem, 4 Pa. Super. Ct. 385; Markle v. Berwick, 142 Pa. St. 84, 21 Atl. 794.

Maintenance of sewers. "When territory within a city is permitted to remain by the authorities in the condition it was when annexed, in other words, if the city does not undertake to make improvements or changes or alterations in existing improvements, or to build streets, sidewalks, drains or gutters or reconstruct old ones, it will not be liable for any damage caused by the overflowing of the premises, because, if it has not interfered in any way with the natural condition of affairs, the

overflow cannot be attributed to its acts, * * *. But when a city undertakes to make improvements or to alter or reconstruct old ones, it then assumes the duty of completing and keeping them in such condition that the property of the citizen will not be injured thereby." Campbell v. Vanceburg, 30 Ky. L. R. 1340, 101 S. W. 343.

While a municipal corporation authorized to construct sewers can not be held civilly liable for failure to do so, it will be held civilly responsible for damages resulting from a neglect of duty in failing to keep sewers constructed by it in repair. Wilson v. New York, 1 Denio 595, 43 Am. Dec. 719.

10. *Connecticut.* Judd v. Hartford, 72 Conn. 350, 44 Atl. 510.

Delaware. Hession v. Wilmington, 1 Marv. (Del.) 122, 40 Atl. 749, 27 Atl. 830.

Georgia. Savannah v. Cleary, 67 Ga. 153.

Kentucky. Louisville v. Gimpeel, 22 Ky. L. Rep. 1110, 59 S. W. 1096.

Massachusetts. Bates v. Westborough, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156.

New York. Talcott v. New York, 69 N. Y. S. 360, 58 App. Div. 514; McCarthy v. Syracuse, 46 N. Y. 194; Barton v. Syracuse, 36 N. Y. 54, affirming 37 Barb. 292; Evers v. Long Island City, 28 N. Y. S. 825, 78 Hun 242.

Pennsylvania. Boehm v. Bethlehem, 4 Pa. Super. Ct. 385,

Knowledge of the municipal corporations or duty to have knowledge of the obstructed condition of sewer or drain is necessary to render it liable.¹¹

A municipal corporation has power to widen and clear obstructions of a sewer, even outside of any highway and on private property.¹²

11. *Daggett v. Cohoes*, 7 N. Y. S. 882, 27 N. Y. St. Rep. 630, 54 Hun 639; *Schreiber v. New York*, 32 N. Y. S. 744, 11 Misc. Rep. 551; *Harper v. Milwaukee*, 30 Wis. 365.

The municipality is bound when properly notified to remove obstructions in sewers constructed by it. *Murphy v. Atlantic High-*

lands, 77 N. J. L. 452, 76 Atl. 1073; *Hayes v. Vancouver*, 61 Wash. 536, 112 Pac. 498. See also *Beyer v. New York*, 126 N. Y. S. 455, 141 App. Div. 679.

See chapter on Municipal Liability for Torts, *post*, vol. 5.

12. *Melrose v. Hiland*, 163 Mass. 303, 39 N. E. 1031.

CHAPTER XXXII.

EMINENT DOMAIN.

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3. USE FOR WHICH TAKEN AS A PUBLIC USE.
4. WHAT PROPERTY MAY BE TAKEN.
5. DISCONTINUANCE OF PROCEEDINGS.
6. COMPENSATION, RIGHT TO AND AMOUNT OF.
7. TITLE AND RIGHTS ACQUIRED, ABANDONMENT, AND REVERSION.
8. PROCEDURE.

1. GENERAL CONSIDERATIONS.

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| 1453. Definition. | 1463. Construction of statutes. |
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| 1455. Constitutional provisions. | 1465. Public corporations on whom power conferred. |
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2. WHAT IS "TAKING" OF PROPERTY.

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6. COMPENSATION, RIGHT TO AND AMOUNT OF.

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7. TITLE AND RIGHTS ACQUIRED, ABANDONMENT, AND REVERSION.

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1518. Title acquired by municipality.
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1. GENERAL CONSIDERATIONS.

§ 1452. Scope of chapter.

To consider at length the law relating to Eminent Domain in a work of this character would be impossible. Moreover, much of the law on that subject has no bearing on the law of municipal corporations. It has been deemed advisable to include herein the rules relating to the power of a municipality to condemn property and the

extent of such power, and also to treat of the question whether the property of a municipality is subject to condemnation, with merely a general review of the law governing the procedure in condemnation cases, since such procedure is so different in the various jurisdictions and governed to so large an extent by local statutes and charter provisions which set forth with more or less detail the exact procedure to be followed.

Matters connected with the law of public improvements and local assessments, or special taxation, including such questions as the right to damages in case of a change of a grade of a street, will be treated in a succeeding chapter on "Public Improvements," and the rights of abutting owners as against public service corporations are considered in a subsequent chapter in this volume on the subject of "Franchises."

§ 1453. Definition.

Eminent Domain is the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare.¹ It is a reserved right attached to every man's land and paramount to his right of ownership.² It is based upon the non-consent of the owner of the land; it is an attribute of sovereignty, and inherent in all governments; it is paramount to all private rights invested under the government; it is older than the constitutions, it requires no constitutional recognition, it is not created or granted by constitution or statute, and

1. Lewis, *Eminent Domain* (3rd Ed.), § 1.

Definitions. The right of eminent domain is the right of a state to take private property for public use in order to promote the general welfare. 12th St. Market Co. v. Philadelphia & R. T. R. Co., 142 Pa. 580, 21 Atl. 989.

2. Todd v. Austin, 34 Conn. 78, 88.

The theory upon which the right of eminent domain is based is that the right of the individual must give way to the greater rights of a majority of the subjects of the state and that it is necessary for the public use. Re Board of Water Supply of City of New York, 109 N. Y. S. 1036, 58 Misc. Rep. 581.

it belongs alone to the sovereign. It is *limited only by the constitutional provision that the taking must be for a public use and that compensation must be made.*³

3. Legislative power is limited only by the constitution. Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505.

See § 244, vol. 1, *ante*.

The right of eminent domain appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The provision found in the constitution of our various States providing for just compensation for private property taken or damaged for public use is a limitation only upon the exercise of the right. So. Ill. & Mo. Bridge Co. v. Stone, 174 Mo. 1, 22, 73 S. W. 453.

The power of eminent domain is one of the inalienable rights of sovereignty. Hollister v. State, 9 Idaho 8, 71 Pac. 541.

"In olden times the eminent domain seems to have been employed only in cases of state necessity, and there is no instance of its exercise in New Jersey prior to 1776 except for highways. But undoubtedly its scope has been much enlarged in recent times to keep pace with the advance in social conditions. Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756. Still, even as late as 1852, Chief Justice Green spoke of the objects for which the state exercises this power as being few in number." Smith v. Applegate, 23 N. J. L. 357; Albright v. Sussex County

Lake & Park Commission, 71 N. J. L. 303, 57 Atl. 398.

Historical. "Lewis, in his excellent work on Eminent Domain (section 1), defines eminent domain to be 'the right or power of a sovereign state to appropriate private property to particular use, for the purpose of promoting the general welfare.' It is an inherent, inalienable, sovereign right, and lies dormant in the state until the Legislature sees fit to exercise it, either directly, or by investing some corporation, or individual, with the power to exercise it. It is interesting to note the various purposes for which the Legislatures of the states have successively exercised the power of eminent domain, as discovery and invention would bring about new social and economic conditions calling for its exercise in relation to some matter not theretofore thought of. In the early history of our country the needs of the public were few, and the eminent domain was exercised in respect to a very limited number of subjects. Gristmills and highways were about the first, and for some time the only material things in which the public had a common use. But since the advent of steam and electric power, many water mills which once flourished, served large communities, have passed into disuse. And while the old mill acts are still retained as part of the law of this state, they are seldom, if ever, invoked in con-

§ 1454. Power distinguished from other powers.

The power of eminent domain is to be distinguished from the police power,⁴ and under the guise of the po-

demnation proceedings. At first public roads, turnpikes, canals, and navigable streams furnished the only means for travel and commerce; but later on, when steam began to be used as a motive power, the eminent domain was applied in the promotion of railroad development, as another means of serving the public. The following are some of the many subjects which the legislatures of many of the states have deemed of sufficient public utility to justify the taking of private property, viz.: Gristmills, public roads and turnpikes, steam and street railroads, canals, pipe lines for carrying water, oil, and gas, sewers and drains, public buildings including schoolhouses, mining privileges, irrigation of arid lands, and drainage of swamp lands. And the courts have uniformly held that the taking of private property for such purposes was a lawful exercise of the state's power. In more recent years the discovery of that hidden, magic force known as electricity, and all the varied uses to which it has been applied to serve the wants and conveniences of mankind, have again called forth the exercise, by the state, of the right of eminent domain, for a purpose not theretofore contemplated. Until the discovery of this new force, and the invention of means by which it could be transmitted, controlled, and applied, so as to give light, heat, and power,

only a limited use could be made of the natural waterfalls which abound in this state." *Pittsburg Hydro-Electric Co. v. Liston* (W. Va. (1911), 73 S. E. 86.

4. What constitutes police power and nature thereof, see § 889 *et seq.*, *ante*, vol. 3.

Police power as distinguished from right of eminent domain, see *Bancroft v. Cambridge*, 126 Mass. 438; *Com. v. Alger*, 7 Cush. (Mass.) 53, 85.

"The moment the legislature passes beyond mere regulation and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power." *Lewis, Eminent Domain* (3d Ed.), § 6.

See *Freund*, Police power, § 20.

"The police power is distinguished from the right of eminent domain in that the state by exercising the latter right takes private property for public use, thereby entitling the owner to compensation under the Constitution, while the police power, founded as it is on the maxim, '*Sic utere tuo ut alienum non laedas*,' is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner, or, if he is deprived of his property altogether, it is not taken for public use, but rather

lice power property cannot be taken for public use without compensation, since a municipal corporation, through its delegated power, cannot arbitrarily attribute the doing of a thing to the police power, whether reasonably done or not, but it is a question finally for the courts to determine whether an act is within the police power.⁵

On the other hand, the constitutional provision that private property shall not be taken or damaged for public use without just compensation, does not preclude a particular exercise by the municipality of its police power on any subject lying within its sphere.⁶

destroyed in order to conserve the safety, morals, health, or general welfare of the public, and in neither case is the owner entitled to compensation, for the law either regards his loss as *damnum absque injuria*, or considers him sufficiently compensated by sharing in the general (and, in this case, also the specific) benefits resulting from the exercise of the police power. 22 Am. and Eng. Ency. of Law (2d Ed.) 916, and cases there cited." Quoted in *Commonwealth v. Plymouth Coal Co.*, 232 Pa. St. 141, 81 Atl. 148.

5. *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013.

See § 893 *ante*, vol. 3.

Not even to promote the public health, public morals, public safety, can property be taken without compensation for public use under the police power, any more than when it bears no relation to such matters but only to the general welfare; and a city which has annexed territory through which runs a turnpike, authorized to exact tolls, cannot take possession of the road to the exclusion of the company, where there

is no overruling necessity for taking possession of the road without compensation. *Belleville v. St. Clair County Turnpike Co.*, 234 Ill. 428, 84 N. E. 1049.

Municipality cannot escape liability for damages to property resulting from the construction of a viaduct in a street on the ground that it was built by the municipality in the exercise of its police power. *Chicago v. Le Moyne*, 119 Fed. 662, 665, 56 C. C. A. 278.

Municipality is liable for the damage caused by emptying its sewers into a natural stream flowing through private property. *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.

6. *Houston & T. C. R. Co. v. Dallas*, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850, reversing on other grounds, 78 S. W. 525.

The rule is well settled that neither a natural person or a corporation can claim damages on account of being compelled to comply with a police regulation designed to secure the public health, safety or welfare. *Cincinnati, I. & W. R. Co. v. Connersville*, 170 Ind. 316, 83 N. E. 503.

So the *power of eminent domain must be distinguished from the power of taxation*,⁷ since the constitutional provision that private property shall not be taken for public use without just compensation applies only to property taken under the power of eminent domain, and is not applicable to the power of taxation.⁸

Likewise, assessments for local improvements are generally not considered a taking of private property for public use, but instead are an exercise of the power of taxation.⁹

7. In *Lewis, Eminent Domain* (3d Ed.), § 4, it is said: "Besides the power of eminent domain, the state is clothed, by virtue of its sovereignty, with other powers over private property, with which it is closely allied and sometimes confounded. These are the power of taxation and the power of police regulation. A tax is a contribution exacted by the government from all the individuals of the state, or from those of a particular class or locality, for the purpose of defraying the public expenses. The contribution may be of money or of property. But when property is exacted instead of money, it is not because the state needs the particular property but because that form of exaction, owing to the scarcity of money, will be more promptly and certainly complied with. Taxation is also based upon some rule of apportionment, as when made upon persons according to number, or upon property according to value or quantity or benefits. In all these respects a tax differs from an exercise of the power of eminent domain."

In *Cooley, Taxation* (3d Ed.), p. 411, the following statement is made: "When the state has need

of the property of citizens for its sovereign purposes, it may lawfully appropriate it against the will of the owner either under the power to tax or the right of eminent domain. There is a difference in the two cases which is vital. When property is appropriated under the right of eminent domain, a particular item or parcel is taken, because for public purposes there is special need of it, and the state takes it under proceedings which amount, so far as the owner is concerned, to a forced sale. But taxation is based upon the idea of calling upon the people for equal and proportional contributions to the public wants, that the burdens of government may fall ratably upon all who in justice should bear them."

8. *Howell v. Buffalo*, 37 N. Y. 267.

9. *Agens v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Weeks v. Milwaukee*, 10 Wis. 242.

Special assessments not eminent domain. A statute providing for the assessment of land benefited by the laying out of any street, alley, etc., within a municipality, so far as it relates to assessments, is not an exercise of

The power of *eminent domain* is also distinguishable from the damaging or destruction of property in cases of necessity, and from the taking, injuring or destruction of property in time of war.¹⁰

§ 1455. Constitutional provisions.

The fifth amendment to the federal constitution provides that private property shall not be taken for public use without just compensation. However, this provision is not a restriction of a state government but is merely a restriction on the legislative functions of the federal government. In every state except North Carolina the constitution provides in effect that private property cannot be taken for public use without compensation. These various statutory provisions differ somewhat in phraseology, although for the most part alike. The constitutional provisions of all the states are collected in the recent edition of Mr. Lewis's valuable work on Eminent Domain and set forth *verbatim*.¹¹

The important questions arising under such provisions are (1) what is *property*; (2) what is a *taking*; (3) what is a *public use*; and (4) what is *just compensation*.

§ 1456. What is "property."

In considering the constitutional provision forbidding the taking or damage of private "property" for public use without compensation, it is necessary to determine what is "property."¹²

the power of eminent domain, but is a grant of the power of taxation. *Clute v. Turner*, 157 Cal. 73, 106 Pac. 240.

A street paving assessment is not an exercise of the power of eminent domain. *Austin v. Nalle*, (Tex. Civ. App., 1909), 120 S. W. 996, rev'g on other grounds, 115 S. W. 126.

10. Lewis, *Eminent Domain* (3d Ed.), §§ 7, 8; *Nichols*, *Eminent Domain*, §§ 15, 16.

11. Lewis, *Eminent Domain* (3d Ed.), §§ 16-61.

12. Property is the right and interest which one has in lands and chattels to the exclusion of others and includes every species of valuable right and interest. *Illinois Cent. R. Co. v. Mattoon*, 161 Ill. 247, 43 N. E. 1100.

Where a street is vacated and the land becomes the private property of abutting owners by reason of accretion or otherwise,

Formerly the tendency was to confine the meaning of the word to the tangible thing itself. At present, however, it is generally held that private property forbidden to be taken or damaged by the constitution for the public use without just compensation is not limited to the tangible subject-matter or *corpus* of the property, but includes the right of user and enjoyment of it, so that when such rights are destroyed or taken for public use the owner thereof is entitled to compensation.¹³

The word "property" therefore, as employed in the constitutional provision means the right of user and disposition and domain to the exclusion of all others and does not necessarily mean the taking of the fee simple title to property.¹⁴ In a word, *the use of property is property itself within the meaning of the constitutional provision.*¹⁵ Thus the rights of riparian owners which

it cannot be taken by a public service corporation without just compensation. *Bullen v. Arkansas Valley & W. R. Co.*, 20 Okla. 819, 95 Pac. 476.

Defined by condemnation statute, see *Lincoln Safe Deposit Co. v. New York City*, 88 N. Y. S. 912, 96 App. Div. 624.

13. *Belleville v. St. Clair Turnpike Co.*, 234 Ill. 428, 84 N. E. 1049.

Private sewers are private property which cannot be taken or destroyed without making compensation to the owners thereof. *Wright v. Mt. Vernon*, 60 N. Y. S. 1017, 44 App. Div. 574, *aff'd* in 167 N. Y. 541, 60 N. E. 1123.

One who has vested rights in public land has property which cannot be condemned except on making him due compensation for his rights. *Oklahoma City v. McMaster*, 12 Okla. 570, 73 Pac. 1012, *rev'd* on other grounds in 196 U. S.

529, 25 Sup. Ct. 324, 49 L. Ed. 587; *Re Ehle*, 68 Minn. 297, 71 N. W. 382.

14. *Drainage Com'rs of Dist. No. 8 in Town of Oakwood v. Knox*, 237 Ill. 148, 86 N. E. 636.

15. *St. Louis v. Dorr*, 145 Mo. 466, 41 S. W. 1094, 68 Am. St. Rep. 575, following *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861.

The word "property" as used herein means the exclusive right of any person to use freely, enjoy, and dispose of any determinate object, whether real or personal. *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

"Sometimes the term is applied to the thing itself, as to a horse or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations, of invisible rights, 'the evidence of things not seen.' Property, then, in a

have become vested are property which cannot be condemned except on making compensation.¹⁶ So the rights of an abutting owner, although he does not own the fee of the street, are property rights which cannot be taken or injured without compensation.¹⁷

§ 1457. Agreement with municipality not to condemn.

A municipal corporation cannot surrender or preclude itself from the exercise of the power of eminent domain; and an agreement by a municipality that the power of eminent domain shall not be exercised in a particular manner or in respect to certain property is null and void.¹⁸

determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the *locus in quo*." *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 862.

16. *Crawford Company v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628.

Statutory right of riparian owners to erect wharves and buildings on bank of river, held to create private right of property, which could not be taken or damaged by a municipality without making compensation. *In re Con-*

struction of Walnut Street Bridge. Gumbes v. Philadelphia, 191 Pa. St. 153, 43 Atl. 88.

Rights to the use of water for a beneficial purpose, whatever the use may be, are property in the full sense of that term within the constitutional provision that private property shall not be taken or damaged for public or private use without just compensation. *Sterling v. Pawnee Ditch Extension Co.*, 42 Colo. 421, 94 Pac. 339, 15 L. R. A. (N. S.) 238.

Underground stream. So where the constitution forbids the taking of property for public use without compensation, a municipality cannot take an underground stream for a public sewer without compensating the owner of the land above for the injury, if any, done him, *Kévil v. Princeton*, 118 S. W. 363.

17. *Smith v. Brooklyn Union Elevated R. Co.*, 193 N. Y. 335, 85 N. E. 1100.

18. *Lewis, Eminent Domain* (3d Ed.), § 406.

§ 1458. Authority of legislature to delegate to municipalities power to condemn.

The rule is well settled by a multitude of authorities that the power to exercise the right of eminent domain may be delegated to a municipality by the legislature, and hence the question is no longer open to discussion.¹⁹

So the legislature may delegate the power to municipal officers to determine whether a municipality shall acquire the fee or only an easement in the land condemned.²⁰ However, in delegating the power of emi-

Perpetual contract with municipality does not affect right.

"It is contended that because the right of the university to have and maintain the existing bridge and to erect others is grounded upon a contract heretofore made by the university with the city, in which the latter fully recognized the right, and agreed that it might be perpetual, this contract is sacred, and its obligation would be impaired by the appropriation now contemplated. We think this contention is unsound. There is no inconsistency between a grant in its terms perpetual, and a subsequent resumption of the property granted; this resumption being made for public use, and in the exercise of the right of eminent domain. The state itself could not grant an easement which would not be subject to resumption in the exercise of this right, and certainly the city could not.

It is no revocation or violation of the grant under which private property is held, to take it for public use, on making adequate compensation to the owner. On the contrary, the proceeding to condemn and take, if it has self-

consistency, concedes the sacredness of the grant, and the creation thereby of all the attributes of ownership which can arise by inviolable contract. Reduced to its essence, a constitutional exercise of the right of eminent domain is not deprivation of property, but a compulsory exchange of one kind of property for another, or rather a compulsory sale of property for money—an exchange of equivalent values. The right of the university, granting it to exist as claimed, is an easement—a servitude to which the street is subject—and is realty as distinguishable from personal property. This easement, in whole or in part, is subject to be taken for the public use at the will of the state." *Trustees of Atlanta University v. Atlanta*, 93 Ga. 468, 475, 21 S. E. 74.

19. *Brunn v. Kansas City*, 216 Mo. 108, 115 S. W. 446; *Re Central Park Extension*, 16 Abb. Pr. (N. Y.) 56 (delegation to commissioners of Central Park in New York City).

20. *Re Commissioner of Public Works*, 10 N. Y. S. 705, 57 Hun (N. Y.) 419.

ment domain to a municipality, the legislature may impose conditions which require the municipality to do more than is exacted by the constitutional provisions in regard thereto, and if the municipality exercises the power so delegated it cannot evade or ignore the conditions.²¹

§ 1459. No inherent power in municipality to condemn.

No principle of law is better settled than that a municipality can only exercise the right of eminent domain when it is conferred upon it by the legislature expressly or by necessary implication, since a municipal corporation has no more right than any other corporation to condemn property.²² But while there is no inherent

21. *People ex rel. v. New York*, aff'g 118 N. Y. S. 742, 92 N. E. 18, 134 App. Div. 75.

22. *Stowe v. Newborn*, 127 Ga. 421, 56 S. E. 516; *Mayor of Eatonton v. Griffith*, 132 Ga. 793, 64 S. E. 1085; *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991.

Power not inherent or implied. *Bibb County Com'rs v. Harris*, 71 Ga. 250; *Butler v. Thomasville*, 74 Ga. 570; *Allen v. Jones*, 47 Ind. 438; *People v. Finger*, 24 Barb. (N. Y.) 341.

Power same as that of private corporation or individual. "The right which a municipality has to take or damage private property for public use is no greater because it has an element of sovereignty in it than is that of any other person or corporation having the eminent domain power. No milder or more liberal rule of interpretation of the Constitution will be indulged in where the taking or damaging is done by a municipality than is to be

applied to all alike. The private citizen is no more called upon to allow his property to be taken or damaged for a public use by a municipality without adequate compensation than he is required to submit to the taking or damage by any other corporation. The tendency of the modern municipal governments is too frequently towards an ignoring of private rights of property, and in many instances border on the despotic. Our Constitution is broad enough to curb within proper limits such tendencies, and to fully and adequately protect each and every property-owner, and it is the duty of the courts to see that the rights secured to private persons are enforced with unvarying strictness." *Jackson v. Williams*, 92 Miss. 301, 46 So. 551, 554.

Presumptions. In the absence of any provision authorizing the municipal authorities to condemn property for streets, the presumption is that the legislature in-

power in a municipal corporation to acquire property by condemnation proceedings, yet in nearly all jurisdictions the legislature has conferred the power of eminent domain on cities, towns and villages to a greater or less extent, either by express provisions in a general statute or in the municipal charter.²³

The power to condemn need not be conferred by charter as distinguished from a statute.²⁴

tended that the necessary property should be acquired by contract. *Brunswick & W. R. Co. v. Waycross*, 94 Ga. 102, 21 S. E. 145, 146.

23. *Cemeteries*. Statutes in some jurisdictions confer authority on certain municipalities to acquire land for cemetery purposes by condemnation. *Phillips v. Scales Mound*, 195 Ill. 353, 63 N. E. 180, holding that an incorporated town could condemn land for cemetery purposes, under the statute.

Drainage districts are often given the power to condemn property. See *Kaw Valley Drainage Dist. v. Metropolitan Water Co.*, 186 Fed. 315.

Electric light plant. Statute authorizes condemnation proceedings for an electric light plant. *State ex rel. v. Superior Court of King County*, 35 Wash. 303, 77 Pac. 382.

School districts. In Missouri, a city, town and village school district has the express statutory power to exercise the power of eminent domain. *School District of Columbia v. Jones*, 229 Mo. 510, 520, 129 S. W. 705.

Subway. So the power of eminent domain has been granted to municipalities to acquire a right of way for a municipal subway for street cars. *Re Board of Rapid*

Transit Commissioners, 112 N. Y. S. 619, 128 App. Div. 103.

By statute, in New Jersey, boroughs may condemn property for an elevated board walk along the ocean front. *Sharpless v. Longport Borough*, 79 N. J. L. 279, 75 Atl. 744.

In Alaska, the code provides the right of eminent domain may be exercised for public buildings and grounds for the use of municipalities; canals, aqueducts, pipes conducting water, heat or gas for the use of the inhabitants of any municipality; "roads, streets and alleys and all other public uses for the benefit of any precinct, city, town, or other municipal division, whether incorporated or unincorporated, or the inhabitants thereof, which may be authorized by Congress or other legislative authority of the District." And it was held that the words "roads, streets and alleys" are used independently as within the public uses defined by the statute and relate to properties clearly made the subjects of condemnation *without further legislation of Congress*. *Ashby v. Juneau*, 174 Fed. 737, 98 C. C. A. 476.

24. The fact that a city charter confers no authority upon municipal authorities to condemn

§ 1460. Power conferred by implication.

It is not necessary that the power to condemn should be conferred upon a municipality by express words, but it is sufficient that it is conferred by a necessary or reasonable implication in the grant of other powers.²⁵ However, the power to condemn cannot be held to have been delegated unless by express words or *clear implication*.²⁶

It is a recognized rule of construction that one power is implied in the grant of another when the latter cannot be exercised or carried into effect without the exercise of the implied power, since anything within the manifest intention of the makers of a statute is as much within the statute as if it were within the letter.²⁷ But there is no power by implication to take private property for public use merely because the object of the corporation cannot be attained without the use of private property.²⁸

“No general rule can be laid down as to when the right to condemn will be implied or inferred, and when not. Such implication will more readily be made in fa-

water for the use of inhabitants of a city does not preclude such condemnation where the constitution provides that cities shall be subject to and controlled by general laws, and the latter provide that the right of eminent domain may be exercised for such purpose for the use of the inhabitants of any city. *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197, followed in *San Francisco v. Kiernan*, 98 Cal. 614, 33 Pac. 720, so far as the general rule is concerned.

25. *Madison v. Daley*, 58 Fed. 751, 755; *Georgia R. & Banking Co. v. Decatur*, 129 Ga. 502, 59 S. E. 217; *Stowe v. Newborn*, 127 Ga. 421, 56 S. E. 516.

26. *Waterbury v. Platt*, 75 Conn.

387, 53 Atl. 958, 60 L. R. A. 211, 96 Am. St. Rep. 229.

When the right to exercise the power can only be made out by argument, it does not exist. *Pennsylvania Tel. Co. v. Hoover*, 209 Pa. St. 555, 58 Atl. 922.

The fact that a municipality has passed an ordinance providing a method and machinery for assessing compensation is not a substitute for the necessary statutory authority to condemn. *Brunswick & W. R. Co. v. Waycross*, 94 Ga. 102, 21 S. E. 145.

27. *Madison v. Daley*, 58 Fed. 751, 755.

See §§ 352-354, § 357 *et seq.*, *ante*, vol. 1.

28. *Thacher v. Dartmouth Bridge Co.*, 18 Pick. (Mass.) 501.

vor of public corporations exercising power solely for the public use and benefit than in favor of private individuals or corporations organized for pecuniary profit.”²⁹

A statute merely granting power to lay out and establish streets does not authorize the condemnation of land for such purposes.³⁰ Likewise power to construct

29. Lewis, *Eminent Domain* (3d Ed.), § 371, quoted and approved in *Leitzsey v. Columbia Water Power Co.*, 47 S. C. 464, 25 S. E. 744, 34 L. R. A. 215.

30. *Brunswick & W. R. Co. v. Waycross*, 94 Ga. 102, 21 S. E. 145; *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847.

Contra. *Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 656, 658, 39 N. E. 574.

Widening street. Statutory authority to widen street is inoperative where no procedure is prescribed therefor. *Re Chaffee*, 56 Mich. 244, 249, 22 N. W. 871.

Power to establish new streets as public necessity requires does not by implication confer the power to condemn property in laying out a street. *Georgia R. & Banking Co. v. Union Point*, 119 Ga. 809, 47 S. E. 183.

Express power to grade and widen streets and to condemn therefor, authorizes the condemnation of land outside the street boundaries for the purpose of widening the street. *Grand Rapids v. Coit*, 149 Mich. 668, 113 N. W. 362.

On the other hand, it has apparently been held that authority to lay off and establish streets, confers implied power to condemn a right to cross a railroad track,

where necessary to connect two ends of a street. *St. Louis & S. F. R. Co. v. Fayetteville*, 75 Ark. 534, 87 S. W. 1174, but it may be that what the court actually intended to hold was that general power to condemn land for streets conferred power to condemn a crossing over a railroad track for a street.

Effect of provision for assessment of damages. “In the section of the charter quoted, we find both the power to open streets and provision made for the assessment of damages sustained in consequence of the exercise of that power. What other conclusion can be reached from the grant of power to open streets and the provision for the assessment of damages sustained in consequence of such opening, than that there was a manifest legislative intent to confer the power to condemn property or easements therein? It will not do to say that: ‘Here is no provision for taking any land and paying for the land so taken. Provision is made only for damages and benefits. And damages and benefits to whom? Not to persons whose lands have been taken, but for ‘the owners of lots fronting on said streets, alleys or squares.’ If this section of the charter had gone no further than

wharves, piers, etc., does not include power to condemn for public use an existing private wharf.³¹ And a grant of power to enforce ordinances to construct sewers does not confer power to condemn land for the construction of sewers.³² So a statute authorizing inferior courts of certain counties to establish smallpox hospitals does not confer by implication power to condemn private property for such purpose.³³ On the other hand, it has been held that a statute authorizing a municipality to build or acquire ferries "by purchase, lease or gift" does not preclude condemnation of land for a ferry landing where the paramount object of the statute was to confer power upon municipalities to acquire and maintain ferries, under the rule that a thing within the intention of a statute is as much within the statute as if it were within the letter.³⁴ But where the only power of eminent domain expressly conferred upon a municipality is that accessory to its power to make public improvements the

to provide for the opening of streets and the assessment of damages sustained in consequence thereof, such a contention might have been sound; but, in connection with the provision for the assessment of damages, we find the further provision that the 'mayor and council shall have the right to decline to accept any property assessed for public purposes, as above provided, whenever in the opinion of said mayor and council the price fixed, or award made, is too high and unreasonable.' Reading this last provision in connection with what proceeds it in the extract from the charter quoted, it seems to us that the conclusion is unavoidable that there was a plain legislative intent to grant the power to the town to exercise the right of emi-

nent domain, and that there is left no doubt or uncertainty respecting such intent. By a general law enacted in 1894, the mode of procedure in condemning private property for public use has been prescribed. But this regulation of the manner of proceeding does not alter the argument as to the legislative intent from the charter provisions when granted in 1893, as above set forth." *Georgia R. & Banking Co. v. Decatur*, 129 Ga. 502, 59 S. E. 217, 220.

31. *Madison v. Daley*, 58 Fed. 751.

32. *Allen v. Jones*, 47 Ind. 438, 441.

33. *Markhan v. Howell*, 33 Ga. 508.

34. *Helm v. Grayville*, 224 Ill. 274, 278, 79 N. E. 689.

municipality cannot condemn an easement in land for the purpose of discharging its sewage thereon.³⁵

If the statute or charter confers express power to condemn for a certain purpose, it must be construed as limited, in so far as authority to condemn is concerned, to the particular purpose enumerated. To illustrate: it has been held that statutory authority to condemn land "for the improvement of watercourses" does not confer power on a municipality to take land for the purpose of enlarging or creating a harbor upon navigable water;³⁶ that authority to condemn property for "opening, altering or laying out any street, lane, avenue, alley, public square, or other public grounds" does not confer power to condemn property on which to erect a city prison;³⁷ that charter power to condemn lands for the opening or improvement of streets does not authorize condemnation of land for the approaches to a bridge;³⁸ and that a statute authorizing the water board of a city to take water from a lake through a certain size pipe does not authorize the city to condemn a right to lay other size pipe than the one specified.³⁹

However, if a statute provides that any corporation authorized to construct a specified thing may take real estate for the purpose, a municipality may condemn land for such purpose.⁴⁰

Power to condemn "for the purpose of public parks" has been held to include power to condemn for any customary form of use of land as a public pleasure ground; and hence a municipality given such power may condemn land to be used to extend a free library and art building already standing on other land which is part

35. *Colby v. La Grange*, 65 Fed. 554.

36. *South Haven v. Van Buren* Probate Judge, 140 Mich. 117, 103 N. W. 521.

37. *East St. Louis v. St. John*, 47 Ill. 463, 467.

38. *State v. Kearney Tp.*, 52 N.

J. L. 338, 19 Atl. 792, following *Sussex County v. Strader*, 18 N. J. L. 108.

39. *Syracuse v. Benedict*, 33 N. Y. S. 944, 86 Hun (N. Y.) 343.

40. *Knox County v. Kennedy* (8 Pickle), 92 Tenn. 1, 20 S. W. 311.

of a public park.⁴¹ Power to condemn for "*public corporate uses*" includes a street or alley to be used by the public, and is not limited to property sought to be used by the corporation itself, such as sites for fire houses, city halls and the like.⁴²

In one case it was held that a charter provision authorizing condemnation not only for the specific purposes enumerated therein, but also for "*any other public purpose*," did not delegate to the municipality the power of eminent domain as broad as that possessed by the state, but that the quoted clause merely meant that the powers conferred specifically should be broad enough to accomplish the specific purpose, and that it is limited in its operation to the effectuation of the specified subjects named in the charter and adds no new and independent rights.⁴³

On the contrary, it has been held that power to condemn lands for "highways, rights of way, building sites, cemeteries, public parks and other public purposes, authorizes a city to condemn lands for a sewerage system."⁴⁴

§ 1461. Power to condemn as conferred by home rule charter.

The question has arisen as to whether a municipality, such as a city, may exercise the right of eminent do-

41. *Laird v. Pittsburg*, 205 Pa. 1, 54 Atl. 324, 61 L. R. A. 332, considering at some length what constitutes a park.

42. *State ex rel. v. Superior Court of Pierce County*, 44 Wash. 476, 87 Pac. 521.

43. *Wise v. Yazoo City*, 96 Miss. 507, 51 So. 453, in which case Chief Justice Whitfield dissented on this point.

A charter provision giving power to condemn land "for streets, roads, alleys, hospitals, burying grounds, landings, wharves, sewerage, water works,

electric light lines, gas mains, railways, places of quarantine and buildings required for quarantine, "*or any other public purpose*," does not confer power on a municipality to condemn land for a spur track to connect its powerhouse, where the power for its water works, etc., is generated, with a railroad, for the purpose of reducing the expense of fuel. *Wise v. Yazoo City*, 96 Miss. 507, 51 So. 453.

44. *Cunningham v. Ponca City*, 27 Okla. 858, 113 Pac. 919.

main in its behalf, without first having received from one of the legislative branches of the state express or specific authority therefor, where the constitution authorizes the legal voters of certain cities and towns to enact and amend their municipal charter, subject to the constitution, and a municipality has enacted a new charter or amended its old charter so as to provide for the exercise of the power of eminent domain in certain instances. In several such cases it has been held that the power to condemn exists by virtue of a charter provision conferring such authority.⁴⁵

So it has been recently decided that under such a charter authorizing condemnation proceedings for water supply, a city may condemn property outside its corporate limits to obtain water for consumption therein, it not being necessary first to obtain legislative authority to condemn.⁴⁶

45. *State ex rel. v. District Court of Ramsey County*, 87 Minn. 146, 91 N. W. 300; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943.

See *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860; § 323 *ante*, vol. 1.

Authority conferred by charter. Inasmuch as the power of eminent domain is inherent in a state, the people may confer that power by constitutional or statutory provision upon the citizens of municipalities framing their own charters, and the authority to condemn need not be directly conferred by the legislature. *People ex rel. v. District Court of Ramsey County*, 87 Minn. 146, 91 N. W. 300.

In Washington, however, under the statute conferring on cities of a certain class organized under "freeholder's" charters, authority

to appropriate private property to their corporate use and empowering them "to institute and maintain such proceedings as may be authorized by the general laws of the state for the appropriation of private property for public use," such cities were held to have no power to condemn lands where the legislature had enacted no law conferring on municipal corporations the right to exercise the power of eminent domain. *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847.

46. In Oregon, under a constitutional provision forbidding the legislature to enact, amend or repeal any municipal charter, and giving municipalities the power to enact and amend their own charters, subject to the constitution, it was held that a city had power to condemn water flowing from certain springs across land situated without the corporate limits,

§ 1462. Power to condemn property for temporary use.

It has been held that the *temporary use* of land for construction purposes may be condemned, under power to take "land, water, water rights or other property" for a municipal water supply.⁴⁷

On the other hand, the right to temporarily pollute a stream cannot be taken, under general authority to condemn property for a sewerage system,⁴⁸ since authority to condemn land for a permanent public use does not necessarily imply power to take for a temporary use.⁴⁹

§ 1463. Construction of statutes.

It is well settled that eminent domain statutes are to be strictly construed, so far as the power to condemn is concerned,⁵⁰ but they are not to be so strictly construed as to defeat the evident purpose of the legislature in granting the power;⁵¹ and it has been held that

pursuant to a charter amendment adopted by the city giving it authority to condemn riparian rights, and especially where a general statute permitted the condemnation of any water course within or outside the corporate limits. *McMinnville v. Howenstine*, 56 Ore. 451, 109 Pac. 81.

47. *Hepburn v. Jersey City*, 67 N. J. L. 114, 50 Atl. 598, aff'd in 67 N. J. L. 686, 52 Atl. 1132.

48. *Waterbury v. Platt Bros. & Co.*, 75 Conn. 387, 53 Atl. 958, 96 Am. St. Rep. 229, 60 L. R. A. 211.

49. *Id.*

50. *Weckler v. Chicago*, 61 Ill. 142; *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989; *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215.

Strict construction of statutes. "In determining whether statutes confer the right to exercise the

power of eminent domain, the rules of strict construction are to be applied. But when the power has been undoubtedly conferred by a statute, then, in so far as it attempts to define the location or route, it is to receive a reasonable rather than a strict construction. It is against common right that a person or corporation should have the power, but, having the power, it is for the general good that they should not be hampered or embarrassed by a narrow and technical interpretation of it." *Lewis, Eminent Domain* (3d Ed.), § 390, citing *Pierce, Railroads*, p. 258 and *Chesapeake & Ohio Canal Co. v. Key*, 3 Cranch C. C. (U. S.), 599, Fed. Case 2649, and *North Dakota* case hereinafter cited.

51. *Wise v. Yazoo City*, 96 Miss 507, 51 So. 453.

strict construction cannot be invoked *in the matter of carrying out the provisions of a statute* that plainly confers the power of eminent domain but that in such case there should be a liberal and reasonable construction so as to make effective the purpose of the statute.⁵²

§ 1464. Necessity for designation in statute or charter of purposes for which property may be condemned.

Although the power of eminent domain is not inherent in municipalities and cannot be exercised by them without statutory authority, it is not necessary that the statute should specifically mention streets, alleys, highways or other purposes for which the municipality may condemn property. The general power to condemn for appropriate municipal purposes confers the authority to condemn for every necessary municipal purpose.⁵³

So a statute granting the power to condemn land "for any *lawful* public use or purpose" is not subject to the objection that the uses for which land may be condemned are not specified.⁵⁴

52. Petersburg School Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756.

Construction of municipal powers. §§ 352-354, and § 357 *et seq.*, ante, vol. 1.

53. Louisville & N. R. Co. v. Louisville, 131 Ky. 108, 114 S. W. 743.

A statute authorizing a town to condemn land adjacent to its town hall is not unconstitutional because it does not specify the particular public use for which the land is to be acquired, the natural construction being that the statute applies to uses and purposes connected with the maintenance and erection of the town hall and

not any others. Jamaica v. Denton, 70 N. Y. S. 837.

54. "It is next objected that the attempt to grant is inefficacious, because the uses for which land may be condemned are not specified. The words of the act authorize the condemnation of land 'for any lawful public use or purpose.' It is not necessary to consider the abstract question whether the legislature may delegate the power of eminent domain for purposes as undefined as those for which the legislature itself may exercise it, viz., for any public use. The tenor of the present statute is not so broad; it only warrants the exertion of the power 'for any

§ 1465. Public corporations on whom power conferred.

Generally, the power to condemn is conferred, to a greater or less extent, not only on cities and villages but also on counties and towns and other kinds of municipal or public and quasi-public corporations.⁵⁵ And a *county* is within a constitutional provision that municipalities and other corporations invested with the power of eminent domain shall make compensation for property taken or injured.⁵⁶

§ 1466. Amount of property which may be condemned.

Ordinarily a municipality has power to condemn only the amount of land reasonably necessary for the purpose for which the property is sought to be taken.⁵⁷

lawful public use or purpose.' This qualifying word 'lawful' limits the uses intended, I think, to such as are sanctioned by the legislature as worthy of this prerogative power, so that a city proceeding under this act must show that it is seeking to acquire land for a purpose which the legislature, either in general laws or in special laws applicable to that city, has expressed its willingness to promote by the power of eminent domain. Thus interpreted, the statute comes within the principle for which the prosecutor contends—that the legislature can delegate the power for such public uses only as the legislature specifically designates for its exercise." *State v. Newark*, 54 N. J. L. 62, 23 Atl. 129.

55. A township has been held not a "municipal or other corporation" invested with the power of taking private property for public use, within the constitutional

provision. *Shoe v. Nether Providence*, 3 Pa. Super. Ct. 137.

An incorporated town has the same right in Illinois to condemn land as a village, it being the same thing. *Phillips v. Scales Mound*, 195 Ill. 353, 63 N. E. 180.

Board of education, power to acquire lands by condemnation. *Wendel v. Board of Education of Hoboken*, 76 N. J. L. 499, 70 Atl. 152; *Holland Board of Education v. Van Der Veen* (Mich. 1912), 135 N. W. 241, distinguishing *Board of Education v. Moross*, 151 Mich. 625, 114 N. W. 75, on the ground that the Detroit charter provision was different.

56. *Dallas County v. Dillard*, 156 Ala. 354, 47 So. 135.

County, under statute, may condemn property. *Mercer County v. Wolff*, 237 Ill. 74, 86 N. E. 708.

57. **Amount of property which may be taken.** "It is often laid down as the law that the taking of property must always be lim-

And if the quantity is specified or a maximum prescribed by the legislature, no more can be taken,⁵⁸ although in such case the condemnor is under no obligation to take all that is permitted. On the other hand, it is held that more may be taken than is needed at the time, in anticipation of the increased demands of the future.⁵⁹

So the power to condemn land for a street is not limited to the number of feet necessary for a passageway for pedestrians' travel and for traffic, but land may also be taken "for the purpose of furnishing ample space for the access of light and air, and also to beautify and adorn." And it was held that a street may be laid out with *space for parkways*, in addition to that needed for

ited to the necessity of the case, and, consequently, no more can be appropriated in any instance than is needed for the particular use for which the appropriation is made. But it will be found that this is almost invariably said, not in discussing the extent of the power of the legislature, but with reference to the construction of statutes granting authority to exercise the right of eminent domain, and where the authority to take a certain quantity of land or a particular estate therein depended, not upon an express grant of power to do so, but upon the existence of an alleged necessity, from which the disputed power is to be implied. This distinction is clearly brought out by Justice Cornell in *Railway Co. v. Fairbault*, 23 Minn. 167." *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325, per Justice Mitchell.

Power to condemn property "needed for municipal purposes" does not authorize the condemnation of any more ground for a right of way than is necessary.

Dennis, Long & Co. v. Louisville, 98 Ky. 67, 32 S. W. 271, 17 Ky. L. Rep. 642.

Width of street. Question as to the width of a street to be condemned, where not regulated by statute or charter provision, is largely an administrative question within the discretion of the local authorities. *Thibodeaux v. Maggioli*, 4 La. Ann. 73.

58. *Lewis, Eminent Domain* (3d Ed.), § 453.

Statute that not more than one acre shall be condemned for a schoolhouse site, and that the site must be on a public highway. *Salisbury v. School Dist. of Highland Tp.*, 101 Iowa 556, 70 N. W. 706.

59. *Los Angeles v. Pomeroy*, 124 Cal. 597, 616, 57 Pac. 585, taking 315 acres for water supply, where rapid increase in population of Los Angeles was involved.

In determining the necessity of condemnation proceedings, special emergencies may be taken into consideration as, for instance, in case of condemning for a water

walks and traffic.⁶⁰ And where land is condemned for a *school house site*, the quantity of land to be taken is not limited merely to the site of the school house, but includes such adjacent land for the purpose of a yard, etc., as may be deemed essential.⁶¹

To sum up, "the condemnor is allowed a large discretion in determining the quantity necessary and the exercise of his discretion will not be interfered with except in case of abuse."⁶²

§ 1467. Necessity as condition to condemnation.

The question of necessity is distinct from the question of public use, and the former question is exclusively for the legislature,⁶³ except that if the constitution or

supply, the possibility of long droughts and increasing population. *Olmsted v. Proprietors of Morris Aqueduct*, 46 N. J. L. 495.

60. *Curran v. Guilfoyle*, 55 N. Y. S. 1018, 38 App. Div. 82, aff'g 54 N. Y. S. 917, 25 Misc. Rep. 432.

61. *Williams v. School District No. 6*, 33 Vt. 271.

Schools. Land condemned for play grounds is for "convenient use of the school" within statute authorizing condemnation for such purpose. *Independent School Dist. v. Hewitt*, 105 Iowa 663, 75 N. W. 497.

62. *Lewis, Eminent Domain* (3d Ed.), § 453.

"A large discretion is lodged with the city council in fixing the amount of land necessary for the particular improvement, and its determination should only be interfered with to prevent the abuse of power. If the land sought to be taken will to some extent con-

duce to the public use for which it is to be devoted, the decision of the municipality that it is necessary therefor should not be interfered with; otherwise it should be set aside." *Bennett v. Marion*, 106 Iowa 628, 76 N. W. 844.

63. "The question of necessity is sometimes confounded with that of public use, and it has sometimes been maintained that the exercise of the power of eminent domain must be founded on a public necessity. But we know of no case in which it has been adjudicated that an appropriation of private property for a recognized public use, or an authority to make such appropriation, was void because, in the opinion of the court, there was no necessity for an exercise of the eminent domain power." *Lewis, Eminent Domain* (3d Ed.), § 369.

"As the legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of

statute authorizes the taking of property only in cases of necessity then the necessity becomes a judicial question.⁶⁴

eminent domain, so it is the exclusive judge of the amount of land, and of the estate in land, which the public end to be subserved requires shall be taken. The only limitation—at least, the only one applicable to a case like the present—which the constitution imposes upon the exercise of the right of eminent domain by the legislature is that private property shall not be taken for public use without just compensation therefor first paid or secured. Of course, there is the further limitation, necessarily implied, that the use shall be a public one; upon which question the determination of the legislature is not conclusive upon the courts. But, when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325, per Justice Mitchell.

In condemnation proceedings it is not necessary to allege that the property sought to be condemned is necessary for some municipal or public use, since the question of the necessity is one for the municipality, through its legislative department, to determine, rather than a judicial question. *Grafton v. St. Paul, M. & N. R. Co.*, 16 N. D. 313, 113 N. W. 598, 22 L. R. A. (N. S.) 1, distinguishing *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

"Once a use is declared public, the necessity of employing con-

demnation proceedings is for the legislature to decide." *Nichols, Eminent Domain*, § 208.

See extensive note in 22 L. R. A. (N. S.) 1, 55-76.

64. *Lewis, Eminent Domain* (3d Ed.), § 599.

In California, where a statute provides that property cannot be taken unless it appears that the taking is necessary to a use authorized by law, it is not necessary to show in proceedings to condemn land for a sewer that the sewer is necessary for the municipality, but only to show that the property to be taken is necessary for the sewer. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

In Michigan, the constitution expressly provides that property cannot be condemned unless there is a public necessity for it, and this must be a real necessity, without which private citizens cannot be disturbed in the enjoyment of their freeholds in their own way; and where land is sought to be condemned for a street, the fact that it would be a convenience to a few lots does not show a necessity for taking the property. *Detroit v. Daly*, 68 Mich. 503, 37 N. W. 11, 14.

The word "necessary" in cases involving the right of eminent domain, does not mean absolutely necessary or indispensable. It is sufficient if the right proposed to be acquired is reasonably necessary to secure the end in view. *Olmsted v. Proprietors of Morris*

§ 1468. What questions are reviewable by courts.

In condemnation proceedings, it is generally held that the following questions and none others, as to the right to condemn, are reviewable by the courts: (1) Whether petitioner has the power to exercise the right of eminent domain; (2) whether the property itself is of a nature subject to condemnation; (3) whether the property is being taken for a public or a private use; and (4) whether the power is being used for taking an excessive amount of property.⁶⁵

Aqueduct, 47 N. J. L. 311, followed in *Sayre v. Orange* (N. J. Sup., 1907), 67 Atl. 933.

The term "necessary" does not mean indispensable but merely convenient and useful. *Commissioners of Parks and Boulevards v. Moesta*, 91 Mich. 149, 51 N. W. 903.

Instruction, in street opening proceedings, that if benefit to public exceeded cost of improvement, jury might find public necessity for making the improvement, held proper, *Detroit v. Brennan*, 93 Mich. 338, 53 N. W. 525.

What constitutes necessity for opening street, see *Detroit v. Brennan*, 93 Mich. 338, 53 N. W. 525.

The fact that certain public land is actually being used as a part of a street does not preclude its condemnation for a street, since no easement can be acquired on public lands. *Roberts v. Seattle*, 63 Wash. 572, 116 Pac. 25.

Water supply. Land cannot be condemned to increase city water supply unless there is a public necessity. *Rome v. Whitestown Water Works Co.*, 100 N. Y. S. 357,

113 App. Div. 547, affirmed 187 N. Y. 542, 80 N. E. 1106.

65. *Pittsburgh Ft. W. & C. R. Co. v. Sanitary Dist. of Chicago*, 218 Ill. 286, 75 N. E. 892, 2 L. R. A. (N. S.) 226.

The law is well settled that it is a question for the legislature, or the municipality when the power to condemn has been delegated to it, to determine the necessity or expediency of taking land for a public use, and that the courts cannot interfere, nor consider the question whether a necessity actually exists. On the other hand, it is a question for the courts to decide whether a proposed use of land sought to be condemned is a public use as distinguished from a private use and also whether the municipality has been delegated the power to exercise the right of eminent domain in the particular case.

Whether a specified use is a public or a private use, within the rule that property can be condemned only for a public use, is a question not entirely within the discretion of the legislative department but one reviewable by the courts.

On the other hand, the *necessity or expediency* of the taking is not a judicial question, in the absence of a constitutional provision to that effect, but purely one for the determination of the legislature or the body or individuals to whom the state has delegated the authority.⁶⁶

In other words, the mere fact that a municipality determines that the use to which it attempts to appropriate private property, is public, does not preclude a review of such question by the courts, although the determination of the municipality through its legislative department is entitled to considerable weight.

Amount necessary. Determination by municipality of amount of land necessary for an improvement is subject to review by the courts, but the determination of the municipality should be interfered with only to "prevent the abuse of power." If the land sought to be taken will to some extent conduce to the public use for which it is to be devoted, the decision of the municipality that it is necessary should not be interfered with; otherwise it should be set aside. *Bennett v. Marion*, 106 Iowa 628, 76 N. W. 844.

66. *California*. *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224.

Illinois. *Chicago v. Wright*, 69 Ill. 318.

Minnesota. *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. 928.

Missouri. *St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298; *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38.

New York. *Re Long*, 12 N. Y. S. 630, 58 Hun (N. Y.) 609, affirmed 128 N. Y. 596, 28 N. E. 251.

North Carolina. *Statford v. Greensboro*, 124 N. C. 127, 32 S. E. 394; *Durham v. Rigsbee*, 141 N. C. 128, 53 S. E. 531.

Pennsylvania. *Philadelphia v. Ward*, 174 Pa. St. 45, 34 Atl. 458.

Virginia. *Culpeper County v. Gorrell*, 20 Grat. (Va.) 484.

Statutory provision so declaring, see *Santa Ana v. Brunner*, 132 Cal. 234, 64 Pac. 287.

It is very generally held by text-writers and courts that the questions of necessity and public use, both of which enter into the subject of eminent domain are distinct in the sense that the necessity for the taking is a matter to be determined by the legislative department, state or municipal as the case may be, and the question whether it is taken for a public use is for the judiciary. In other words, the prevailing rule is that when the municipal authorities declare in the regular way that it is necessary streets shall be opened, their action, is conclusive of that question, and the courts will not, except in rare cases, inquire into the necessity for opening the street or look into the motives or reasons that induced the municipal authorities to order it opened. And so, when a street or public way in a city is ordered to be opened, it will be presumed that it is to be opened for public purposes; and ordinarily the courts will not inquire

Thus, the determination of a municipality that a street shall be opened over the property of a railroad company

into the question whether or not it is for public use. But a case might arise in which it could be made plain that the street or highway was not opened for the use of the public, but for the exclusive advantage of an individual, and was not intended to be used by the public generally, and, if this was made to appear, the courts would have the undoubted right to prevent such abuse of the exercise of the power of eminent domain, a power that finds its only support in the proposition that the property is taken for a public use. *Louisville & N. R. Co. v. Louisville*, 131 Ky. 108, 114 S. W. 743.

"The principle being accepted that the decision of the question of necessity for taking private property for public use is a legislative prerogative, and not ordinarily a judicial function, it is plain that the power of the courts to decide such question exists if at all, only in exceptional cases. It will accordingly be found that the cases in which the courts have assumed to pass upon the question of necessity in eminent domain are ranged generally in three classes, viz: Those wherein constitutional provisions have committed to the judicial department of the government the power and duty of determining the necessity for exercising the right of eminent domain; those in which the legislature, declining to decide the question of necessity itself, or to delegate elsewhere the power to

decide it, has committed the decision thereof, by express statute, general or special, to the courts; and, finally, those in which the legislature, neither deciding itself, nor expressly delegating to any one the power to decide, the question of necessity, has, in granting the power to appropriate private property to any particular public use, restricted its grantee to taking only such property as shall be actually necessary for that use, and inferentially required the necessity to be proved as a fact." Conclusion of exhaustive note in 22 L. R. A. (N. S.) 1, 173.

"So long as the members of this board act regularly and in good faith, their decision upon the question of necessity is final." *Burnett v. Boston*, 173 Mass. 173, 53 N. E. 379.

The legislature may delegate to a municipality the authority to pass upon the necessity of taking private property for a public use, and the courts have no power to reexamine a question of necessity or exigency, or the extent to which land may be taken for a public use, unless that power is expressly reserved to them. *Hayford v. Bangor*, 102 Me. 340, 66 Atl. 731.

Water supply. In condemnation proceedings for a water supply, the objection that it is more convenient and less expensive for the city to procure a supply of water from a creek other than the one sought to be condemned cannot be considered. *Dallas v. Hallock*, 44 Ore. 246, 75 Pac. 204.

is conclusive as to the necessity and the propriety of such street.⁶⁷

2. WHAT IS "TAKING" OF PROPERTY.

§ 1469. Meaning of "taking."

Many state constitutions prohibit the "*taking*" of private property for public use without just compensation.⁶⁸

The question of what constitutes a "*taking*" of property within the meaning of such constitutional provisions has been the subject of many decisions, and in connection therewith the question of what is "property" has been necessarily involved. The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be *taken*, in the constitutional sense, though his title and possession remain undisturbed; "and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken, and he is entitled to compensation."⁶⁹

67. *Re Folts Street in Herkimer*, 46 N. Y. S. 43, 18 App. Div. 568.

In absence of abuse of power or oppression, courts are powerless to interfere. *Chicago & N. W. R. Co. v. Morrison*, 195 Ill. 271, 63 N. E. 96.

68. List of constitutional provisions set forth in full in this respect, see Lewis, *Eminent Domain* (3rd Ed.), §§ 15-61.

69. Lewis, *Eminent Domain* (3rd Ed.), § 65.

Property need not be taken in the literal sense in order to en-

For instance, the cutting off the access of an abutting owner is a taking within the constitutional provision,⁷⁰ as is, it is generally held, the *impairment or destruction of his private right of light, air or view*.⁷¹ So the interference with the rights of a *riparian owner* for any purpose not connected with the navigation of the stream is a taking,⁷² as is any *interference with any right respecting surface water* in the exercise of the eminent domain power.⁷³

§ 1470. Taking as affected by police power.

The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of

title the owner to compensation for property taken, and, in fact, the right acquired is ordinarily a mere easement. *Drainage Com'rs of Dist. No. 8 in Town of Oakwood v. Knox*, 237 Ill. 148, 86 N. E. 636.

Flowage of lands by a village raising a dam used in operating an electric light plant is a taking. *Doty v. Johnson* (Vt., 1910), 77 Atl. 866.

Plotting of street through the land of a private owner is not a taking of the land, but it is simply the expression of a purpose to take it when occasion for the opening of the street arises. *Re South 12th St. in City of Allentown*, 217 Pa. 362, 66 Atl. 568.

70. *Ranson v. Sault Ste. Marie*, 143 Mich. 661, 107 N. W. 439, with extensive note in 15 L. R. A. (N. S.) 49 on "Cutting off access to a highway as a taking."

Right of access of abutter and injuries thereto, see § 1321 *ante*, vol. 3.

Recovery of damages from

public service corporation, see *post*, this volume, chapter on Franchises.

71. **Abutter's right of light, air and view.** See § 1322 *ante*, vol. 3, and for recovery from public service corporations for injury thereto, see chapter on Franchises, *post*, this volume.

72. *Lewis, Eminent Domain* (3rd Ed.), § 84.

73. *Lewis, Eminent Domain* (3rd Ed.), § 112.

Taking of water. Taking of a bit of land on a brook, with the right to lay a pipe and construct an aqueduct, and the erection of a dam and the construction of a reservoir on the brook, and the diversion of the water of the brook into a ten inch main and conducting it for use by the inhabitants—all these things having been done professedly under the authority of the statute—constitute a taking of water within the meaning of the act. *Bryant v. Pittsfield*, 199, Mass. 530, 85 N. E. 739.

eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable. However, under the guise of the police power, there cannot be a taking which can be accomplished only by the power of eminent domain.⁷⁴

On the other hand, regulations governing the use of property by its owners, consistently with the public welfare and rights of others, do not constitute a "taking."⁷⁵ But a municipal regulation forbidding *sign boards* in certain places on private property has been held invalid, where there was no provision for compensation, on the ground that it was such an interference with the use of property for advertising purposes as to amount to a taking of property for public use without compensation.⁷⁶ So it has been held that an ordinance prohibit-

74. Lewis, *Eminent Domain* (3rd Ed.), § 243 *et seq.*

Police power. "Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. * * * If the means employed have no real, substantial relation to public objects which government may legally accomplish—if they are arbitrary and unreasonable, beyond the necessities of the case—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the court to interfere in such

cases is beyond all doubt. * * * Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the constitution, a "taking" of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the constitution." Justice Harlan, in *Chicago B. & Q. R. Co. v. People ex rel.*, 200 U. S. 561, 592, 26 Sup. Ct. 341, affirming 212 Ill. 103, 72 N. E. 219.

75. *Richmond F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734.

76. *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74

ing the *erection of any building* on a city lot, the purpose being to prevent buildings between a road and a bay which would intercept the view and the breeze from the water, is a taking.⁷⁷ Likewise, statutes authorizing municipalities to exclude *business vocations* on any property fronting on a boulevard have been held unconstitutional.⁷⁸ And prohibiting the *cutting of ice* on lakes and ponds used to supply water to municipalities is invalid as an attempt to take private property without compensation.⁷⁹

On the other hand, regulations forbidding the erection or repairing wooden *buildings* within the fire limits, restricting the heights of buildings, etc., are a valid exercise of the police power and do not constitute a taking.⁸⁰ And a statute authorizing a municipality to designate a certain number of streets as *public driveways for pleasure driving only* does not constitute a taking of private property for public use without just compensation.⁸¹ So prohibiting the growth of *weeds* on one's premises is not a taking of his property.⁸²

Likewise the destruction of private property *to prevent the spread of fire* in a municipality, where such destruction is necessary, does not constitute a taking of private property.⁸³ So an ordinance fixing penalties

N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494; *People v. Green*, 83 N. Y. S. 460, 85 App. Div. 400.

§ 929 *ante*, vol. 3.

77. *Quintini v. Bay St. Louis*, 64 Miss. 483, 1 So. 625, 60 Am. Rep. 62.

78. *St. Louis v. Dorr*, 145 Mo. 466, 41 S. W. 1094, 68 Am. St. Rep. 575, following *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 46 S. W. 976, 42 L. R. A. 686.

79. *People ex rel. v. Kirk*, 119 N. Y. S. 862, 136 App. Div. 45.

80. § 948 *ante*, vol. 3.

Forbidding repair or rebuilding of wooden buildings within

specified fire limits is not a taking of private property for public use. *Brady v. North Western Insurance Co.*, 11 Mich. 425.

81. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

82. *St. Louis v. Galt*, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778.

§ 919 *ante*, vol. 3.

Forbidding the *cultivation of rice* within the corporate limits, § 920 *ante*, vol. 3.

83. *Field v. Des Moines*, 39 Iowa 575, 18 Am. Rep. 46; *McDonald v. Redwing*, 13 Minn. 38; *American Print Works v. Law-*

for permitting water to flow from a spring onto any street or alley is not a taking.⁸⁴

Furthermore, reasonable municipal *health regulations* do not constitute a taking of property, and hence a statute requiring all school sinks in tenement houses in cities of a certain class to be removed, does not take private property without compensation.⁸⁵ Likewise there is not a taking of private property by a municipality, in so far as adjoining property is concerned, by the *location of a pest house* for smallpox on land owned by the municipality.⁸⁶

§ 1471. Preliminary steps as a taking.

On the question as to what constitutes a taking of property, the general rule is that the *filing of a map* of a proposed improvement does not of itself amount to an appropriation of the land included therein.⁸⁷ However,

rence, 21 N. J. L. 248, 23 N. J. L. 590, 57 Am. Dec. 420; Russell v. New York, 2 Denio (N. Y.) 461.

§ 892 *ante*, vol. 3.

84. Skaggs v. Martinsville, 140 Ind. 476, 39 N. E. 241.

85. Tenement House Department of New York City v. Moeschén, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, affirmed in Moeschén v. Tenement House Department of New York City, 203 U. S. 583, 27 Sup. Ct. 781, 51 L. Ed. 328.

§ 899 *et seq.*, *ante*, vol. 3.

86. Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055, 51 L. R. A. 306, 78 Am. St. Rep. 296.

§ 905 *ante*, vol. 3.

87. New York Central & H. R. Co. v. State, 55 N. Y. S. 685, 37 App. Div. 57; Singer v. New York, 62 N. Y. S. 347, 47 App. Div. 42, affirmed in 165 N. Y. 658, 59 N. E. 1130.

Mere laying out of street on official map is not a taking. Re Hamilton St., 129 N. Y. S. 317, 320.

In New York City, filing of map does not divest owner's title nor impair it before statutory proceedings to condemn have been taken. Forster v. Scott, 17 N. Y. S. 479, 60 N. Y. Super. 313, affirmed 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543.

"At the time of these earlier deeds, no public interest had been acquired in any streets shown on the official map of Long Island City, except such as might possibly arise from the mere laying down of the proposed street on the official map, and no public right or interest in the lands to be covered by the proposed streets did in fact arise from the mere laying out of the street on the official map, as such in itself was not an appropri-

under particular statutes the filing of a map may in some cases of itself constitute an appropriation.⁸⁸

So the *mere location of a street* on the plans of a city has been held not a taking or injury of property.⁸⁹ Likewise, it has been held that the *mere laying out of a road* over the land of a party by municipal officers does not constitute a taking before the actual opening of the road, so as to entitle the land owner to damages.⁹⁰

However, in some jurisdictions at least, the right to damages awarded for lands taken for a street is fixed at the time all the acts required are performed without regard to whether the street has been in fact actually opened and graded.⁹¹

§ 1472. Change of grade of street.

It is generally held that changing the grade of a street is not a *taking* within the meaning of the constitutional provisions, and hence, if authorized, no damages are recoverable by an abutting owner.⁹² However, by virtue

ation of the land to a public use. *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 545; *Mott v. Eno*, 181 N. Y. 346, 74 N. E. 229; *Matter of City of New York*, 200 N. Y. 536, 93 N. E. 498." *Re Hamilton*, 129 N. Y. S. 317.

88. *People v. Collins*, 46 N. Y. S. 727, 20 App. Div. 341.

89. *Busch v. McKeesport*, 166 Pa. St. 57, 30 Atl. 1023.

In Missouri, the constitutional provision "that private property shall not be taken or damaged for public use without just compensation," etc., is not violated by judicial proceedings to determine whether the property can be taken for the desired use and how much must be paid for it, or by the fact that provisions for a fund for payment of the compensation may

prove inadequate, since in no event can the property be taken until paid for, and in the meantime the owner is not disturbed in his possession. *Kansas City v. Ward*, 134 Mo. 172,

Property is damaged for public use, within the meaning of the constitution, when it is damaged by establishing the grade of a street or by raising or lowering a grade already established. *Gibson v. Owens*, 115 Mo. 258.

90. *State ex rel. Evans v. James*, 4 Wis. 408.

91. *Daley v. St. Paul*, 7 Minn. 390.

92. **At common law** the owner of land abutting upon a public street is not entitled to consequential damages for the injury he may suffer by reason of a lawful

of the constitutional provisions now existing in some states, extending prohibitions against the taking of private property for public use without compensation to taking "or damaging," municipal corporations are now liable in those states to abutting owners for damages resulting from a change in the grade of a street.⁹³ This question will be considered more in detail in a subsequent chapter.⁹⁴

§ 1473. Vacation of street or alley.

That the closing of a public street or alley is a taking of private property within the meaning of the constitutional provisions, so that compensation must be made to the abutting owners, is well settled, as has already been noticed in a preceding chapter, of this work.⁹⁵

change in the grade of the street upon which his property abuts. *People ex rel. v. Stillings*, 121 N. Y. S. 13, 136 App. Div. 438.

The mere changing of the grade of a street is not considered a taking of property within the meaning of the constitution. *Dahlman v. Milwaukee*, 131 Wis. 427, 111 N. W. 675.

Where a street is graded pursuant to legal authority and in a careful manner, the adjoining owners have no right to compensation unless it is given by statute. *Chicago, I. & L. R. Co. v. Johnson*, 45 Ind. App. 162, 90 N. E. 507.

See *Lewis, Eminent Domain* (3rd Ed.), §§ 129-148.

93. *Lewis v. Springfield*, 142 Mo. App. 84, 125 S. W. 824; *Fuess v. Kansas City*, 191 Mo. 692, 90 S. W. 1029; *Wideman Investment Co.*

v. St. Joseph, 191 Mo. 459, 90 S. W. 763; *Cole v. St. Louis*, 132 Mo. 633, 34 S. W. 469; *Smith v. Kansas City*, 128 Mo. 23, 30 S. W. 314.

Change in the grade of a street, where an injury to abutting owners, is a damaging of private property for public use within the constitutional provision. *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013.

94. Chapter 37, Public Improvements, *post*.

95. §§ 1405 *et seq.*, *ante*, vol. 3.

Vacating a street without providing for the means of ascertaining damages is void, in Washington, as a taking of property without compensation in violation of a constitutional provision. *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797.

§ 1474. Interference with franchises.

Whether an interference with, or regulation of, a franchise, is a taking, will be noticed in a subsequent chapter in this volume relating to Franchises.

Suffice it to state in this connection that a municipality which constructs and operates a plant to compete with a company, to whom it had granted a franchise not by its terms exclusive, is not required to make compensation, since such act does not amount to a taking of property.⁹⁶

§ 1475. Tax or assessment as a taking.

A tax has generally been held not a taking of private property,⁹⁷ but special assessments for a local improvement in excess of the benefits accruing to the property therefrom have been held, as to such excess, a taking.⁹⁸

§ 1476. Injury to lateral support.

There is a sharp conflict in the authorities upon the question whether a property owner is entitled, as against the municipality, to the lateral support of the soil. In some jurisdictions it is held that where a substantial part of the adjoining owner's land falls into the street by reason of the removal of its lateral support in the course of grading, there is a taking of the soil for public purposes and not mere consequential damage.⁹⁹

96. *Meridian v. Farmer Loan & Trust Co.*, 143 Fed. 67, 74 C. C. A. 221, rev'g 139 Fed. 673.

See *Lewis, Eminent Domain* (3rd Ed.), § 214.

97. *Lewis, Eminent Domain* (3rd Ed.), § 242.

98. *Id.*

See chapter on Public Improvements.

99. *Dahlman v. Milwaukee*, 131 Wis. 427, 111 N. W. 675.

See chapter 37, Public Improvements, *post*.

Subway. In New York the use by the city of streets in constructing a subway for a street railroad imposes an additional servitude so as to entitle abutting owners to recover damages, although they own no part of the street, for injury to the lateral support of the land. *Re Board of Rapid Transit R. Com'rs of New York City*, 197 N. Y. 81, 90 N. E. 456,

Where the constitution provides that private property shall not be "taken or damaged" for public use without just compensation, a municipality is liable to an abutting owner where the lot slips and his buildings are destroyed by reason of the increased lateral pressure on the soil by the building of an embankment by the municipality on the street opposite the property, in connection with the collection of surface waters in constructing the street.¹

§ 1477. "Damage" or "injury" to property.

In 1870, Illinois changed its constitution by adding the words "*or damaged*" so as to make the provision read: "Private property shall not be taken *or damaged* for public use without just compensation." Nearly every other state which has revised its constitution since 1870 has followed the example set by Illinois by adding the word "damaged," or its equivalent, to the provision in question. The terms "damaged," "injured," and "injuriously affected" as used in different constitutions "are believed to be equivalent in meaning and extent."²

Contra, see *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577.

1. *Kunst v. Grafton*, 67 W. Va. 20, 67 S. E. 74.

2. *Peel v. Atlanta*, 85 Ga. 138, 11 S. E. 582; *Lewis, Eminent Domain* (3rd Ed.), § 347.

History of constitutional provisions. "The Constitution of Idaho, unlike the Constitutions of Alabama, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming, does not prohibit the damaging of

property. It provides simply that 'private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.' The omission of the damage clause is significant. Prior to 1870 that clause was not to be found in any constitution, and the courts had uniformly held that under the prohibition against taking, consequential damages were not recoverable. The Ohio and Kentucky courts had given an unusually wide definition as to what constituted a taking, but we believe there was no dissent from the general proposition that consequential injuries were *damnum absque injuria*. It was

These words were intended to enlarge the right to compensation and must be so construed,³ the construc-

felt that this limitation frequently resulted in hardship; and in 1870 Illinois adopted a constitutional amendment providing that private property should not be taken or damaged for public use without compensation. This provision was soon followed in many of the states, by West Virginia in 1872, by Arkansas and Pennsylvania in 1874, by Alabama, Missouri, and Nebraska in 1875, by Colorado and Texas in 1876, by Georgia in 1877, by California and Louisiana in 1879; all prior to the adoption of the Idaho Constitution. The effect of the damage clause was repeatedly determined by various courts prior to 1889, including the United States Supreme Court. *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. R. A. 638. And see list of cases and history of amendment in *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161. The same year that the Idaho Constitution was adopted the states of Montana, North and South Dakota, and Washington adopted Constitutions, and all included therein the damage clause. And when the convention in Idaho framed the Constitution of that state, omitting such clause, and it was so adopted, the conclusion must be that the omission was deliberate and because the people of that state believed that, owing to the conditions there existing, the public interests demanded that the additional burden of paying consequential damages should not be imposed on those taking property for public uses. And there

is nothing in the Idaho Constitution requiring compensation except for the taking of property." *Idaho Western R. Co. v. Columbia Conference of E. L. A. S.* (Idaho, 1911), 119 Pac. 60.

Damage to property not taken.

"It is well settled that inconvenience, expense, or loss of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent interference with their right of access to their property, made necessary by the construction of a public improvement, gives no cause of action against the municipality. The Constitution provides no remedy for the property owner under such circumstances. Such claim is not damage to property not taken, within the meaning of the Constitution." *Chicago Flour Co. v. Chicago*, 243 Ill. 268, 90 N. E. 674, 676; *Lefkovitz v. Chicago*, 238 Ill. 23, 87 N. E. 58; *Osgood v. Chicago*, 154 Ill. 194, 41 N. E. 40; *Northern Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

In Georgia the words "or damaged" are contained in the constitutional provision. *Macon v. Daley*, 2 Ga. App. 355, 58 S. E. 540.

In Virginia, before the adoption of the Constitution of 1902, damages could be recovered only where property was taken but by that enactment the word "damaged" was added. *Lambert v. Norfolk*, 108 Va. 259, 61 S. E. 776.

3. *Montgomery v. Townsend*, 80 Ala. 489, 492, 2 So. 155; *Chicago*

tion to be a liberal one in favor of the individual whose property is affected. They include (1) any *physical injury* to property not held to be a taking, (2) any *interference with private rights* not held to be a taking, and (3) generally any *damage to property arising from an interference with a right*, public or private, which does not amount to a taking.⁴

v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820.

4. Lewis, Eminent Domain (3d Ed.), §§ 360-363.

In Alabama, under the constitutional provision of 1901 that municipal corporations invested with the privilege of taking property for public use shall make just compensation, to be ascertained as may be provided by law, for the property "taken, injured or destroyed," by the construction or enlargement of its works, highways or improvements, a city is liable to an abutter for injury to the value or enjoyment of his property by reason of the removal of shade trees, although the abutter does not own the fee of the street or the trees and his right of access to his property was not affected thereby. McEachin v. Tuscaloosa, 164 Ala. 263, 51 So. 153.

Mississippi. "Const., § 17, makes the right of the owner of private property superior to that of the public, reversing the former rule that the individual might be made to suffer loss for the public. He may still be compelled to part with his property for public use, but only on full payment for it or any right in relation to it. Before the Constitution of 1890 it was held that a municipality might cut

down a street to the injury of abutting owners, without any liability to them (White v. Yazoo City, 27 Miss. 357), and a river might be turned away from a plantation fronting on it without compensating the owner (Homochitto River Com'rs v. Withers, 29 Miss. 21, 64 Am. Dec. 126), and damage could be done to the property from constructing a levee without any right of the owner to be indemnified (Richardson v. Board of Levee Com'rs, 68 Miss. 539, 9 South. 351). This was because of the rule that the right of the public was superior to that of the individual. The decisions of this court since the Constitution of 1890 give full effect to the just rule established by its seventeenth section, by maintaining the right of the owner to be fully compensated for any loss of value sustained from any physical injury to his property or disturbance of any right in relation to it, whereby its market value is diminished. Railway Co. v. Bloom, 71 Miss. 247, 15 South. 72; City of Vicksburg v. Herman, 72 Miss. 211, 16 South. 434; Richardson v. Board of Levee Com'rs, 77 Miss. 518, 26 South. 963; Rainey v. Hinds County, 78 Miss. 308, 28 South. 875; City of Laurel v. Rowell, 84 Miss. 435, 36 South. 543. Many decisions

However, the fact that the constitutional provision merely uses the word "taken" does not preclude the leg-

of the courts of other states, with Constitutions like ours, are cited and discussed in Lewis' Eminent Domain, §§ 230-236." King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 42 So. 204.

"Taken" as distinguished from "injured" or "damaged." "It is perfectly well settled that municipal corporations, acting under authority conferred by the legislature, are not liable for consequential damages to abutting land-owners arising from grading or changing the grade of streets, provided that in so doing they keep within the limits of the streets, and there is no physical invasion of the rights of private property, and reasonable care and skill are exercised in the performance of the work, unless there is some provision in the State Constitution, in the city charter, or in some statute creating such liability; and, even where the Constitution contained the provision that private property should not be 'taken' for public use without just compensation, it was uniformly held by the courts of the state and the United States Supreme Court that municipalities were not liable for consequential damages caused by an authorized change in the grade of a public street, where private property was not actually taken or there was no physical invasion of the property. The theory upon which these decisions was based was that the state had duly delegated to the municipality the power to make public improve-

ments, and as long as the work was carried on within the scope of the authority thus delegated, and without negligence in the performance of the work, there would be no liability whatever damage occurred. 'A citizen was thus left without protection in all that large class of cases done for the public benefit, or for a use public or quasi-public; although no part of his tangible property was physically taken, the use or value of the property was palpably impaired, or was stripped of incidents comprised within the conception of complete property rights which brought to those rights quite as much value as the mere possession of property.' Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161. This was a mischievous for which a remedy was sought; and a most complete remedy was found in the constitutional provisions of many of the states. The state of Illinois was the pioneer in this measure of relief to the citizen. In 1870 that state inserted in its Constitution the provision that 'private property shall not be taken or damaged for public use without just compensation.' Many of the states followed the example thus set of a more liberal rule of protecting the citizen against public progress or improvement, and similar constitutional provisions were adopted. Where this special constitutional provision exists, the rule of municipal liability has been changed, and greatly enlarged.

islature from requiring compensation to be made for the damages sustained by the remaining property by reason of the taking.⁵

The courts have, without a single exception, held that although prior to these provisions a municipal corporation was under no liability to an adjoining abutting landowner for any damages sustained from the action of the city in grading or changing the grade of its streets, unless his property was actually invaded, under such provisions a city is liable to him for all direct and consequential damages resulting from changing the grade of the street, where the damage thus inflicted exceeded the benefit derived from the grading. Of course, the same rule applies to all improvements of a public character. The decisions of the courts announcing this rule of liability are numerous. Many of them can be found collated in *O'Brien v. Philadelphia*, 150 Pa. 589, 24 Atl. 1047, 30 Am. St. Rep. 835-850, where the subject is ably and exhaustively considered by the learned editor. The Supreme Court of the United States, in the case of *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, construing the provision of the Illinois Constitution, *supra*, declares that, under such provision, 'a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character, whether the damages be direct, as when caused by tres-

pass or physical invasion of the property, or consequential, as in diminution of its market value.'" *Macon v. Daley*, 2 Ga. App. 355, 58 S. E. 540, 541.

5. "While our constitutional provision omits the words 'or damaged' which are found in many constitutions immediately following the word 'taken' as it occurs in our Constitution, this provision does not prevent the legislature from adding the requirement that compensation be made for the damages sustained to the remaining property by reason of the taking; in other words, the omission of the words 'or damaged' from the Constitution does not prevent the legislature from imposing a condition to that effect by statutory enactment. It is true that the legislature in this state has not gone to that extent; in other words, it has not authorized the collection of damages under the eminent domain statute previous to the taking, where there is no actual physical taking of the property, but it has provided that the damages done to the remaining portion of the property from which the condemned portion is taken shall be paid before the condemnor is allowed to take the property sought." *Idaho-Western R. Co. v. Columbia Conference of E. L. A. S.* (Idaho, 1911), 119 Pac. 60.

3. USE FOR WHICH TAKEN AS A PUBLIC USE.

§ 1478. Use must be a public use.

It is elementary that private property can only be taken for a public as distinguished from a private use,⁶ unless the owners of the land consents thereto.⁷

Only a few of the state constitutions in terms prohibit the taking of private property for private use. All courts, however, agree that this cannot be done. Different courts find different reasons for this conclusion, some putting it on the ground of an implied prohibition in the eminent domain provision of the constitution, some on the ground that it would be contrary to the provision that no person shall be deprived of his property except by the law of the land; others on the ground that it

6. *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185.

Condemnation for benefit of railroad company. "If it is a fact that the purpose of the council in passing the ordinances was that these streets, when widened and extended as proposed, were to be given over to railway switch tracks, then the common council was proceeding to condemn private property for a purpose for which it had no right to condemn. To the city council the state has delegated the power to condemn land for a public use, it has no power to condemn for a private use; 'public' in that connection means everybody; if the use is not for everybody it is a private use; if to an individual, or to any number of individuals, is given the right to use the property in such manner as will practically exclude the general public, it is a giving of the property to private use and a destruction of its public-

service character." *Kansas City v. Hyde*, 196 Mo. 498, 507, 512, 96 S. W. 201.

A municipality cannot condemn land for a street where the purpose is merely to give the use of a street to a railroad company so as to exclude all other travel therefrom. *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179.

To aid commercial growth. A municipality cannot take lands for the purpose of afterwards selling them for full value to promote the transportation of freight and passengers to a certain section of the city, and to promote the industrial welfare by a street adapted to the improved requirements of commerce, such a taking not being for a public use. *Opinion of Justices*, 204 Mass. 616, 91 N. E. 578.

7. *Baker v. Braman*, 6 Hill (N. Y.) 47, 40 Am. Dec. 387.

would be subversive of the fundamental principles of free government or contrary to the spirit of the constitution.⁸

The question what is a public use has been said to be not susceptible of precise definition, but it has been the subject of a multitude of decisions, more or less conflicting in some respects.⁹

8. Lewis, *Eminent Domain* (3d Ed.), § 250.

"The language of the constitution does not authorize property to be taken 'for public enjoyment,' or 'for public purposes,' or generally 'for the public.' Its expression is 'for public use,' which implies an idea of utility, of usefulness, not necessarily inherent in the other phrases mentioned." *Albright v. Sussex County Lake & Park Commission*, 71 N. J. L. 303, 57 Atl. 398, 399.

9. See extensive note in 22 L. R. A. (N. S.) 35, on what is a public use.

Boulevard outside city limits. Land taken for a boulevard connecting parks outside the corporate limits is taken for a public use and not merely a public convenience. *Memphis v. Hastings*, 113 Tenn. 142, 86 S. W. 609, in which case the court said: "The next objection is that the condemnation of the land of the defendant is not a public necessity, but merely a public convenience, and for that reason the act of the legislature, so far as it attempts to authorize such appropriation, is unconstitutional and void. Mr. Lewis in his work on *Eminent Domain* (volume 1, § 175), says: 'Pleasure and recreation are not

only essential to health, but tend to the improvement of character. No better instance of a public use can be given than that of a public square or park in the midst of, or convenient to, a dense population. Private property may be taken for the purpose of securing such means of recreation and health. A park is a public use, although not located in a city or town, but only in the vicinity of it. Land may be taken on each side of highways to be kept open for courtyards and ornament. Highways may be laid out for the purpose of affording access to a position which commands a fine view or for accommodating pleasure driving. The taking of a large tract in the Adirondacks for a state park was held to be for a public use. So, limiting the height of buildings around a public park or square.' It will be observed the author states that a park is a public use, though not located in a city or town, but only in the vicinity of it, and, further, that land may be taken for driveways or for accommodating pleasure driving. In the case of *West Chicago Park Commissioners v. The Western Union Tel. Co.*, 103 Ill. 33, it was held that land might be condemned for building a boulevard running from the south end

A distinguished authority on the law of eminent domain states that one class of cases construes the words "public use" as meaning a use or right of use on the part of the public or some limited portion of it, while the other class holds the words are equivalent to public benefit, utility or advantage; and he concludes that the words should receive the former rather than the latter meaning.¹⁰

of Douglas Park to the Illinois & Michigan Canal."

Harbor lines. Taking property in the legal establishment of harbor lines is a taking for public use, but the right to establish harbor lines and to take private property for that purpose must be exercised in good faith and for a public use naturally connected with their establishment. It follows that harbor lines laid out for the purpose of preventing a new bridge from being marred by the building of structures connected with it, which would obscure it, and not in the interests of navigation or any other public use, do not constitute a taking for a public purpose. *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590.

The right of fishing in the fresh water lakes of a state was held a public use, so that property might be condemned therefor for the benefit of the public. *Albright v. Sussex County Lake & Park Commission*, 68 N. J. L. 523, 53 Atl. 612, in which case it was said that "if private lands may be taken for public use as a park for general purposes of popular recreation it is perfectly plain that they be taken for the purposes of a park, with the incidental rights

of a public fishery." On appeal to the court of errors and appeals, however, the decision of the supreme court was reversed and it was held that the power of eminent domain could not constitutionally be exercised for the purpose of taking a common right to fish in fresh water lakes held as private property, on the ground that the supply of fish in such lakes was so small as to be incapable of meeting a public demand, and the taking being to furnish a means of amusement or sport to those having the leisure to fish was not for a "public use." *Albright v. Sussex County Lake & Park Commission*, 71 N. J. L. 303, 57 Atl. 398, 69 L. R. A. 768, 108 Am. St. Rep. 749.

Subway. Taking of land for a subway is for a public use. *Re Board of Rapid Transit R. Com'rs of New York City*, 197 N. Y. 81, 90 N. E. 456.

10. "Public use means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the

To constitute a public use, the public must be to some extent entitled to use or enjoy the property as a matter of right;¹¹ but it is not required that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the property taken,¹² or, according to the doctrine of

general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application." Lewis, *Eminent Domain* (3d Ed.), § 258.

See also note in 14 Am. and Eng. Ann. Cases on this question.

11. *Gaylord v. Sanitary Dist. of Chicago*, 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235.

12. *Re Whitestown*, 53 N. Y. S. 397, 24 Misc. Rep. 150.

See note in 22 L. R. A. (N. S.) 48-50.

In order to constitute a public use, "it is not necessary that the entire community or any considerable portion of it should directly participate in the benefits to be derived from the property taken. The public use required need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates." *Miller v. Pulaski*, 109 Va. 137, 63 S. E. 880, 883.

"In holding a use to be public, it has never been deemed essen-

tial that the entire community, or any considerable portion of it, should directly enjoy or participate in the improvement or enterprise. This is made necessary because in the very nature of things the benefits to be derived from improvements local in character or peculiar in adaptation must be subject to the restrictions of locality, the necessities of individual and community life, etc. *Talbot v. Hudson*, 16 Gray 425; *Railway v. Railway* (Mont.), 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; *Williams v. School Dist.*, 33 Vt. 271; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Zigler v. Menges*, 121 Ind. 99, 22 N. E. 732, 16 Am. St. Rep. 357. So, also, a moment's consideration will serve to make it clear that controlling effect cannot be given the fact, however apparent it may become, that the construction of a particular improvement will result incidentally in benefit to private rights and interests. If the contrary were true, it is doubtful if there could be prosecuted any public work requiring an exercise of the power of eminent domain. Not a mill-dam, canal, or railway intended to be operated by private corporations for private gain could be built, however necessary to the public convenience or welfare, not even a schoolhouse site or ground

many judicial decisions, that all portions of the community derive equal benefit from the purpose for which the property is taken.¹³ So it is generally held that the question of necessity for the exercise of the power of eminent domain has nothing to do with the question of what constitutes a public use.¹⁴ On the other hand, the *use is not public* where the benefit to the municipality is merely incidental and purely prospective.¹⁵ Likewise, property cannot be condemned to obtain the possible income or profit that might inure to the municipality from the ownership and control of it.¹⁶

for cemetery, park, market house, street, or highway could be acquired, although intended to remain under control of public authority, and for the undoubted use and benefit of the public, without making disclosure of influence, more or less marked, upon private rights and property interests. *Bankhead v. Brown*, *supra*; *Township, etc. v. Hackmann*, 48 Mo. 243. Perhaps no nearer approach to accuracy in the way of a general statement can be had than to say that the mandate of the Constitution will be satisfied if it shall be made reasonably to appear that to some appreciable extent the proposed improvement will inure to the use and benefit of parties concerned, considered as members of the community or of the state, and not solely as individuals. While, however, the benefit must be common in respect of the right of use and participation, it cannot be material that each user shall not be affected in precisely the same manner or in the same degree." *Sisson v. Buena Vista County*, 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440.

Vacation of street. The closing of a street is not for a private, as distinguished from a public use, merely because some parties may receive more direct benefits from the closing than the public at large. *Baltimore v. Brengle* (Md. 1911), 81 Atl. 677. See also § 1403 *ante*, vol. 3.

13. *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185.

14. *Lewis, Eminent Domain* (3d Ed.), § 255; *Savannah v. Hancock*, 91 Mo. 54, 3 S. W. 215.

15. *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394.

16. *Opinion of Justices*, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483.

Speculative purposes. Municipality cannot condemn land for speculative purposes. *Opinion of Justices*, 204 Mass. 616, 91 N. E. 578.

Commercial street. A municipality cannot condemn property for a broad thoroughfare for the transportation of goods, and for sites on such thoroughfare for the construction of warehouses, mercantile establishments and other buildings suited to the needs of

§ 1479. Incidental benefits to individuals.

The mere fact that a corporation or an individual may be interested in or benefited by the taking of property by a municipality in condemnation proceedings will not of itself preclude the right of the latter to exercise the power of eminent domain.¹⁷

§ 1480. Who may raise objection.

The objection that the condemnation is not for a public use may be made not only by the *owner* of the property sought to be condemned but also by any *taxpayer* of the municipality who is assessable for the costs of the taking.¹⁸

§ 1481. Cemeteries.

Where the authority so to do is delegated, land may be condemned by a municipal corporation for a cemetery, since land taken for a public burial ground is taken for a public use.¹⁹

trade and commerce, with a view to the subsequent use by private individuals of so much of the property taken as lies on either side of said thoroughfare, under conveyances, leases or agreements embodying suitable provisions for the construction on said land of buildings suited to commercial needs, since such use is a private and not a public use. Opinion of Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483. See also Opinion of Justices, 204 Mass. 616, 91 N. E. 578.

17. *Henderson v. Lexington*, 33 Ky. L. Rep. 703, 111 S. W. 318.

Benefit to railroad. The fact that a railroad company is interested in the condemnation of property by a municipality for a public

landing and that when the municipality obtained title it intended to grant an easement or right of way across it to the railroad company, does not preclude condemnation of such property by the municipality. *Diamond Jo Line Steamers v. Davenport*, 114 Iowa 432, 87 N. W. 399, 54 L. R. A. 859.

18. *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394.

19. *Edwards v. Stonington Cemetery Ass'n*, 20 Conn. 466.

Cemeteries. City may condemn lands for cemetery purposes. *Shield v. Walker*, 114 Mo. App. 521, 526, 90 S. W. 124.

That care and management of cemetery owned by municipality is confided to an association of in-

§ 1482. Ferries.

Where a ferry is to accommodate the increased business interests of the municipality, it seems that land condemned for a ferry landing is for a public use.²⁰

§ 1483. Light, heat or power supply.

The condemnation of property by a municipality for the supply of gas or electric light, heat or power, is for a public use.²¹

dividuals is immaterial, so far as "public use" is concerned. *Edgecumbe v. Burlington*, 46 Vt. 218.

Land taken by a city for a public cemetery is taken for a public use notwithstanding private persons interested in vacating old cemeteries because of iron deposits thereunder had agreed to pay for moving the bodies and monuments to the new cemetery. *McDonald v. Marquette* Circuit Judge, 159 Mich. 367, 123 N. W. 1112.

20. *Helm v. Grayville*, 224 Ill. 274, 280, 79 N. E. 689.

See § 406 *et seq.*, *ante*, vol. 1, as to power of municipal corporation touching ferries.

21. Supply of electric light is public use. *Miller v. Pulaski*, 109 Va. 137, 63 S. E. 880.

"Light, heat, and power are essential to the comfort and convenience of the people of a community, and electricity is capable of supplying them. It can be distributed to each member of a community in such quantity as he may need. It may not only be applied in operating street railways, and in the running of large factories, but the farmer can, if he wants to, utilize it in lighting his

house, and in operating machinery to saw wood and grind grain for his family and cattle. He could also relieve his wife of much labor by using it to operate the washing machine, the sewing machine, and the churn. But it is not necessary that all the people of a community should take a portion of the electric current in order to constitute the use a public one. It is sufficient if each member of the community has an equal right to a portion of it on equal terms with every other member. That some of the residents of a city do not use gas for lighting or heating, or that some elect not to have their houses supplied with water from the public reservoir, or that some refuse to avail themselves of the general convenience afforded by the telephone, affords no reason for holding telephone, gas, water, and electric power and light companies not to be public service corporations. All the residents of the city have the right to these conveniences, on the same terms with those citizens who do enjoy them, and that is sufficient to determine the service to be a public, and not a private, use." *Pittsburg*

By express authority conferred, it has been held that a municipality may condemn land and water for a water supply notwithstanding it is also supplying water to another municipality;²² but in another jurisdiction a statute conferring power on a municipality to condemn property for an electric light plant to supply not only the inhabitants of the municipality but also "other persons, companies or corporations," with electric light or power, was held unconstitutional on the theory that the furnishing of light or power to others than the inhabitants of

Hydro-Electric Co. v. Liston (W. Va., 1911), 73 S. E. 86.

The maintenance of a light plant is a corporate use for which property may be condemned under statutes authorizing condemnation of private property "for corporate uses," and also authorizing a municipality to acquire and maintain works necessary for the lighting of streets and public places. *State ex rel. v. Superior Court of King County*, 35 Wash. 303, 77 Pac. 382.

The condemnation of property for electric light plants is for a public purpose, notwithstanding the statute authorizes the erection of poles and stringing of wires for furnishing electric lights for private use as well as lights upon the streets and other public places of the municipality. *State ex rel. v. Allen*, 178 Mo., 555, 77 S. W. 868, 876.

A statute authorizing municipalities to condemn property for the purpose of furnishing the inhabitants and other persons with gas, electricity, and power, and facilities for lighting, heating and fuel and power purposes, "public and private," is not unconstitutional as authorizing condemnation for both public and private

use, since the use of the word "private" in such statute merely renders the statute a nullity so far as such word is concerned; the statute does not mingle public and private purposes so that they cannot be separated within the rule that in such a case the entire statute is void, since the purposes enumerated are unquestionably public. *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

Whether furnishing of electrical power for manufacturing purposes to the public generally, or such parts of the public as are in a position to avail themselves thereof is in itself a public purpose for which the power of eminent domain may be exercised, irrespective of the question whether the use to which the power is applied by the ultimate consumer is in itself a public purpose which will sustain a grant of the power of eminent domain, see *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 69 Atl. 870, 21 L. R. A. (N. S.) 410, and notes in 21 L. R. A. (N. S.) 410, 19 L. R. A. (N. S.) 725 and 2 L. R. A. (N. S.) 842.

²² *Munday v. Fountain*, 76 N. J. 701, 71 Atl. 693.

the municipality was for a private and not a public use, and that the valid and the invalid part could not be separated.²³

It has also been held that the fact that a municipality has been furnishing power for public and private purposes in the past does not show that a proceeding by the municipality to condemn lands and water rights for the purpose of generating electric power is for both public and private use, the rule being that a private use incidentally included will not defeat the right to condemn for public use so long as the public use is maintained.²⁴

§ 1484. Market places.

Likewise property may be condemned, where authority is delegated, for a public market, it being a taking for a public use.²⁵

§ 1485. Ornamental purposes.

While there is some *dicta* that property cannot be condemned merely for ornamental purposes or for purposes of pleasure,²⁶ and there is little, if any, direct authority to the contrary,²⁷ yet the undoubted tendency of the more recent decisions is in the opposite direction, and the time is not far distant, it is believed, when it will be the ac-

23. *Miller v. Pulaski*, 109 Va. 137, 63 S. E. 880.

24. *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

25. *Re Cooper*, 28 Hun (N. Y.) 515 holding that a market is a public market notwithstanding all kinds of commodities are not sold there.

See § 965 *ante*, vol. 3.

26. *Boston & R. Mill Dam Corp. v. Newman*, 12 Pick. (Mass.) 467, 480, 23 Am. Dec. 622.

27. *Roads*. It was held at an early day that a town may lay out

a road wholly upon the lands of a certain person, as a side road entering and returning to the main highway, at about the same place, with the purpose of providing access to places esteemed as pleasing natural scenery. *Higginson v. Nahant*, 11 Allen (Mass.) 530.

Compare *Blodgett v. Boston*, 8 Allen (Mass.) 237 and *Woodstock v. Gallup*, 28 Vt. 587, to effect that public ways are not for places of amusement.

cepted rule that a municipality may be authorized to condemn property for aesthetic purposes.²⁸

It has been held that the condemnation of land to widen a street twenty feet on each side, the added space to be for ornamental court yards, is a taking for a public as distinguished from a private purpose.²⁹

§ 1486. Parks.

Property may be condemned by a municipality for a public park.³⁰ In densely populated cities, public parks

28. See article on "Legal Aspect of Municipal Aesthetics" in Case and Comment, vol. 18, no. 7; § 929, pp. 2021-2023 *ante*, vol. 3, and notes; §§ 931, and 949 *ante*, vol. 3.

29. "It is not necessary that every part of all highways should be used for the passage of vehicles and pedestrians. It is proper that some regard should be had for the aesthetic tastes, the comfort, health, and convenience of the public; and if the legislature had enacted that Clinton avenue should be increased in width to the extent provided in this act, and had provided that a strip in the center of the highway, forty feet wide, should be devoted to trees and flowers, as is done in many of our cities, it would hardly have been questioned that this constituted a public use, in the same sense that a park preserve is generally recognized as a public use. *Shoemaker v. U. S.*, 147 U. S. 282, 297, 13 Sup. Ct. 361, 37 L. Ed. 170, and authorities there cited. Because the legislature has preferred to leave this breathing space upon the sides of the street, subject to the limited use of the

owners of the fee, does not change its essential character, and the improvement is undoubtedly much less expensive than the one which is suggested as within the legislative discretion." *Re New York City*, 68 N. Y. S. 196, 200, 57 App. Div. 166.

30. *District of Columbia*. *United States v. Cooper*, 9 Mackey (D. C.) 104.

Illinois. See *People ex rel. v. Williams*, 51 Ill. 57.

Massachusetts. *Dicta* in *Attorney General v. Williams*, 174 Mass. 476, 479, 55 N. E. 77, 47 L. R. A. 314, *aff'd* in 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559.

Missouri. *St. Louis County Court v. Griswold*, 58 Mo. 175, condemnation by county.

New York. *Re Rochester*, 137 N. Y. 243, 33 N. E. 320; *Re Clinton Ave.*, 68 N. Y. S. 196, 57 App. Div. 166; *Re Central Park*, 63 Barb. (N. Y.) 282.

United States. *Shoemaker v. United States*, 147 U. S. 282, 297, 13 Sup. Ct. 361, 37 L. Ed. 170; *Wilson v. Lambert*, 168 U. S. 611, 18 Sup. Ct. 217, 42 L. Ed. 599.

Borough may condemn land for a park where authorized by stat-

are manifestly essential to the health, comfort and prosperity of their citizens. Such improvements are a public use, within the meaning of the constitution, for the purposes for which land of the citizen may be taken upon the payment of a just compensation.³¹

ute. *Hutches v. Hohokus Borough* (N. J., 1911), 81 Atl. 658.

Title to, and management of, parks, in general, see §§ 1153-1157 *ante*, vol. 3.

Adoption of system of parks. The power to condemn property for a public parkway is not made dependent, under the charter of Kansas City, upon the adoption of a system of parks. *Kansas City v. Mastin*, 169 Mo. 80, 68 S. W. 1037.

31. *County Court v. Griswold*, 58 Mo. 175, 192, 196; *Kansas City v. Ward*, 134 Mo. 172, 177, 35 S. W. 600; *United States v. Cooper*, 20 D. C. 104; *Graeff v. Felix*, 24 Pa. Co. Ct. 657, 664.

Land for park as public use. In *Shoemaker v. United States*, 147 U. S. 282, 297, 13 Sup. Ct. 361, 37 L. Ed. 170, the court says: "Land taken in a city for public parks and squares, advantageous to the public for recreation, health or business is taken for a public use and the right of eminent domain extends thereto."

Public parks confer not only a general benefit upon all the citizens of the municipality, but over and above this, a special and peculiar benefit upon the citizens owning real estate in the immediate vicinity thereof, in the enhancement of the pecuniary value of their property. *Kansas City v. Ward*, 134 Mo. 172, 177, distinguishing *State ex rel. v. Leffingwell*, 54 Mo. 477, approved in *Kan-*

sas City v. Bacon, 147 Mo. 273.

County park. Appropriation of land by the authority of the legislature for a public park for the benefit of the inhabitants of St. Louis County is "a public use," although chiefly beneficial to the inhabitants of the city. *County Court of St. Louis County v. Griswold*, 58 Mo. 175, 192.

Ornamental purposes. Private property, however, it has been said, cannot be taken when wanted by the public for merely ornamental purposes. The purpose must be necessary and useful. *Boston & R. Mill Dam. Corp. v. Newman*, 29 Mass. (12 Pick.) 467, 480, 23 Am. Dec. 622.

Library in park. Power to condemn "for the purpose of public parks" includes power to condemn land for the enlargement of a free library building in a park; and the fact that the library is managed by a board in which the municipality has only a one-half representation does not make the taking one for a private institution rather than a public use. *Laird v. Pittsburg*, 205 Pa. 1, 54 Atl. 324, 61 L. R. A. 332, considering at some length the definitions and nature of a park.

"The acquisition of lands for parks is unquestionably for a public purpose, and is so conceded. Likewise, 'it is now the generally accepted rule that a public park is a special benefit to the locality

So a public park is a public use although the land is located outside the territorial limits of the municipality seeking to condemn property therefor.³²

Likewise, the fact that a statute authorizing a municipality to condemn land for a park empowers it to sell at public auction any lands unnecessary to be longer used for park purposes, does not authorize condemnation for a purpose not public.³³

§ 1487. Public buildings.

Property taken for public buildings of all kinds, such as city halls, court houses, jails, public schools, markets, almshouses and the like is taken for public use. This right has been questioned in some decisions but never denied in any decided case.³⁴ So the condemnation of

or part of the city in which it is established; and its cost, to the extent of such special benefits, may be assessed against the property specially benefited. * * *

The propriety of apportioning the tax according to the special benefits received is unquestionable.' Hamilton on the Law of Spec. Assess., §§ 256, 257; Page & Jones on Tax. by Assess., §§ 307, 356, 357. We therefore conclude that the people of the city and county of Denver, when making a charter for the municipality, had the power to write therein provisions for the purchase of lands, or for the exercise of the power of eminent domain in acquiring lands for parks and parkways, and the payment therefor, in whole or in part, by collections arising from assessments made upon the property within the districts specially benefited by the improvements, and that the charter provisions in that respect are constitutional." Lon-

doner v. Denver (Colo., 1911), 119. Pac. 156.

32. Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609, 69 L. R. A. 750.

See also Thompson v. Moran, 44 Mich. 605, 7 N. W. 180.

33. Re Rochester, 137 N. Y. 243, 33 N. E. 320.

34. Lewis, Eminent Domain (3d Ed.), § 270.

County jail. Where a statute authorizes the condemnation of land for any "public work," a county may condemn land for a county jail. Mercer County v. Wolff, 237 Ill. 74, 86 N. E. 708.

Library. A municipality having power to condemn land for "public use" may condemn land for a library lot. Lyford v. Laconia, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062.

Smallpox hospital, land may be condemned for. Manning v. Bruce, 186 Mass. 282, 71 N. E. 537.

private property for additions to public buildings is for a public use.³⁵

§ 1488. Public square.

Land condemned by a municipal corporation for a public square is taken for a public use without regard to whether it is to be traveled upon.³⁶

§ 1489. School purposes.

A taking of land for school house sites is a taking for a public use.³⁷ And where land may be condemned for the location and construction of a school house "and for the convenient use of the school," land may be condemned for a playground for the school children.³⁸

§ 1490. Sewers and drains.

The condemnation of property for public sewers and drains, or works for the disposition of sewerage, is so manifestly for public use that it has been seldom questioned and never denied.³⁹

35. *Jockheck v. Shawnee County*, 53 Kan. 780, 37 Pac. 621. See also *Norfolk County v. Cox*, 98 Va. 270, 36 S. E. 380.

See § 1114 *et seq.*, *ante*, vol. 3.

36. *Owners of Ground, etc. v. Albany*, 15 Wend. (N. Y.) 374.

See §§ 1153, 1154 *ante*, vol. 1.

37. *Buckwalter v. School Dist.* No. 42, 65 Kan. 603, 70 Pac. 605; *Township Board v. Hackmann*, 48 Mo. 243; *Long v. Fuller*, 68 Pa. St. 170; *Williams v. School Dist.* No. 6, 33 Vt. 271.

38. *Independent School Dist. of Oakland v. Hewitt*, 105 Iowa 663, 75 N. W. 497.

39. *Lewis, Eminent Domain* (3d Ed.), 267.

A sewerage system is a "public use" within the statute authoriz-

ing condemnation of property for such purpose. *Twin Falls v. Stubbs*, 15 Idaho 68, 96 Pac. 195.

Fact that city had agreed to permit a hotel outside the city limits to use the sewer does not make the use a private rather than a public use. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

Outlet for sewage. Municipality may exercise right of eminent domain in securing an outlet for its sewage. *Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305.

See chapter 31 *ante*, § 1421 *et seq.*

"The presumption, in the absence of a clear showing to the contrary, is that in directing and

So the promotion of the public health being undoubtedly a public use within the meaning of the constitution, property may be taken for the construction of *drains, levees or other works* in order to accomplish this object.⁴⁰

§ 1491. Streets or alleys.

The rule is uniformly maintained that the taking of property for a public street or alley is for a public use,⁴¹

carrying on a work of this character in their corporate capacity the municipal authorities act for a public purpose, and for the benefit primarily of the community at large or the people generally in the locality of the improvement, and not merely in the interest of any particular individual or individuals who may have petitioned for such improvement, and who may be specially benefited thereby." *McDaniel v. Columbus*, 91 Ga. 462, 17 S. E. 1011.

40. *Lewis, Eminent Domain* (3d Ed.), 286.

The construction of ditches for drainage of land otherwise useless for agricultural purposes is recognized as a public use. *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779.

41. *Re 17th Street, Kansas City v. Kansas City F. S. & M. R. Co.*, 189 Mo. 245, 256, 88 S. W. 45; *State v. Superior Court of Whatcom County*, 42 Wash. 521, 85 Pac. 256; *Seattle v. Byers*, 54 Wash. 518, 103 Pac. 791.

When property is condemned for a public street, it is taken for a public use, as a matter of law. *Jeffress v. Greenville*, 154 N. C. 490, 70 S. E. 919.

Taking land for widening public highway is for a public use. *Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122.

Taking of land for widening a street is for a public use where principal purpose is to enhance value of all real estate in the municipality. *Dunham v. Hyde Park*, 75 Ill. 371.

Widening street for subway. Where land to be taken from a private person is to be devoted to the use of the public—is to be used by the public as a public street—the fact that the necessity for its use arose out of the plan adopted by the municipality for the elevation of the tracks of a railroad company over a public street crossing and that the land condemned was to widen the street for a subway under the track elevation does not show that the taking was for a private use. *Summerfield v. Chicago*, 197 Ill. 270, 64 N. E. 490.

Ornamental courtyards. Taking of land to widen a street twenty feet on each side is for a public service although the additional space is reserved for ornamental courtyards. *Re New York City*, 68 N. Y. S. 196, 57 App. Div. 166,

and this rule is enforced notwithstanding the street so established is a *cul de sac* on either side of property belonging to the municipality.⁴² Furthermore, property taken for a street is not taken for a private use merely because the cost of the improvement is contributed to by an individual.⁴³

On the other hand, land cannot be taken for a *private road*, since this is not for a public use.⁴⁴ However, if such a road, when laid out, is in fact a public road, for the enjoyment of all who may desire to use it, the taking is for a public use notwithstanding the road may accommodate but a single family.⁴⁵ But a municipality cannot condemn land for a street, where the intention is to turn the way over to a railroad or other company or person for its or his private use.⁴⁶

aff'd without opinion in 167 N. Y. 624, 60 N. E. 1108; Re Bushwick Ave., 48 Barb. (N. Y.) 9.

42. State v. Superior Court of Whatcom County, 42 Wash. 521, 85 Pac. 256.

43. "There can be no objection to the contributing of an individual to the expense of laying out or altering a street, nor will such an act prove that the property was taken for the accommodation of private individuals, and not for public use. If, in point of fact, the public necessity and convenience require the improvement of a street, or the opening of one, it can make no difference who pays the damages of condemnation. It might be that a party contributing a part or the whole of the assessed damages in the condemnation of land for a public street, when the public necessity requires such street, might have lands adjacent which might be improved by the opening of the

street; and surely, if nothing else appeared, it would not be either immoral or illegal for him to pay the damages growing out of the condemnation proceedings." Stratford v. Greensboro, 124 N. C. 127, 32 S. E. 394.

44. Arnsperger v. Crawford, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497; Beaudrot v. Murphy, 53 S. C. 118, 30 S. E. 825; Varner v. Martin, 21 W. Va. 534.

Log road. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964.

45. Fanning v. Gilliland, 37 Ore. 369, 61 Pac. 636, 82 Am. St. Rep. 758.

46. Kansas City v. Hyde, 196 Mo. 498, 96 S. W. 201, 7 L. R. A. (N. S.) 639, 113 Am. St. Rep. 766; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. Rep. 866.

§ 1403 *ante*, vol. 3.

§ 1492. Water supply.

In many jurisdictions, statutes or charter provisions expressly authorize the condemnation of property for a public water supply.⁴⁷ And it is undoubtedly true that the exercise of the power of eminent domain for such purpose is for a public use.⁴⁸ Furthermore, a municipality possessed of power to condemn a water supply, may condemn the property of a water supply company in its entirety, franchise and all;⁴⁹ and the fact that there

47. *Helena v. Rogan*, 26 Mont. 452, 68 Pac. 798; *Dallas v. Hallock*, 44 Ore. 246, 75 Pac. 204.

Water board may take, under statutory authority, right to make and perpetually maintain a dike or mound of earth of a certain height for the benefit of adjoining reservoir and system of water supply, without taking the fee of the land. *Burnett v. Commonwealth*, 169 Mass. 417, 48 N. E. 758.

Poles for electrical power. Water commissioners with power to take any property which may be required for the purpose of water supply, have authority to condemn land for an electrical power line supported by poles, to pump water from lake. *Canandaigua v. Benedict*, 48 N. Y. S. 679, 681, 24 App. Div. 348.

48. *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238; *Smith v. Chicago*, 107 Ill. App. 270.

Condemnation proceedings by municipality to obtain the right to enlarge an irrigating canal, in order to convey water from a river for the use of its inhabitants, is for a public use. *Salt Lake City v. East Jordan Irr. Co.* (Utah, 1911), 121 Pac. 592.

"A supply of water to the people is everywhere recognized as a public use." *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774.

Land condemned for pipe lines in connection with municipal water works is taken for a public use notwithstanding the purpose of obtaining a water supply is in part to be accomplished by the additional municipal power of contracting with a water company or the fact that in certain contingencies the municipality may refuse to accept the water works of a private company so as to make it uncertain whether the land condemned will be devoted to public use. *Hallock v. Alvord*, 61 Conn. 194, 23 Atl. 131.

49. § 1496 *post*.

See *Rome v. Whitestown Waterworks Co.*, 100 N. Y. S. 357, 113 App. Div. 547.

"That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water-supply system must be recognized as within the unquestioned limits of the power of eminent domain." *Long Island Water Supply Co. v. Brooklyn*, 166

is an existing contract for water between the municipality and a water company does not preclude the former from condemning the property of the latter.⁵⁰

So the power to condemn a water supply system does not depend on making the supply of water absolutely free, since it is not essential to a public use that it be absolutely free.⁵¹ Moreover, the possibility that a municipality may in the future dispose of a portion of its public water supply for purposes not expressly authorized does not affect its right to condemn land required for the construction of a system of waterworks which had been determined upon under the power conferred by law.⁵²

On the other hand, a municipality cannot be authorized to condemn property to secure water power to be leased

U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165, per Justice Brewer.

"Again, it is beyond question that the property and plant of a water company, owned and operated by a private corporation, and engaged, by virtue of its charter, in furnishing water to the people of a municipality, may be condemned and taken for public use by such municipality—just compensation being given—to which power to so condemn and take has been granted by the legislature. *Re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270." *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774, 779.

50. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165.

The fact that a water company has issued its bonds and mortgaged its property to secure them, and has also assumed fixed permanent obligations to municipali-

ties to supply them with water, does not exempt its property and franchise from condemnation by one of the municipalities seeking to condemn its plant. *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774.

51. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165.

52. *Edwards v. Cheyenne* (Wyo., 1911), 114 Pac. 677.

"The mere fact that, as a natural incident to the securing of public water-supply, more water is obtained than is now requisite for public purposes, and that the city disposes of the surplus for an outside use, does not deprive the condemnation of its public character. The power to construct and maintain the works still rests on the municipal public use, not on the disposition of the accidental excess." *State v. Newark*, 54 N. J. L. 62, 23 Atl. 129.

for manufacturing purposes, since such use is a private rather than a public use.⁵³

§ 1493. Wharves.

The taking of land for a public wharf, dock or pier is a taking for a public use.⁵⁴ And this is so notwithstanding some portion of the land actually used may thereafter, in the discretion of the municipality, be divided off and placed in the exclusive possession of a lessee for the sole purpose of using it in the transaction of the necessary business connected with the loading and unloading of passengers and cargoes of ships and steamers.⁵⁵

4. WHAT PROPERTY MAY BE TAKEN.

§ 1494. All property may be taken.

All kinds of property required for public use, including land, timber, stone, gravel, streams of water, etc., may be taken under the right of eminent domain.⁵⁶ So

53. *Attorney-General v. Eau Claire*, 37 Wis. 400. To same effect, *Nalle v. Austin* (1893), 21 S. W. 375.

54. *State ex rel. v. Wiethaupt*, 231 Mo. 449, 133 S. W. 329; *Pittsburgh v. Scott*, 1 Pa. St. 309.

See also *Iron R. Co. v. Ironton*, 19 Ohio St. 299.

55. *Re Mayor, etc., of City of New York*, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825, aff'g 63 Hun (N. Y.) 632, 18 N. Y. S. 536.

After the Baltimore fire, the legislature granted power to the city of Baltimore to condemn property for wharves and piers. It was held that the fact that the requirements for strictly public wharves might not exhaust all the

piers and docks which it would be necessary to construct in carrying out the beneficial changes contemplated, and that there might be space which the city could utilize only by leasing it, did not make the contemplated use a private rather than a public use. *Dyer v. Baltimore*, 140 Fed. 880, 886.

For nature of wharves, power to establish, etc., see § 397 *et seq.*, *ante*, vol. I.

56. *South Park Commissioners v. Montgomery, Ward & Co.*, 248 Ill. 299, 93 N. E. 910.

"Every species of property which the public needs may require, and which government cannot lawfully appropriate under any other right, is subject to be

every variety and degree of interest in property may be taken under the power of eminent domain.⁵⁷ Likewise, a municipality may condemn personal as well as real property,⁵⁸ a franchise,⁵⁹ a contract,⁶⁰ a leasehold interest,⁶¹ or a homestead.⁶²

seized and appropriated under the right of eminent domain. Lands for the public ways; timber, stone, and gravel with which to make or improve the public ways; buildings standing in the way of contemplated improvements, or which for any other reason it becomes necessary to take, remove, or destroy for the public good; streams of water; corporate franchises; and generally, it may be said, legal and equitable rights of every description—are liable to be thus appropriated." *Cooley's Const. Lim.* (3rd Ed.), § 526, quoted in *Pittsburg, C., C. & St. L. Ry. Co. v. Wolcott*, 162 Ind. 399, 69 N. E. 451, 453.

57. *Lewis v. Eminent Domain* (3rd Ed.), § 411.

"Land and all estates, rights, interests and easements in, or appurtenant thereto, may be taken under the power of eminent domain." *Lewis, Eminent Domain* (3rd Ed.), § 412.

Easement in land may be condemned. *Cincinnati v. Dodson*, 7 Ohio Dec. 504; *Stein v. Chesapeake & O. R. Co.*, 132 Ky. 322, 330, 116 S. W. 733.

"The term 'land' in statutes conferring power to condemn is to be taken in its legal sense, and includes both the soil and buildings and other structures on it, and any and all interest therein. An easement merely may be taken under authority to take land." *Pacific P. Telegraph-Cable Co. v.*

Oregon & C. R. Co., 163 Fed. 967, 969.

58. *Christy's Adm'r v. St. Louis*, 20 Mo. 143, 61 Am. Dec. 598.

Money and personal property. "Undoubtedly money and all kinds of personal property are subject to the state's power of eminent domain." *Lewis, Eminent Domain* (3rd Ed.), § 413.

Charter limitation. Where a charter confers the power of eminent domain on a municipality for a certain and well defined purpose and only where the city needs "ground" for the purpose of opening or extending its streets, or for other public purposes, the power to exercise the right of eminent domain is limited to the taking or destruction of land as distinguished from personal property. *Wallace v. Richmond*, 94 Va. 204, 26 S. E. 586, holding that city could not, in exercise of eminent domain in aid of police power, order the destruction of all intoxicating liquor on promise of payment therefor, in view of the expected entry of the Federal army during the civil war.

59. *State v. Suffield & Thompsonville Bridge Co.*, 81 Conn. 56, 70 Atl. 55; *Re Brooklyn*, 143 N. Y. 596, 38 N. E. 983 (franchises of water company); *Red River Bridge Co. v. Clarksville*, 33 Tenn. (1 Sneed) 176, 60 Am. Dec. 143 (franchise to maintain a toll bridge).

The word "land" also includes water in so far as the right of eminent domain is granted to a municipality to condemn land.⁶³ Lands of a private corporation may be taken,⁶⁴ as well as the lands of an individual.

The interests of a company under its charter, whether denominated a franchise or an easement in a highway, is a valuable property right, so that its practical destruction is the taking of property within the constitutional provision; and likewise the interfering with such an interest may be, *pro tanto*, a taking of property which will entitle the owner to compensation. *Belleville v. St. Clair Turnpike Co.*, 234 Ill. 428, 84 N. E. 1049.

Judge Cooley (Const. Lim. [5th Ed.] 341) says: "It must be conceded, under the authorities, that the state may grant exclusive franchises, * * * but the grant of an exclusive privilege will not prevent the legislature from exercising the power of eminent domain in respect thereto. Franchises, like every other thing of value and in the nature of property within the state, are subject to this power; and any of their incidents may be taken away, or themselves altogether annihilated, by means of its exercise. * * *

Appropriating the franchise in such a case no more violates the obligations of a contract, than does the appropriation of land which the state has granted under an express or implied agreement for quiet enjoyment by the grantee, but which nevertheless may be taken when the public need requires." *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774, 778.

Taking as impairing obligation of contract. Notwithstanding the granting by the legislature of a charter to a private corporation, and its acceptance by the corporation may be regarded as a contract, the subsequent taking of the franchise and property of the corporation by a municipality for public use is not an impairment of the obligation of the contract. *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774.

A statute authorizing the condemnation of land and timber has been held not to authorize the condemnation of a franchise. *Leake County v. McFadden*, 57 Miss. 618.

60. A contract is property, and, like any other property, may be taken under condemnation proceedings for public use, subject to the rule of just compensation. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165.

61. *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290.

62. *Jockheck v. Shawnee County*, 53 Kan. 780, 37 Pac. 621.

63. *Philadelphia Trust, Safe Deposit & Insurance Co. v. Merchantville Borough*, 74 N. J. Eq. 330, 69 Atl. 729.

Condemnation proceedings by city to acquire right to take water from a stream, see *Walla Walla v. Dement Bros. Co.* (Wash., 1912), 121 Pac. 63.

64. *Herbert v. Bayonne*, 63 N. J. L. 532, 42 Atl. 833, affirmed in 64 N. J. L. 548, 46 Atl. 608.

Furthermore, property may be taken by a city for a street although it is held under a covenant of quiet enjoyment entered into by the city in its capacity as a municipality.⁶⁵

It has been held that a municipality, which is already the owner of an interest in land, may secure the condemnation of outstanding interests in a case which in other respects is a proper one for condemnation.⁶⁶

§ 1495. Property outside corporate limits.

Property outside the state cannot be condemned,⁶⁷ except under a specific grant from the federal government.⁶⁸ Likewise, a municipality cannot condemn lands outside its own corporate limits unless the power has been delegated by the legislature. However, it is well settled that the legislature may delegate such power. Conceding that the purpose is a public one and the authority to condemn would exist if the land was situated within the corporate limits, it sometimes becomes a difficult question to determine whether the statutory authority to condemn inside the corporate limits extends to condemnation of property outside the limits.⁶⁹

65. *Brimmer v. Boston*, 102 Mass. 19.

66. *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

67. *Saunders v. Bluefield Waterworks & Imp. Co.*, 58 Fed. 133.

But the right to condemn property within the state is not affected by the fact that a part of the enterprise will be in another state. *Helm v. Grayville*, 224 Ill. 274, 79 N. E. 689.

Power of legislature. The legislature of a state cannot authorize one of its municipalities to take, in the exercise of its power of eminent domain, property situated without the state, and this applies equally well to the property of a

riparian owner in another state, so that a municipality cannot be authorized to divert the waters of a non-navigable interstate stream so as to injure riparian owners on such stream in the other state. *Pine v. New York*, 112 Fed. 98, 50 C. C. A. 145, rev'd on other grounds in *New York v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820.

68. *Haeussler v. St. Louis*, 205 Mo. 656, 687, 103 S. W. 1034, the doctrine of which is set forth in § 410 *ante*, vol. I.

69. *Lewis* says: "As a rule, a municipal corporation cannot condemn property beyond its limits, unless authority so to do is ex-

While there is no settled rule in respect to this question, it would seem that the rule supported by the better

pressly given." Lewis, *Eminent Domain* (3rd Ed.), § 371.

Where authority is conferred, a municipality may condemn for waterworks purposes land situated beyond its corporate limits. *Edwards v. Cheyenne* (Wyo., 1911), 114 Pac. 677.

Under statute, power to condemn for sewer outlet outside limits exists. *Maywood Co. v. Maywood*, 140 Ill. 216, 221, 29 N. E. 704.

See § 1434 *ante*.

Where authorized by statute, city may condemn property outside of its limits. *Potts v. Atlanta* (Ga., 1911), 73 S. E. 397.

A statute in Tennessee making the city of Memphis a taxing district and authorizing it to condemn land beyond the corporate limits for parks and parkways is not an improper delegation of legislative authority, so far as boulevards are concerned, on the theory that there is a distinction between a grant of authority from the legislature to a municipality to exercise the right of eminent domain in the condemnation of property situated beyond the corporate limits for the establishment of a park, and the grant of such authority for the building of a boulevard connecting such parks. *Memphis v. Hastings*, 113 Tenn. 142, 86 S. W. 609.

In West Virginia, "chapter 13, Acts of the Extraordinary Session of the Legislature of 1907 (Code Supplement of 1909, c. 42, § 2, cl. 8), amending chapter 42 of the

Code, in § 2, cl. 8, says that land may be condemned 'by any city, town or village or company, now incorporated or hereafter incorporated for the purpose of establishing waterworks for the public use, to acquire any land necessary for the construction of reservoirs, dams, cisterns, and other waterworks which may be necessary for its purposes, and land and right of way for pipes, conduits for the conveyance of water and so much water from any springs, rivers and creeks as may be necessary for its purposes.' Here is a very broad, wide power of condemnation given municipal corporations for water purposes. It contains no language limiting the power of condemnation to lands within the municipal limits. It says 'any land, any springs, rivers and creeks.' It gives right to condemn lands necessary for waterworks purposes without any limitation to municipal limits. We may reasonably say that, if such a restraint on the power of the town was intended, it would be found in the statute. We know that a supply of water for a town or city is highly useful, and essential, in many instances indispensable. The legislature knew that in many instances it would be impossible to secure a sufficient supply of water within the municipal limits. It knew that in many of the towns and cities of the state water is obtained from beyond their boundaries. It intended to confer this indispensable

reasoning is that if the power exists to construct public works or improve property outside the municipal limits, and the statute or charter expressly or by necessary implication authorizes the condemnation of property within the corporate limits for such purposes, then the municipality is impliedly authorized to condemn property outside the limits for such purposes.⁷⁰

For instance, it has been held that a municipality, under a statute conferring authority to construct waterworks within or without the corporate limits, and in general to do whatever may be necessary to erect and protect the system, has power to condemn land outside the corporate limits for a ditch to carry water for the use of the municipality.⁷¹ So a municipality authorized to erect works for lighting purposes and to condemn property therefor, may, it has been held, condemn property outside the corporate limits for such purpose, notwithstanding the statute makes no provision for condemnation for lighting purposes outside the corporate limits, but does provide that waterworks may be acquired within or "without" the corporate limits.⁷²

power without restraint to the corporate limits. In most cases the power of condemnation, if so limited, would be worthless. It does seem unreasonable to say that these statutes taken together must be construed to limit the power of the municipality in the maintenance of waterworks to the municipal boundary. We have to insert such a limitation into the statute by judicial construction, and that too against public utility, and thus cramp the powers of municipalities in the discharge of essential functions. Such a construction would be against public policy. It would be ruinous to towns and cities." Per Justice

Brannon in *White v. Romney* (W. Va., 1911), 73 S. E. 323.

70. See *Helm v. Grayville*, 224 Ill. 274, 79 N. E. 689, holding, under particular statutes, that city could condemn ferry landing beyond its corporate limits.

A statute authorizing condemnation proceedings to straighten the channel of a stream was held not limited to the side of the stream within the corporate limits. *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215.

71. *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238.

72. *State ex rel. v. Superior Court of King County*, 35 Wash. 303, 77 Pac. 382.

On the other hand, if a municipality cannot purchase lands outside the corporate limits it cannot ordinarily condemn property outside such limits.⁷³

§ 1496. Property already devoted to public use.

Property which has already been condemned, or acquired in any other way, and devoted to a public use, may nevertheless be condemned by a municipal corporation where the legislative authority to condemn such property is conferred expressly or by necessary implication.⁷⁴ Furthermore, the legislature cannot, even by specific enactment, clothe the property of a corporation with exemption from subsequently authorized condemnation.⁷⁵ So a municipality to whom the power of eminent domain has been delegated cannot lawfully contract that the power will not be exercised in a particular manner.⁷⁶

73. Under a statutory provision that municipalities "authorized to take or hold land or property outside of their corporate limits * * * may take private property therefor," a municipality not so authorized cannot condemn lands outside the corporate limits. *Houghton v. Huron Copper Min. Co.*, 57 Mich. 547, 24 N. W. 820.

Power to acquire property outside corporate limits in general, see § 1108 *ante*, vol. 3.

74. Property acquired by contract. "As to property actually devoted to public use by a corporation having the power of eminent domain, there is probably no distinction between such as has been acquired by contract and such as has been acquired by condemnation." Lewis, *Eminent Domain* (3d Ed.), § 443.

But property voluntarily devoted to public use by individuals

and corporations, the use being one which may be discontinued at the pleasure of the owner, is subject to condemnation under a general power the same as if devoted to private uses. Lewis, *Eminent Domain* (3rd Ed.), § 445.

75. Nichols, *Eminent Domain*, § 325.

76. *Re First St.*, 66 Mich. 42, 33 N. W. 15; Nichols, *Eminent Domain*, § 326.

Where there is a necessity for subjecting land devoted to a public use to some other public service, it may be condemned, and there is a reasonable necessity for the taking where the public interest will be better subserved thereby or advantages to the condemnor will largely exceed the disadvantages to the condemnee. *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

In considering whether the right exists to condemn property already devoted to a public use, it is often important to determine whether the second use is consistent or inconsistent with the first use. If it is consistent with the first use, then general power to condemn for the particular purpose will ordinarily be held sufficient to authorize the condemnation of property already devoted to a public use, notwithstanding there is no provision expressly or by necessary implication authorizing the condemnation of property already devoted to a public use. On the other hand, if the second use is not consistent with the prior use, general authority to condemn is not sufficient.⁷⁷ In other words, it is well settled that the power to take property for a second public use, when such an appropriation will supersede or destroy the first use, must be conferred expressly or by necessary implication.⁷⁸

77. The general rule is that property already devoted to a public use cannot be taken and appropriated to another and *different* use unless the legislative intent to so take it has been manifested in express terms or by necessary implication. *Moline v. Greene*, 252 Ill. 475, 96 N. E. 911.

78. *Albia v. Chicago, B. & Q. R. Co.*, 102 Iowa 624, 71 N. W. 541.

Property which has once been appropriated to a public use by a private corporation or other person cannot be condemned by a municipality for inconsistent public uses, unless such second appropriation is expressly or by necessary implication authorized by statutes. *Terre Haute v. Evansville & T. H. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189.

Lands already taken by condemnation or acquired by purchase for public use should not

be taken for another public use unless the reasons therefor are special, unusual, and peculiar. For this reason it has been frequently held that, where lands have once been taken or acquired for public use, they cannot be taken for another public use, at least if such other public use would interfere with or destroy the public use first acquired, unless the intention of the legislature that such lands should be so taken is shown by express terms or necessary implication. *New York Cent. & H. R. R. Co. v. Buffalo*, 200 N. Y. 113, 93 N. E. 520, 521.

Streets. The general rule is that a street cannot be opened over property already devoted to a public use under mere general power to open or change streets unless both uses of the land may reasonably exist together. *Augusta v. Georgia R. & B. Co.*, 98 Ga. 161,

The rule then being that property already devoted to a public use cannot be taken for another public use, at least if such use is an inconsistent one, without legislative authority expressly given or "necessarily implied," it becomes important to determine, if possible, when authority can be considered to be *necessarily implied*. It has been held that such implication arises only from the language of the act, or from a state of facts showing such taking to be necessary in order to enjoy beneficially and to exercise efficiently the rights and privileges granted; and then the taking can be only to the extent of the necessity, and that necessity must arise from the nature of things over which the corporation desiring to take has no control, and not from a necessity created by such corporation for its convenience or economy.⁷⁹ To illustrate, statutory authority to lay out and improve streets and to take private property for the purpose of local improvements does not, by implication, confer authority to condemn public library land for widening a street, since the first use will be destroyed.⁸⁰ So it has

26 S. E. 499. Rule applied to street running through a cemetery. *Evergreen Cemetery Ass'n v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643.

Railroad land. It is well settled that land once appropriated to a public use by a railroad company cannot be condemned by a municipality for inconsistent public uses unless the statute expressly or by necessary implication authorizes such second appropriation. *Terre Haute v. Evansville & T. H. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189.

79. *Rutland-Canadian R. Co. v. Central Vermont R. Co.*, 72 Vt. 128, 133, 47 Atl. 399.

In order for the implication to arise from a general grant of

power, the face of the act must show it, or it must appear from the application of it to the particular subject matter that some special object sought to be attained by the exercise of the power granted cannot be attained in any other place nor in any other manner. *Re Buffalo*, 68 N. Y. 175.

80. *Moline v. Greene*, 252 Ill. 475, 96 N. E. 911, where it was said: "Cases are cited by appellant from other jurisdictions, where a general grant of power to take property has been construed to authorize an appropriation of property devoted to a public use to another use, when it does not essentially interfere with the public use to which the property is already devoted. But those cases,

been held that statutory power to condemn for a park does not authorize the taking of railroad lands where such intention is not plainly manifested.⁸¹

Furthermore, in some jurisdictions, it is expressly provided by statute that the second taking must be for a "more necessary public use."⁸²

On the other hand, if a statute or charter provision expressly or by necessary implication authorizes the condemnation of property for an *inconsistent public pur-*

we think, can have no application to this case, for the reason that it is proposed to take the land from the library and devote it to a use that will prohibit the library hereafter from any use of or control over it. Appellant argues that taking ten feet of land will not destroy the library; that it will still have sufficient ground for carrying out the purposes for which it was established. The case must be controlled by legal principles, and not by considering the practical effect of allowing the taking of the land in this particular case. If it is held appellant has authority to take part of the property, it would necessarily require holding that all of the property could be taken by virtue of the same authority, if that were sought to be done. Our conclusion upon this branch of the case is that *no* authority exists in appellant to take the property of the library for the purpose of devoting it to a public street."

81. *Boston & A. R. Co. v. Cambridge*, 166 Mass. 224, 44 N. E. 140; *Re Buffalo*, 25 N. Y. S. 218, 72 Hun (N. Y.) 422.

82. In California, statute providing that, where property is

already appropriated to some public use, it cannot be taken for another public use unless the latter is a more necessary public use, is not applicable to proceedings to condemn a highway for a right of way for a sewer, inasmuch as the second use will not disturb the first. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

In Montana, under a statute providing that before property can be taken it must appear, if it is already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. Water appropriated for irrigation purposes may be condemned for a city water supply only where it is shown that such use is more necessary than the present use. *Helena v. Rogan*, 26 Mont. 452, 68 Pac. 798.

"More necessary public use." Where statute authorizes condemnation of land of municipality for a "more necessary public use," the land of an abutter subject to an easement for a highway may be taken for a dam and reservoir, by a water company. *Marin County Water Co. v. Marin County*, 145 Cal. 586, 79 Pac. 282.

pose, such provision is valid and may be acted upon. Thus, an act empowering a city to acquire by eminent domain all wharf property within its limits is sufficient to enable the city to condemn wharf property owned by a railroad and a gas company and actually occupied by them for public use.⁸³

§ 1497. Same—what are inconsistent uses.

The question as to what are inconsistent uses does not appear to be susceptible of a precise answer.⁸⁴ The question whether the interference with the prior use or the inconsistency between the uses will arise is not to be settled with reference to every possible manner in which the land may be used, for the purpose for which it had been acquired, but with a reasonable regard to the way in which it would *naturally and reasonably* be used in putting it to that purpose.⁸⁵

A municipality authorized to condemn land for public use for a sewer may condemn land occupied by railroad tracks, the uses not being inconsistent.⁸⁶ So the use of land by a town for laying water pipes is not inconsistent with the use of the same land by a city for the laying of its water pipes, there being no material interference between such uses.⁸⁷

Whether a municipality may condemn *railroad lands for a park* depends on the terms of the particular statute and how far such condemnation will interfere with

83. Re New York, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825.

84. Railroad land for canal. Under general authority to take land for a canal, city cannot take strip sixty feet wide and two miles long, already devoted to use for main tracks, side tracks, and general yard purposes. Re Buffalo, 68 N. Y. 167.

Water pipes of municipality may be laid through lands of

water company. Re Rochester Water Com'rs, 66 N. Y. 413.

85. Boston v. Brookline, 156 Mass. 172, 30 N. E. 611.

86. Re Gloversville, 87 N. Y. S. 612, 42 Misc. Rep. 559; Northern Ohio R. Co. v. Hancock County, 63 Ohio St. 32, 57 N. E. 1023. See also Lake Erie & W. R. R. Co. v. Board of Com'rs, 57 Fed. 945.

87. Boston v. Brookline, 156 Mass. 172, 30 N. E. 611.

the use of the property for railroad purposes. Ordinarily the two uses are inconsistent, within the rule that in such cases the property of the railroad company cannot be condemned, without express or necessarily implied authority.⁸⁸

§ 1498. Same—taking property for same use.

A municipality may be authorized to take the property of a private corporation, acquired by condemnation or otherwise, and devoted to a public use, to be used for the same purpose in the same manner,⁸⁹ and while in at least one case the use was held different because the municipal use was to be free,⁹⁰ yet in a later decision of the Supreme Court of the United States where it was held that a municipality could condemn the franchise and property of a water supply company, for a municipal water supply, the power to condemn was held unaffected by the question whether the municipality made the supply of water free to all individuals who desired to use it.⁹¹

§ 1499. Same—property not actually devoted to public uses.

The land or other property of an individual or corporation, including that belonging to municipal corporations, where not used or necessary to a public purpose, may be taken for a public use, without regard to whether

88. See *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 510, 28 N. E. 525; *Re Buffalo*, 25 N. Y. S. 218, 72 Hun (N. Y.) 422; *Re New York*, 5 N. Y. S. 463, 51 Hun (N. Y.) 416; *Re Central Park*, 63 Barb. (N. Y.) 282.

89. For instance, a municipality may condemn property and franchise of a water supply company in order to better subserve the public use. *Re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R.

A. 270; *Brady v. Atlantic City*, 53 N. J. Eq. 440, 32 Atl. 271. But see *dicta* in *New Haven Water Co. v. Wallingford Borough*, 72 Conn. 293, 44 Atl. 235.

90. *West River Bridge Co. v. Dix*, 6 How (47 U. S.) 507, 12 L. Ed. 535, where toll-bridge was condemned for a public highway.

91. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165.

such property has itself been obtained by the owner by condemnation proceedings.⁹² Thus, the property of a steamboat company, used for land and dock purposes, is not devoted to a public use within the rule as to condemning property already devoted to a public use, where the ownership or possession of such property is not essential to the operation of the boats, and especially where it is in fact owned jointly by the company and an individual.⁹³

§ 1500. Same—application of rule to railroad property.

In determining the application of the rules already set forth as to the right to condemn property already devoted to a public use, to condemnation of railroad property, the authorities are, for the most part, harmonious. In the first place, if a municipality merely seeks to extend a street over a railroad right of way at a point where there are no buildings or structures or yards, it is well settled that the use is a consistent one and that the general power to condemn land for streets is suffi-

92. *Re Rochester Water Com'rs*, 66 N. Y. 413.

"Land held by a corporation, whether acquired by purchase or appropriation, which is not employed in, nor needed for, the proper exercise of its corporate franchises, is not within the reason or operation of the rule" that property already appropriated to a public use cannot be taken for a second use wholly defeating or superseding the former use, unless the power to make such second appropriation is given expressly or by necessary implication by statute. *Cincinnati S. & C. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. 464.

Land held by a railroad company for purposes for which it is

not by law authorized to condemn private property, may be condemned by city for wharf. *Iron R. Co. v. Ironton*, 19 Ohio St. 299.

"It seems to be the universal rule that property, although previously condemned or purchased for a public use, but which never has been put to such use, or has ceased to be so used, is subject to condemnation the same as property of a private individual." Note in 24 L. R. A. (N. S.) 383.

Property not used as a street, although dedicated as a street, held subject to condemnation. *State v. Superior Court of King County*, 30 Wash. 219, 70 Pac. 484.

93. *Diamond Jo Line Steamers v. Davenport*, 114 Iowa 432, 87 N. W. 399, 54 L. R. A. 859.

cient to authorize the condemnation of so much of the right of way as is necessary for a crossing.⁹⁴

On the other hand, if the extension of a street across a railroad track will preclude the railroad from using its tracks, or the two uses cannot coexist, or the use by the railroad company will be materially impaired or destroyed, a municipality cannot extend a street across railroad property in the absence of express statutory authority or authority derived from necessary implication.⁹⁵

94. Mere general power to condemn land for a street is sufficient to authorize the construction of a street across a railway. *Lake Erie & W. R. Co. v. Kokomo*, 130 Ind. 224, 29 N. E. 780; *Cicero v. Lake Erie & W. R. Co.* (Ind. App. 1912), 97 N. E. 389; *Louisville & N. R. Co. v. Louisville*, 131 Ky. 108, 114 S. W. 743.

Power to condemn property for streets and for changing street lines authorizes exercise of eminent domain to extend a street over a railroad right of way. *Poulan v. Atlantic Coast Line R. Co.*, 123 Ga. 605, 51 S. E. 657.

General authority to lay out highways and streets is sufficient to authorize the laying out or extension of a street across the right of way of a railroad and it makes no difference that the railroad owns its right of way in fee. *Lewis*, *Eminent Domain* (3d Ed.), § 417.

The rule that railroad lands devoted to a public use cannot be taken for another public use without special authority from the legislature applies only where it is sought to deprive a person or corporation to which the first public use is granted of the substantial

use of the property, and it follows that an easement may be acquired in such property when it may be enjoyed without interfering with the use to which the lands are devoted. *Re Folts Street in Herkimer*, 46 N. Y. S. 43, 18 App. Div. 568.

"It was, and is, clearly within the power of a city to lay out, establish, condemn or acquire a street to cross a right of way of an existing railroad company. The street thus acquired is subject to the paramount right of the existing railroad company, but the two uses of the land, for, first, a railroad right of way, and second, for street purposes, are consistent, compatible and legal uses." *St. Louis & Suburban Railway Co. v. Lindell Railway Co.*, 190 Mo. 246, 254, 88 S. W. 634.

A right of way for a boulevard may be condemned across railroad tracks, under statute relating to boulevards of Detroit. *Commissioners of Parks and Boulevards v. Mich. Cent. R. Co.*, 90 Mich. 385, 51 N. W. 447.

95. *Ft. Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. Rep. 277; *Cincinnati, Wabash*

However, where there is express statutory authority or the right exists by necessary implication, a municipality may condemn railroad lands for a street, although such use will be inconsistent with the use made by the railroad company.⁹⁶ On the same theory, where no special provision is made by statute for taking the land of a railroad company, a municipality cannot condemn for a street a strip of land on which the tracks of the railroad company were laid longitudinally.⁹⁷

& *Michigan R. Co. v. Anderson*, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285.

The stricter rule that if the second use will destroy the first use or render its exercise so extremely inconvenient and hazardous as practically to destroy its value, the power must be expressly conferred, and cannot be conferred by necessary implication, seems to be laid down in some cases (*Augusta v. Georgia Railroad & Banking Co.*, 98 Ga. 161, 26 S. E. 499; *Louisville & N. R. Co. v. Louisville*, 131 Ky. 108, 114 S. W. 743, but it is submitted that the better rule is as stated above.

96. *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485; *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530, holding that statute authorized extension of street across railroad yard; *Chicago & N. W. R. Co. v. Chicago*, 151 Ill. 348, 37 N. E. 842.

Under a statute providing that municipalities may condemn the right of way or other lands of any railroad company passing through a municipality for street or alley purposes "whether such land be

occupied and used or not," a municipality may open a street across a freight yard and railroad tracks of a railroad company, notwithstanding the second use is inconsistent with the prior use. *Terre Haute v. Evansville & T. H. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189.

In *Connecticut*, under charter power to take "any property or property rights" needed for extending any street, the city may condemn land for the purpose of extending a street across a railroad and through its station building. *New York, N. H. & H. R. Co. v. New Haven*, 81 Conn. 581, 71 Atl. 780.

97. *Ft. Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. Rep. 277; *New Jersey Southern R. Co. v. Long Branch*, 39 N. J. L. 28.

A city cannot lay out a street longitudinally over waters and tow path of a chartered canal company. *Hyde v. Newark*, 28 N. J. L. 529.

A highway cannot be laid out longitudinally over a turnpike road. *West Boston Bridge Co. v.*

So the general rule is well settled that a mere naked grant of the power to condemn land for streets is wholly insufficient, where no special provision is made for taking the lands of a railroad company, to authorize the condemnation for street purposes of property used by a railroad company for station grounds, shops and the like.⁹⁸ The reasons supporting this rule as advanced by

Middlesex County Commissioners, 10 Pick. (Mass.) 270.

Longitudinal right of way. General power to condemn property for a street does not confer power to condemn a part of the right of way of a railroad for a street to be laid out longitudinally along the track, where it will oust the railroad company of its right of way. *Portland R. L. & P. Co. v. Portland*, 181 Fed. 632.

98. *Indiana*. *Valparaiso v. Chicago & G. T. R. Co.*, 123 Ind. 467, 24 N. E. 249; *Seymour v. Jeffersonville, M. & I. R. Co.*, 126 Ind. 466, 26 N. E. 188.

Minnesota. *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684.

New Jersey. *State v. Paterson*, 61 N. J. L. 408, 39 Atl. 680; *Paterson & R. R. Co. v. Paterson*, 72 N. J. L. 112, 60 Atl. 47, aff'g 68 Atl. 76.

New York. *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552; *Re Walden*, 14 N. Y. St. Rep. 590.

Ohio. *Bellaire & O. R. Co. v. Bellaire*, 7 Ohio Dec. 607.

South Dakota. *Winona & St. P. R. Co. v. Watertown*, 4 S. D. 323, 56 N. W. 1077.

Virginia. *Richmond, F. & P. R.*

Co. v. Johnston, 103 Va. 456, 49 S. E. 496.

Depot grounds, shops, yards, etc. General statutory authority in a charter cannot be presumed to authorize the taking of land already lawfully appropriated and needed as a site for a depot and its necessary appendages or carshops, etc., or land within the lines of the location of the railroad and parallel with the track, for the purposes of a street or highway, for the reason that it has already been set apart for a specific public use under the sanction of law, and it cannot, therefore, be diverted to another public purpose, except the power be expressly given or necessarily implied. And there can ordinarily be no necessary implication of the existence of such authority from the grant of a general statutory power to lay out streets, because there is ample authority to appropriate other lands, and especially where, the public necessity for the particular street is not demonstrated. *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684, 686; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Boston & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 373; *Bridgeport v. N. Y. & N. H. R. Co.*, 36 Conn. 265.

the courts, sufficiently appear from the numerous judicial decisions set forth in the notes.

If there is no statute authorizing a municipality to take or appropriate land already appropriated for a public use and apply it to another and inconsistent public use, a municipality cannot condemn land over a railroad right of way, or depot grounds, where the opening of the street will destroy or essentially impair the use of the right of way and depot grounds for railroad purposes. *Minneapolis & St. L. R. Co. v. Hartland*, 85 Minn. 76, 88 N. W. 423, holding that whether the destruction or impairment of the use is a legislative question or only an ordinary question of fact to be determined in the usual way, the determination thereof by the municipality is conclusive, and the verdict on appeal from their determination should not be set aside by the supreme court unless the evidence is practically conclusive against the result reached.

Where it is sought to lay out and open a street over and across property already appropriated and necessary to a public use, such as the depot platform, yards, station grounds, side and passing tracks of the railway company at its station, under the general power of eminent domain, and such taking will destroy and render useless such property for the public purpose to which it is dedicated, the courts may examine into the necessity of such re-appropriation, and will not uphold it unless there is express or necessarily implied authority conferred on the

municipality. *Chicago, R. I. & P. R. Co. v. Williams*, 148 Fed. 442, 449.

Shops. Land occupied by railroad company for shops. *Atlanta v. Central R. & B. Co.*, 53 Ga. 120.

Engine house. A highway cannot be laid out over grounds acquired by a railroad corporation for the site of an engine house and necessary for its use at a station. *Albany Northern Railroad Co. v. Brownell*, 24 N. Y. 345.

Yards. A street cannot be laid out across the tracks of a railroad used for storing cars or exclusively for making up trains (*Boston & A. R. Co. v. Greenbush*, 52 N. Y. 510), but a street may be laid across railroad property some five rods in width covered by four railroad tracks, two of which are main tracks of the railroad, for the passing of cars, and two of which are extra tracks extending several hundred feet both to the north and the south of the proposed street crossing and are used, in connection with others, for switching cars, making up trains, and for allowing cars to stand upon them until they can be put into trains about to depart, such property being more like a yard for the transfer of cars, than depot grounds, since "to hold otherwise would enable a railroad company, by judicious adjustment of switch, turn-outs, turn tables, water tanks, and other accessories of its roadway or business, so to control its whole way as to exclude

On the other hand, it has been adjudged properly that a street may be condemned across lengthy and unimportant extensions of depot grounds, such as tracks used for storing cars and the like.⁹⁹

new streets or highway crossings at any point along its lines." *Delaware & H. Canal Co. v. Whitehall*, 90 N. Y. 21.

In Illinois, however, it is held to be a question of fact, whether the laying out of a street crossing on the grounds of a railroad company would so materially interfere with the particular and necessary use thereof by the company as to be inconsistent with it, so that both uses could not exist, and it has been held that the fact that the company would be put to some inconvenience by the opening of the street, and would have to rebuild part of its platforms and remove a certain structure, does not preclude condemnation where it would suffer no diminution in its business nor would any additional force of men be necessary. *Chicago & N. W. R. Co. v. Morrison*, 195 Ill. 271, 63 N. E. 96.

In New York, where the charter of a city provided that no street not laid out before a certain date should be constructed through or upon the depot or station grounds of any railroad within certain wards, the charter provision was construed as a clear recognition of right in the city in respect to the streets laid out before such date to open them through depot or station grounds. *Re Alexander Avenue*, 17 N. Y. S. 933, 63 Hun (N. Y.) 630.

In Iowa, it is said that "the general rule seems to be that, if

the use of the proposed street is not inconsistent with the continuing use by the railway company of its depot grounds for proper purposes, the power of the city to condemn a right of way for street purposes is not excluded (*Minneapolis & St. L. R. Co. v. Hartland*, 85 Minn. 76, 88 N. W. 423; *Battle Creek & S. R. Co.*, 99 Mich. 471, 58 N. W. 617), even though it may be necessary for the railway company to make slight changes in its tracks or other appurtenances. *Fohl v. Sleepy Eye Lake*, 80 Minn. 67, 82 N. W. 1097; *Chicago & N. W. R. Co. v. City of Morrison*, 195 Ill. 271, 63 N. E. 96." *Chicago, G. W. R. Co. v. Mason City (Iowa)*, 1912), 135 N. W. 9.

Where a railroad has no freight depot in village, and side track is used for loading and unloading freight because no other property suitable for freight depot can be obtained, laying out of street cannot be said, as matter of law, not to affect railroad use of land. *Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574.

99. In Michigan, it is held that highway commissioners, under a statute authorizing them to lay out highways across railroads, may lay out a highway across railroad tracks where not interfering with any structure more permanent than cattleyards, and not requiring the removal of buildings or subjecting the railroad

So it has been held that a municipality may condemn land of a railroad company for a street although it would destroy a section house on the right of way, where such house was not necessary for the operation of the railroad and required no particular location either on or off its right of way, and a railroad company could not have condemned land for such a use.¹

§ 1501. Property of municipal corporation already devoted to public use.

Ordinarily, property of a municipal corporation held for public purposes cannot be condemned by third persons where the public use will thereby be interfered with, but if the taking does not impair or interfere with the public use and is not inconsistent therewith the property may be condemned.² Thus a *public square* in a vil-

company to any great expense or inconvenience, since the statute should be construed as affirming the power to lay highways across village depot grounds except where the concurrent use will be impossible or attended by serious inconvenience to the railroad. *Battle Creek & S. R. Co. v. Tiffany*, 99 Mich. 471, 58 N. W. 617.

In *Indiana*, it has been held that if the extension of a street across the yard of a railroad company would necessitate the removal of a turn-table, water tank, engine house and coal dock property cannot be condemned for such purpose notwithstanding such structures could be rebuilt and placed on other land of the railroad nearby, without inconvenience. *Cincinnati, W. & M. R. Co. v. Anderson*, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285.

1. *Illinois Cent. R. Co. v. Normal*, 175 Ill. 562, 51 N. E. 781.

2. *Jersey City v. Montclair R. Co.*, 35 N. J. L. 328; *Re Southwestern State Normal School*, 213 Pa. 244, 62 Atl. 908.

Authority to construct water-works held not authority to occupy part of a street for a reservoir. *Ex parte Manhattan Co.*, 22 Wend. (N. Y.) 653.

Railroad through park is not authorized under general authority to condemn property. *Re Boston & A. R. Co.*, 53 N. Y. 574; *Re Milwaukee S. R. Co.*, 124 Wis. 490, 102 N. W. 401.

Electric power company may condemn land of a village on which its water works and electric light plant are located, in order to build a dam of a specified height to obtain electric power, where necessary therefor. *Kilbourn City v. Southern Wisconsin Power Co.* (Wis., 1912), 135 N. W. 499.

lage cannot be condemned for a school-house site,³ or for a railroad track.⁴ So land used for a public street cannot be condemned by a railroad company unless expressly provided for by statute;⁵ but the legislature may authorize a private or other corporation to condemn such property.⁶

A railroad company authorized to construct a railroad between certain termini has no authority to appropriate a highway longitudinally but the right to *cross* highways is given by necessary implication.⁷

A strip off school lands may be condemned for a street where the remainder will be benefited.⁸

§ 1502. Public lands.

The power of eminent domain extends only to the taking of *private property*, and does not authorize the taking of the property of the state, or of the subordinate municipalities through whose agency the state govern-

Post office. City may contest right of federal government to condemn park for a post office. *Re Certain Land in Lawrence*, 119 Fed. 453.

Normal school corporation cannot condemn streets intersecting its property, under general authority to condemn. *Southwestern State Normal School*, 213 Pa. St. 244, 62 Atl. 908.

Public school property. "Lands and buildings in actual use for public schools cannot be taken for other public uses under a general authority." *Lewis, Eminent Domain* (3d Ed.), § 435.

3. *McCullough v. Board of Education*, 51 Cal. 418.

4. *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540.

5. *Cornwall v. Louisville & N. R. Co.*, 87 Ky. 72, 7 S. W. 553.

A railroad company cannot acquire by eminent domain the exclusive right to use half of a street for a double track railway, since land already devoted to a public use cannot be condemned by such a corporation. *State ex rel. v. Spokane County*, 62 Wash. 96, 113 Pac. 576.

6. *Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa 455; *Lexington & O. R. Co. v. Applegate*, 38 Ky. (8 Dana) 289, 33 Am. Dec. 497; *Re New York Cent. & H. R. R. Co.*, 77 N. Y. 248; *Millvale Borough v. Evergreen R. Co.*, 131 Pa. St. 1, 18 Atl. 993.

7. *Lewis, Eminent Domain* (3d Ed.), § 430.

8. *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25.

ment is administered, by the exercise of the right of eminent domain.⁹

A municipality cannot condemn land belonging to the federal government,¹⁰ nor land belonging to the state,¹¹ nor other public land, unless expressly authorized by statute.¹² But under a municipal charter authorizing the condemnation of the property of corporations, a board of public works of a city has been held empowered to condemn for a street land owned by the city.¹³

§ 1503. Exemptions.

Statutes or charter provisions sometimes exempt certain property from condemnation and, of course, under such circumstances, a municipality has no more power to condemn such property than any other corporation or person, unless excepted from the operation of the statute.¹⁴ For example, statutes frequently prohibit

9. *Edwardsville v. Madison County*, 251 Ill. 265, 96 N. E. 238, holding that property of a county, such as a poor farm, although located within the corporate limits of a city, cannot be condemned by the city.

10. *United States v. Chicago*, 7 How. (48 U. S.) 185, 12 L. Ed. 660.

11. *Atlanta v. Central Railroad & Banking Co.*, 53 Ga. 120; *Re Utica*, 26 N. Y. S. 564, 73 Hun (N. Y.) 256.

State lands cannot be condemned by a private corporation unless there is a permissive statute. *State ex rel. v. District Court, Sanders County*, 42 Mont. 105, 112 Pac. 706.

School lands owned by state cannot be condemned for a county road, in Nebraska. *State v. Boone County*, 78 Neb. 271, 110 N. W. 629, 15 Am. & Eng. Ann. Cas. 487.

12. *Re Alexandria Avenue*, 17

N. Y. S. 933, 63 Hun (N. Y.) 630; *Re Utica*, 26 N. Y. S. 564, 73 Hun (N. Y.) 256.

Statutes in some states authorize cities to condemn state, county and school lands, for streets. *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25, holding statute not unconstitutional because it authorized condemnation of lands granted to state for school purposes by United States.

13. *State v. District Court of Ramsey County*, 77 Minn. 248, 79 N. W. 971.

14. *Water supply*. In some jurisdictions property held by a municipality for the purposes of a water supply is exempted from condemnation by express statutory provision. *Florhan Park v. Madison*, 77 N. J. L. 260, 78 Atl. 753.

Statute held not applicable to proceedings to widen a street. *Shreveport v. Noel*, 114 La. 187, 38 So. 137.

the taking of certain buildings and enclosures, for rights of way, including gardens, orchards, etc.¹⁵ So statutes sometimes expressly provide that no street shall be laid through a *cemetery*, without the consent of the trustees thereof, unless the legislature expressly permits such use.¹⁶

5. DISCONTINUANCE OF PROCEEDINGS.

§ 1504. Right to discontinue proceedings.

In order to determine whether a municipality may discontinue or abandon condemnation proceedings, resort should first be had to the statutes and charter to

15. Lewis, *Eminent Domain* (3d Ed.), § 455 *et seq.*

Orchards. Statutes prohibiting highway from being laid through orchard. *Snyder v. Plass*, 28 N. Y. 465; *Seymour v. State*, 19 Wis. 240.

Garden. Statute prohibiting laying out highway through a garden. *People v. Greenburgh*, 57 N. Y. 549; *Seymour v. State*, 19 Wis. 240.

Mill yards. Statute prohibiting laying out of public road through mill yards. *People v. Kingman*, 24 N. Y. 559.

Demolishing buildings. Statute forbidding pulling down of public buildings and dwelling houses to alter or widen a public highway. *Pancoast v. Troth*, 34 N. J. L. 377; *Philadelphia v. Johnson*, 11 Phila. 197.

Statute forbidding highway to be laid without consent of owner through any "buildings or fixture" of owner, held not to apply to cow stables, wagon shed, and chicken

house. *Smart v. Hart*, 75 Wis. 471, 44 N. W. 514.

16. *Re Opening of Mt. Vernon Ave.*, 49 N. Y. S. 531, 23 App. Div. 518.

Exempting cemetery from condemnation is exercise of legislative discretion so that such property cannot be condemned until a repeal of the statute. *Hyde Park v. Oakwood's Cemetery Ass'n*, 119 Ill. 141, 7 N. E. 627.

In Michigan, statute held to exempt cemeteries only as relating to condemnation proceedings under general law. *Woodmere Cemetery v. Roulo*, 104 Mich. 595, 62 N. W. 1010.

Ornamental part of cemetery held exempt. *Evergreen Cemetery Ass'n v. New Haven*, 43 Conn. 234, 21 Am. St. Rep. 643.

In Minnesota, statute forbids the condemnation of any part of a cemetery for street purposes. *State ex rel. v. District Court of Ramsey County*, 114 Minn. 287, 131 N. W. 327.

ascertain if there are any provisions in regard thereto,¹⁷ since if there is such a provision it governs both as the time when, and the conditions under which, the proceedings may be discontinued. If there is no statutory or charter provision, the general rule is that a municipality may dismiss condemnation proceedings,¹⁸ at any time before title passes,¹⁹ and that if the title does not pass

17. See *Walsh v. Board of Education of Newark*, 73 N. J. L. 643, 64 Atl. 1088, holding that statute authorizing abandonment within twenty days after filing of report of commissioners is not applicable merely to cases where no appeal is taken from the report and award of commissioners.

In Washington, by statute, city may dismiss within two months from a condemnation judgment. *State v. Humes*, 34 Wash. 347, 75 Pac. 348.

18. *Kelly v. Waterbury*, 83 Conn. 270, 76 Atl. 467; *Ford v. Park Com. of Des Moines*, 148 Iowa 1, 126 N. W. 1030; *Evanston v. Knox*, 241 Ill. 460, 89 N. E. 670.

Resolution of abandonment held not qualified by subsequent resolution adopted at same meeting, instituting proceedings anew for condemning the same property for the same purpose. *State ex rel. v. Minneapolis*, 40 Minn. 483, 42 N. W. 355.

19. *District of Columbia v. Hess*, 35 App. (D. C.) 38, 28 L. R. A. (N. S.) 91. See *Re Franklin St.*, 14 Pa. Super. Ct. 403.

Cannot dismiss after paying damages and taking possession. *Shannahan v. Waterbury*, 63 Conn. 420, 28 Atl. 611.

"It has long been the rule in this state, and is the general rule

elsewhere, that, in the absence of statutory regulations to the contrary, a municipal corporation has the right to discontinue proceedings for condemning property for public uses, and to abandon such public improvements at any time before a final award, in the nature of a judgment, in favor of the property-owners for their compensation, is made." *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38; *Kansas City v. Kansas City & Ft. Scott Railroad*, 189 Mo. 245, 258, 88 S. W. 45.

In *Sylvester v. St. Louis*, 164 Mo. 601, *Burgess, J.*, fully reviews all the authorities and concludes with the full recognition of the right of the city, at any time before any property rights are vested, to abandon or discontinue the proceeding to open a public street.

Where there is no statutory or charter authority to abandon condemnation proceedings once commenced, and none can be implied, a municipality cannot abandon such proceedings and escape liability for compensation after the proceedings have been carried so far as to invest the owner of land condemned with the unconditional right to a certain compensation for it. *Bohannon v. Stamford*, 80 Conn. 107, 67 Atl. 372.

prior to confirmation or judgment, the proceedings may be dismissed even after the return of an award or verdict.²⁰

20. Dismissal may be after award or verdict.

Illinois. Chicago v. Goodwille, 208 Ill. 252, 70 N. E. 228.

Iowa. See State v. Keokuk, 9 Iowa 438.

Louisiana. Re New Orleans, 4 Rob. (La.) 357.

Missouri. Simpson v. Kansas City, 111 Mo. 237, 20 S. W. 38; State v. Hug, 44 Mo. 116.

New Jersey. O'Neill v. Hudson County Freeholders, 41 N. J. L. 161; Re Water Com'rs, 31 N. J. L. 72.

New York. Re Commissioners of Washington Park, 56 N. Y. 144; Re Military Parade Ground, 60 N. Y. 319.

Pennsylvania. Re Waynesboro School Dist., 1 Pa. Co. Ct. R. 422.

What is a confirmation. "The only provisions of the statute (Sp. Laws, 1889, c. 401, as amended by Sp. Laws, 1891, c. 54), which are here material are as follows: 'The court shall have power to revise, correct, amend or confirm said appraisement in whole or in part or may order a new appraisement.' 'The board (of park commissioners) shall have the right at any time before the final confirmation of said report (of the appraisers) to dismiss and withdraw said proceedings upon payment of the costs thereof.' It is undoubtedly true that where, as in this case, the court amends the report of the appraisers by increasing the award as to a particular lot or tract proposed to be taken, it re-

quires no other or further order of the court as to such lot or tract.

But this is not, as to such lot or tract, a confirmation, within the meaning of the clause fixing the time within which the board may dismiss or withdraw the proceedings. The main object of that clause is to give the board the right to withdraw in case the amount which they will have to pay for the property is more than public interests will justify. The increase of the award by the court may be the very thing that would justify and require that the proceedings as to such tract should be withdrawn; and if the order increasing the award is a confirmation of the report of the appraisers, within the meaning of the statute, the board would be absolutely without power to withdraw the proceedings after the cause of withdrawal came into existence. Any such construction of the statute would be unreasonable. The board is entitled to at least a reasonable time within which to withdraw after the court has made its order increasing the award. Nor can the board be deprived of this right by the court instantly after increasing the award making another order 'confirming' the report as thus amended. Where, for any cause, the board deems proper to do so, they may withdraw the proceedings as to one lot or tract, and allow them to stand as to the other property included. The statute never con-

So it has been held that condemnation proceedings may be discontinued as to merely a part of the property.²¹

On the other hand, after the assessment of damages has been confirmed and judgment entered it is held in many jurisdictions that the proceedings cannot be discontinued,²² but in other jurisdictions it is held that no step prior to actual payment or tender precludes the right to discontinue;²³ and it is said by an eminent writer on the law of eminent domain that "the weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded."²⁴

templated that, if the board concluded that the public interests did not justify the taking of one tract originally included in the proceedings, they must either take it or abandon the proceedings in toto." *Re Rogers Boulevard*, 70 Minn. 132, 72 N. W. 967, per Justice Mitchell.

If possession obtained and not surrendered after assessment of damages, cannot dismiss. *Bellingham Bay & B. C. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140.

In New York, it is well settled that proceedings to condemn land may be abandoned at any time before the confirmation of the report of the commissioners of appraisal. *Simpson v. Berkowitz*, 110 N. Y. S. 485, 59 Misc. Rep. 160; *Re Reinbeck & Conn. R. R. Co.*, 67 N. Y. 242, 245; *Re Anthony St.*, 20 Wend. (N. Y.) 618, 32 Am. Dec. 608.

See note in 28 L. R. A. (N. S.) 91 on "Right of condemning party to dismiss condemnation proceedings after award or verdict and before confirmation or judgment."

21. *Re Mt. Veron Ave. in City of New York*, 102 N. Y. S. 159, 52 Misc. Rep. 319, aff'd in 111 N. Y. S. 895, 127 App. Div. 650, which was aff'd in 193 N. Y. 658, 87 N. E. 1123 without opinion.

22. *Lafayette v. Shultz*, 44 Ind. 97, where statute was involved; *Buell v. Lockport*, 11 Barb. (N. Y.) 602; *Myers v. South Bethlehem Borough*, 149 Pa. St. 85, 24 Atl. 280.

See also *Duncan v. Louisville*, 8 Bush (71 Ky.) 98 (statute).

23. *Merrick v. Baltimore*, 43 Md. 219; *Graff v. Baltimore*, 10 Md. 544.

24. *Lewis, Eminent Domain* (3d Ed.), § 955.

By statute, in some jurisdictions, a discontinuance may be entered after a verdict on appeal "greatly" increasing or diminishing the benefits or damages.²⁵

It is held that after the amount of compensation has been fixed as a finality, by failure to appeal from the report within the statutory time, the proceedings cannot be dismissed, notwithstanding the title has not become vested in the municipality.²⁶

§ 1505. Recovery of damages after discontinuance.

If the municipality legally dismisses the condemnation proceeding, it follows that the owner of land which was condemned cannot recover the damages awarded to him,²⁷ and in such case it is immaterial that the municipality entered into temporary possession of the property.²⁸ But if a municipality unreasonably delays in abandoning condemnation proceedings after judgment—and a delay of fifteen months was held *prima facie* unreasonable—the owner may recover damages resulting

25. *Brokaw v. Terre Haute*, 97 Ind. 451, holding it immaterial that city had taken possession of land sought to be appropriated.

26. *People v. Syracuse Common Council*, 78 N. Y. 56.

27. *California*. *Lamb v. Schotler*, 54 Cal. 319.

Connecticut. *Carson v. Hartford*, 48 Conn. 68.

Illinois. *Chicago v. Hayward*, 176 Ill. 130, 52 N. E. 26.

Louisiana. *Mallard v. Lafayette*, 5 La. Ann. 112.

Maryland. *Black v. Baltimore*, 50 Md. 235, 33 Am. Rep. 320.

Missouri. *St. Joseph v. Hamilton*, 43 Mo. 282.

Compare *Daley v. St. Paul*, 7 Minn. 390.

Where bill of appropriation was vetoed by mayor, owner cannot recover damages awarded. *Sil-*

vester v. St. Louis, 164 Mo. 601, 65 S. W. 278.

Action for wrongful entry. Where there is an entry by the city on the land sought to be taken, and the proceedings are afterwards abandoned, a suit will lie for any damages caused by the entry and possession, which will be taken as tortious from the beginning. *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38. So, proof of a long unexplained and wrongful delay in, and the final dismissal of, the condemnation proceedings, with the resulting injuries, will make out a *prima facie* case in favor of the property owner. *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38.

28. *Pearce v. Chicago*, 176 Ill. 152, 52 N. E. 27, aff'g 67 Ill. App. 671.

from being unable to sell the property until it had decreased in value.²⁹ So, generally, if the owner of the land has been temporarily deprived of his property pending condemnation proceedings, they cannot be dismissed or abandoned without compensating him for his loss during the time he has been deprived of possession.³⁰

In some jurisdictions, the statute itself provides for the payment of defendant's expenses where the condemnation proceedings are dismissed by the municipality.³¹ So statutes sometimes require the payment by the municipality of the actual *damage* sustained by the landowner.³²

On the other hand, if there are no statutory provisions, it is generally held that defendant is not entitled to recover his counsel fees and expenses in defending the proceeding,³³ although the contrary rule prevails in some states,³⁴ and it is also held in some jurisdictions that the payment of such expenses may be imposed, in a proper case, as a condition to the right to dismiss.³⁵

29. *Winkelman v. Chicago*, 213 Ill. 360, 72 N. E. 1066.

30. *De Hensen v. District Court of Second Judicial District*, 11 Ariz. 379, 94 Pac. 1125.

31. *Sanitary District of Chicago v. Bernstein*, 175 Ill. 215, 51 N. E. 720; *Mellichar v. Iowa City*, 116 Iowa 390, 90 N. W. 86; *Andrews v. Hyde Park*, 20 Ohio Cir. Ct. R. 278.

In *New York*, see *Onondaga County v. White*, 77 N. Y. S. 1074, 38 Misc. Rep. 587.

In *Illinois*, statute does not apply to proceedings under local improvement act of July 1, 1897. *Rieker v. Danville*, 204 Ill. 191, 68 N. E. 403.

32. *Moravian Seminary v. Bethlehem Borough*, 153 Pa. St. 583, 26 Atl. 237.

See also *Van Valkenburgh v. Milwaukee*, 43 Wis. 574.

Indemnity must be sought in separate suit and cannot be had in the condemnation proceeding. *Drury v. Boston*, 101 Mass. 439.

33. *Winkelman v. Chicago*, 213 Ill. 360, 72 N. E. 1066; *Re New York*, 54 N. Y. S. 295, 34 App. Div. 468.

34. *Owen v. Springfield*, 83 Mo. App. 557, holding it immaterial whether dismissal voluntary or involuntary.

Cannot recover damages for voluntarily setting back building, where condemnation proceeding abandoned. *Whyte v. Kansas*, 22 Mo. App. 409.

35. *Moravian Seminary v. Bethlehem Borough*, 153 Pa. St. 586, 26 Atl. 237.

Furthermore, if proceedings are discontinued, although rightfully, the owner, if he has been damaged by the proceedings, may bring a separate suit to recover such damages, provided the acts of the municipality are *both* wrongful and injurious.³⁶

After the damages awarded have been paid, they cannot be recovered by the municipality where the condemnation proceedings are discontinued.³⁷

§ 1506. Reinstatement after discontinuance.

Where condemnation proceedings have been discontinued, the municipality cannot reinstate them as against persons who in the meantime have acquired new rights.³⁸

§ 1507. Discontinuance as bar to new proceeding.

Proceedings which have been discontinued before completion are no bar to new proceedings for the same purpose,³⁹ provided the abandonment is one in good faith and of the entire proceedings.⁴⁰

"This, however, is opposed to the current weight of authority, which is that the right to discontinue is absolute and cannot be fettered with conditions by the court. Legal costs may, of course, be imposed." Lewis, *Eminent Domain* (3d Ed.), § 957.

36. *Feiten v. Milwaukee*, 47 Wis. 494, 497, 2 N. W. 1148, where loss of rents relied on as "injury" and delay of municipality as the "wrong."

37. *Hampton v. Coffin*, 4 N. H. 517.

38. *Herkimer v. New York Cent. & H. R. R. Co.*, 51 N. Y. S. 390, 29 App. Div. 69.

39. Lewis, *Eminent Domain* (3d Ed.), § 960.

If judgment is not paid, and landowner obtains vacation of

judgment because of such failure to pay in two years, there may be a subsequent condemnation under a new ordinance; but if the judgment remains in force, although unsatisfied, it bars condemnation proceedings under a different ordinance to obtain the same property. *Pearce v. Chicago*, 169 Ill. 631, 48 N. E. 330.

A statutory abandonment by failure to pay the damages assessed, within a specified time, does not preclude the right to institute a new proceeding to condemn the same land. *Cincinnati Southern R. Trustees v. Haas*, 42 Ohio St. 239.

40. "But the abandonment contemplated by the statute, and by the authorities which we have been able to examine, is an aban-

6. COMPENSATION, RIGHT TO AND AMOUNT OF.

§ 1508. Right to Compensation.

The constitutions of all the states, as now construed, require that compensation shall be made whenever property is taken for public use,⁴¹ and the constitutions of

donment in good faith of the entire proceedings and of the land for the purpose for which it was sought. In other words, it must be a complete surrender of the project so far as the land involved is concerned. The law permitting the taking of private property for public use is arbitrary in its nature, and should always be strictly construed to protect the rights of the landowner whose land may be thus taken, whether he so wills or not. The right of abandonment implied by this statute does not, in our judgment, give the condemnor the power to abandon the award alone, or the power to abandon the entire proceeding simply for the purpose of securing another jury whose finding may be more favorable to him. If he were permitted to do this, he would be given an unfair advantage over the landowner never contemplated by the statute, and one which the courts will never sanction. If there be not such a good-faith abandonment as we have designated, it is clear that the finding of the sheriff's jury where there is no appeal, or by the trial jury in case of an appeal, is an adjudication binding upon the condemnor." *Robertson v. Hartenbower*, 120 Iowa 410, 94 N. W. 857.

Remedy. If new proceeding

instituted merely because assessment of damages is considered to be too high, owner may move to dismiss the second proceeding. *Chicago, R. I. & P. R. Co. v. Chicago*, 148 Ill. 479, 36 N. E. 72.

41. *Lewis, Eminent Domain* (3d Ed.), § 672.

Annual payments. While the statutory provisions, in regard to the mode of making compensation, must exist and be specific, it has been held that a charter provision authorizing condemnation and providing that the compensation should be paid in a gross sum or fixed at a sum to be paid annually during the use of the property by the municipality, is not objectionable, since permissive on the part of the land owner as to the latter provision, notwithstanding it would have been invalid had the latter provision stood alone. *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856.

Buildings erected after filing of map. It has been held a statutory provision that after the filing of the map of a street no compensation shall be paid for buildings erected, after such filing, on the opening of the street, was unconstitutional, on the theory that such a restriction of the use of the land is a taking of property. *Re Rogers Avenue*, 22 N. Y. S. 27, 29 Abb. N. C. 361.

many of the states also require compensation whenever private property is *damaged or injured* for public use;⁴² and the restriction imposed by such constitutional provisions applies as well where the taking or damage is at the instance of a municipal corporation as where the condemnor is a private corporation or other person.⁴³

Any statute attempting to authorize the taking of private property for public use without compensation is unconstitutional.⁴⁴ However, the constitutional provision as to compensation is not violated by requiring a part of the compensation to constitute a court fund for the payment of special tax bills issued against land before condemnation.⁴⁵ Likewise a statute authorizing condemnation of certain land for a park is not objectionable because it provides that the cost of the land shall not be in excess of a specified sum.⁴⁶

42. *Id.*

§ 1477 *ante*.

Where the constitution provides that private property shall not be taken or damaged without payment of just compensation, the legislature is powerless to confer authority on a municipality to injure private property for the public good without just compensation. *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.

43. *Illinois Central R. Co. v. State ex rel*, 94 Miss. 759, 48 So. 561.

Quasi-public property. The fact that property may be devoted to a quasi-public use and affected with a public interest, so to speak, does not authorize the taking of such property or damaging it for another public use, except upon due compensation being made to the owners thereof. *Illinois Cen-*

tral R. Co. v. State ex rel, 94 Miss. 759, 48 So. 561.

Sewer under railroad right of way. Municipality which constructs a sewer under a railroad right of way must compensate the railroad company for the damages resulting therefrom. *Baltimore v. Cowen*, 88 Md. 447, 41 Atl. 900, 71 Am. St. Rep. 433.

Flooding land. Municipality is liable, where it constructs a dam for its water supply, for the permanent flooding of land, notwithstanding the dam is authorized by the legislature. *Baltimore v. Merryman*, 86 Md. 584, 39 Atl. 98.

44. *Barron v. Memphis*, 113 Tenn. 89, 80 S. W. 832, 106 Am. St. Rep. 810.

45. *Ross v. Kendall*, 183 Mo. 338, 81 S. W. 1107.

46. *Re Rochester*, 92 N. Y. S. 405, 102 App. Div. 181.

§ 1509. Necessity for statutory provisions as to payment.

In case of private corporations, it is generally held that some provision must be made for compensation whereby the owner will certainly obtain it, and it is not sufficient that the law provides a method for ascertaining the amount of damages and imposes on the party taking the duty of making payment. But in case of condemnation by municipal corporations, the fact that there is no express provision in the statute for paying or securing the damages before the taking, or the injury, is not objectionable, since the power of taxation given to municipal corporations is adequate security to the citizen for his property which may be taken for public use, —the rule in this respect being different from cases where the party condemning is a private corporation which must pay or secure payment before the taking or injury.⁴⁷

And if the owner may recover a judgment for the amount of such compensation, and the judgment is enforceable in some effective way, the provision for compensation is sufficient.⁴⁸

47. *Lewisburg Bridge Co. v. Union Co.*, 232 Pa. 255, 81 Atl. 324.

Taxes as security. If payment does not precede the actual taking of the property, a safe and adequate fund must be provided to which the owners of the property taken may look for compensation. *State v. Several Parcels of Land*, 79 Neb. 638, 113 N. W. 248, holding that making the taxable property of the municipality liable for the judgment, to pay for property appropriated by condemnation proceedings, provides a safe and adequate fund.

See *Lewis, Eminent Domain* (3d Ed.), § 679.

A statute authorizing the exer-

cise of the power of eminent domain must provide for a certain definite and adequate source and manner of payment, and unless there is a certainty that compensation will be paid, or unless it is made a public charge, so that it may be obtained in due course through the aid of the courts without unreasonable delay, there is no adequate provision for obtaining compensation. *Re Lincoln Park*, 44 Minn. 299, 46 N. W. 355.

48. *Steenerson v. Fontaine*, 106 Minn. 225, 119 N. W. 400; *Re Walton Ave.*, 116 N. Y. S. 471, 131 App. Div. 696; *Sweet v. Rechel*, 159 U. S. 380, 40 L. Ed. 188; *Nichols, Eminent Domain*, § 264.

Furthermore, a statute or charter provision authorizing condemnation is not unconstitutional because of failure to provide a method of assessing damages where the general law supplies such method.⁴⁹ However, if the inhabitants are not liable for the municipal debts, and the judgment can only be satisfied out of a particular fund, which may prove inadequate, the provision for compensation is insufficient.⁵⁰

§ 1510. Waiver of right to compensation.

The fact that one has signed a petition for the laying out of a street or highway, or for any public improvement, does not estop him from recovering for property taken or damaged thereby.⁵¹ But an agreement by the owner to waive damages, while revocable until acted upon, constitutes an estoppel after being acted upon.⁵² And if the owner of land consents to the taking or injury to his property, he cannot thereafter recover damages because thereof.⁵³

§ 1511. Additional servitudes.

The question as to the right of an abutter to compensation where an additional burden is cast upon the land is considered in subsequent chapters.⁵⁴

49. *Poulan v. Atlantic Coast Line R. Co.*, 123 Ga. 605, 51 S. E. 657.

Statute need not in terms provide for payment of compensation where that is provided for by the general law. *Memphis v. Hastings*, 113 Tenn. 142, 86 S. W. 609, 69 L. R. A. 750.

50. *Keene v. Bristol*, 26 Pa. St. 46.

51. *Turner v. Stanton*, 42 Mich. 506, 4 N. W. 204; *Lewis, Eminent Domain* (3d Ed.), § 760.

52. *Ashley v. Burt County*, 73 Neb. 159, 102 N. W. 272.

53. *Beckerle v. Danbury*, 80

Conn. 124, 67 Atl. 371; *Williams v. Hudson*, 130 Wis. 297, 110 N. W. 239.

54. Chapters on Public Improvements and on Franchises, *post*, this volume.

Change of grade. Damages resulting from the change of grade of street cause no liability as against the municipality at common law where there was no negligence in the performance of the work but at present there are statutes in nearly all the states giving a right of action to persons injured by the change of grade. See chapter on Public Improvements, *post*.

§ 1512. Amount of compensation.

The question as to the amount of compensation which must be paid for property taken or damaged, the elements to be considered, and the right to offset benefits that accrue to the land not taken, are matters as to which there are no special rules where the condemnor is a municipal corporation, and hence this question will not be considered herein further than to merely state that the compensation must be a fair and full equivalent for the loss sustained by the owner,⁵⁵ and that in estimating the value, it is the *market value* of the property which is to be considered, and the market value includes its value for any use to which it may be put.⁵⁶

55. **Due compensation** is what ought to be made, i. e., what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses or by interference with some right in relation to property whereby its market value is lessened as the direct result of the public use. *King v. Vicksburg R. & L. Co.*, 88 Miss. 456, 42 So. 204, 6 L. R. A. (N. S.) 1036.

A toll bridge highway, as well as a turnpike road, is a public highway established by public authority, and regarded as a public easement, and persons who have been paid damages for property taken in its construction are entitled to no additional damage when it is made by public authority a free bridge. *State v. Suffield & Thompsonville Bridge Co.*, 81 Conn. 56, 70 Atl. 55; *State v. Main*, 27 Conn. 641, 648, 71 Am. Dec. 89.

Right to offset benefits, see Lewis, *Eminent Domain* (3d Ed.), § 687 *et seq.*

Extensive note on "Deduction of benefits in assessing damages for land taken by eminent domain proceedings," see 13 Am. & Eng. Ann. Cas. 603.

56. **Market value.** "In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. It is not a question of the value of the property to the owner. Nor can the damages be enhanced by his unwillingness to sell or because of any sentiment which he has for the property. On the other hand, the damages cannot

On condemning the *property of a water company*,

be measured by the value of the property to the party condemning it, nor by its need of the particular property." 2 Lewis, *Eminent Domain* (3d Ed.), § 706.

"It is often difficult to determine the market value of property, for the reason that there may be no general demand for the same, or it may be that the property is only valuable for a specified purpose as was the case here, and a value can only be estimated upon the basis of the fitness of the property for the specific use on account of its formation, its location, or other specific, natural, or artificial adaptability to the use for which it is sought. In a case, therefore, where no general market value can be ascertained, these latter elements must be taken into consideration and are proper subjects of inquiry in arriving at the value of the property." *Portneuf-Marsh, etc. Co. v. Portneuf Irrigating Co.*, 19 Idaho 483, 114 Pac. 19. In *Ranck v. Cedar Rapids*, 134 Iowa 563, 111 N. W. 1027, the Iowa court was considering the competency of evidence admitted and the measure of damages applicable in a case where the condemnor was seeking to condemn a lot for an approach to a bridge. The landowner had fitted up a livery barn and undertaking rooms on the property, and had carried on business there for some sixteen years, and had established a reputation for his business and location, and on the trial of the case the court admitted evidence showing the length of time the

landowner had maintained his business thereon and the character and nature of the business he was conducting, "and that the situation was well adapted to and valuable for such business," and "that the long use of the premises for such use tended to increase its value therefor." The Supreme Court sustained the action of the trial court in admitting the evidence along this line, and cited a long line of authorities sustaining its position. Among that list of authorities will be found cases holding to the following effect: (1) That evidence is admissible to show the adaptation and value of the property for any legitimate purpose or business, even though it has never been so used, and the owner has no present intention to devote it to such use; (2) that it is proper for the owner to prove the presence and value of undeveloped mineral deposits in the land taken; (3) that the cost and value of a house and other improvements on the premises may be shown; (4) that the value of a salt well, though not being utilized, may be shown; (5) that the value of trees on the land may be proven; (6) that the value of growing crops lost by reason of the condemnation may be proven; (7) that the kind and value of crops produced in other years may be proven, and that the income which might be derived from the property is proper to be shown; (8) that the owner has an established and lucrative business on the premises may be proven; (9)

compensation must be paid not only for the physical property but also for the franchise.⁵⁷

§ 1513. Extending street across railroad track.

A municipality cannot extend a street over a railroad right of way without making compensation,⁵⁸ unless there is a statute to the contrary.⁵⁹ In so far as the measure of damages is concerned, there is much conflict in the decisions, and, without considering them in detail, it may be stated that the general rule is that the measure is the value of the land taken subject to the use for railroad purposes and the cost of any structural changes in the works of the company made necessary by the taking.⁶⁰

A few of the decisions, including all of the most recent ones, are set forth in the note below,⁶¹ but for a

that the price paid for the property is a pertinent fact for the consideration of the jury; (10) that evidence of cost as affecting estimates of value of property of the kind shown to be taken is admissible; (11) that loss and inconvenience which must be incurred by the interruption of business or its enforced removal to another location may be introduced as a material fact bearing upon the value of the property. *Idaho-Western R. Co. v. Columbia Conference of E. L. A. S.*, 20 Idaho 568, 119 Pac. 60.

57. *Re Monongahela Water Co.*, 223 Pa. 323, 72 Atl. 625.

Chapter 34, *Franchises, post*.

58. *Poulan v. Atlantic Coast Line R. Co.*, 123 Ga. 605, 51 S. E. 657.

59. *Yonkers v. New York Cent. & H. R. R. Co.*, 165 N. Y. 142, 58 N. E. 877; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345.

60. *Lewis, Eminent Domain* (3d Ed.), § 733.

61. *Damages for crossing railroad right of way.* "The company's contention is that the proper measure of damages it was entitled to was compensation for the property taken, injured, or destroyed, including the value of the depreciation in the value of its right of way, the cost of any structural or physical changes necessary in its property to establish a reasonably safe crossing, and the expense of maintaining and protecting the same. On the other hand, the city's contention is that although the railroad company was entitled to damages for any diminution in the value of its exclusive right to use its tracks, it was not entitled to any compensation for the land occupied by the street, or for erecting and maintaining gates or watch towers, or providing a flag-

complete list of the decisions reference should be made to text books and encyclopedia articles on the law of

man, or for the increased danger of accident, or for constructing or maintaining a suitable crossing, or the expense of structural or physical changes made necessary by the crossing. That a railroad company, whether it be the owner of the fee as in these cases or merely of the right of way, is entitled to just compensation for the establishment of a highway or street over its line or right of way, cannot be denied. The constitutional provision that "property shall not be taken without just compensation" applies to the property of railroads as well as to property of individuals. The only question is: What is the measure of compensation to which a railroad company is entitled when it is proposed to open a street or highway across it. Upon this subject we have been furnished with an array of authorities in support of the respective contentions of the parties that illustrate the various and contradictory views of courts of last resort upon the question of what compensation a railroad company is entitled to in cases of this character. The leading case in support of the position of the city is *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, in which the city opened a street across the land and right of way of the railroad company. The Supreme Court held that the expense of erecting safety gates for the protection of the crossing, construct-

ing, and maintaining the crossing, or the damage that might be incurred by accident or additional expense in operating the trains, were not proper elements of damage, saying that the whole compensation to which the railroad company was entitled was 'the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad track untouched.' And this measure of compensation has been adopted by several states. The leading case sustaining the contention of the railroad company is *Old Colony & Fall River R. Co. v. Plymouth*, 14 Gray (Mass.) 155, where it was held that the measure of damage to which a railroad company was entitled when crossed by a highway was the expense of erecting and maintaining signs required by law at crossings, for making and maintaining cattle guards at the crossing, if necessary, and for the expense of flooring the crossing and keeping the planks in repair, and such other expenses as necessarily result from the establishment of the highway. And this case has been followed by many courts of last resort." *Louisville & N. R. Co. v. Louisville*, 131 Ky. 108, 114 S. W. 748.

In Illinois, the measure of com-

eminent domain and to extended notes recently appearing in annotated case reports.⁶²

pensation is the amount of decrease in the value of the use for railroad purposes, caused by the use for the purposes of a street; such use for the purposes of a street being exercised jointly with the use of the companies for railroad purposes. *Illinois Cent. R. Co. v. Commissioners of Highways*, 161 Ill. 247, 43 N. E. 1100.

In *Indiana*, nothing can be recovered for the expense of constructing and maintaining a crossing over the street, where required as part of the police power. *Cincinnati I. & W. R. Co. v. Connorsville*, 170 Ind. 316, 83 N. E. 503.

In *Kentucky*, the question has been recently decided for the first time by holding that a railroad company is not entitled to compensation for the expense it might necessarily incur in constructing, maintaining, or protecting the street across its right of way nor to compensation for the increased liability to damages that it might be required to pay on account of accidents at the crossings. *Louisville & N. R. Co. v. Louisville*, 131 Ky. 108, 114 S. W. 743.

In *Michigan* the damage done to a railroad by having a highway running across it, includes all the additional expense entailed by such a crossing which, in a city, may involve a considerable outlay in making the crossing safe, and providing against accident. *Grand Rapids v. Railroad Co.*, 58 Mich. 648, 26 N. W. 150, followed in *Com'rs of Parks & Blvds. v. Michigan Cent. R. Co.*, 90 Mich.

385, 51 N. W. 447, holding that compensation for the expense of erecting safety crossing gates are allowable.

In *North Dakota* it is held that the railroad company should be compensated for the diminution in value of its exclusive right to the use for railway purposes of the property sought to be condemned, caused by the use of the same by the public for a street crossing, and that items for grading, plank-ing and constructing side walks at such crossings are not proper elements of damage. *Grafton v. St. Paul M. & N. R. Co.*, 16 N. D. 313, 113 N. W. 598, 22 L. R. A. (N. S.) 1, distinguishing *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

Retaining walls. Where a street is extended over a railroad track, the cost of erecting necessary retaining walls adjacent to the street to support the soil under the tracks is recoverable. *New York, N. H. & H. R. Co. v. New Haven*, 81 Conn. 581, 71 Atl. 780.

Crossings over right of way. A railroad company in absence of express legislation, cannot be required to construct viaducts or crossings over its right of way, in order to connect streets, on condemnation of a right of way over the road for a street. *Albia v. Chicago, B. & I. R. Co.*, 102 Iowa 624, 71 N. W. 541.

62. See *Lewis, Eminent Domain* (3d Ed.), § 733; note in 24 L. R. A. (N. S.) 1226; note in 15 Am. & Eng. Ann. Cas. 14.

§ 1514. Constitutional provisions as to time of making payment.

The constitutions of a majority of the states provide that compensation shall be *first* made, or that it shall be first made or deposited, or secured, or words to that effect.⁶³ In some jurisdictions, however, provisions that

63. See *Buckwalter v. School Dist. No. 42*, 65 Kan. 603, 70 Pac. 605; *Clinton v. Franklin*, 119 Ky. 143, 83 S. W. 140, 26 Ky. L. Rep. 1056; *Rische v. Texas Transp. Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324.

Deposit in court. In some jurisdictions statutes provide that in condemnation proceedings the court may direct that petitioner be permitted to enter immediately upon the land in question on depositing in court the sum stated in the answer as the value of the property where it appears that public interest will be prejudiced by delay. *Re Niagara L. & O. Power Co.*, 97 N. Y. S. 853, 111 App. Div. 686.

Payment into court. Under a constitutional provision requiring compensation to be first made or paid into court "for the owner," a statute authorizing the petitioner in condemnation proceedings to obtain an order for possession by paying into court sufficient money to compensate the owner for the land if condemned, or for damages if not condemned has been held unconstitutional on the theory that the money is not "first" paid into court for the owner unless he can take it. *Steinhart v. Superior Court of Mendocino County*, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183.

Deposit and filing of bonds. Constitutional provision that compensation shall be first paid or secured by depositing of money is not violated by a statute authorizing the taking of possession before the payment of the damages awarded, on the deposit of a certain sum and the filing of bonds. *Davidson v. Texas & N. O. R. Co.*, 29 Tex. Civ. App. 54, 67 S. W. 1093.

In Missouri, where the constitution provides that the compensation must be paid to the owner or into court for him before the condemning municipality can take possession, it is not sufficient merely to deposit a sum of money by way of security, which is not to be withdrawn until the final disposition of the case, and furthermore a deposit in court of the damages assessed for the use of persons other than the owner is not sufficient. *Holmes v. Kansas City*, 209 Mo. 513, 108 S. W. 9.

In Iowa, constitutional provision requires compensation to be first made "or secured to be made." *Sisson v. Buena Vista County*, 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440.

See *Lewis, Eminent Domain* (3d Ed.), § 676.

compensation shall first be made or secured expressly except property taken for the use of the state.⁶⁴

If the constitution merely provides that compensation must be *first* made, the petitioner in condemnation proceedings cannot be permitted to go ahead on filing a bond to pay all damages.⁶⁵ But a constitutional prohibition against taking property before compensation has been paid or tendered, means the actual taking and not the preliminary steps of surveying and assessment of damages.⁶⁶

Furthermore the constitutional provisions requiring payment to be *first* made do not generally apply where property is not in fact taken but merely damaged, and hence do not apply to consequential damages.⁶⁷

64. *Morgan v. Oliver*, 98 Tex. 218, 82 S. W. 1028.

65. *State v. Superior Court of King County*, 26 Wash. 278, 66 Pac. 385.

66. *Stuart v. Baltimore*, 7 Md. 500.

67. Where property is not actually taken for public use, but will be damaged as a consequence of a municipal act, and the constitution merely forbids the "taking" of property without first making compensation, it is not necessary that compensation be first made or secured where there is no "taking," and hence damages resulting from grading need not be paid or secured before doing the work. *Marshall v. Allen* (Tex. Civ. App., 1909), 115 S. W. 849.

"Whilst the first clause of section 24, art. 2, supra, provides that private property shall not be taken or damaged without just compensation, an accompanying clause in

the same section provides that, until compensation shall be paid to the owner or into court for the owner, the property of the owner shall not be disturbed or the proprietary rights of the owner divested. Does this latter clause require compensation to be paid to the owner, or into court for the owner, where the damages are merely consequential? The word 'disturb,' according to Mr. Webster, means, 'to interrupt a settled state of,' and according to the same authority 'proprietary' means 'belonging or pertaining to a proprietor, considered as property, owned,' and the words 'the property shall not be disturbed or the proprietary rights of the owner divested' seem to mean possession thereof shall not be taken, nor his property taken, nor the title thereof be divested, until compensation therefor has been first paid to the owner, or into the court for the owner. This was the con-

§ 1515. Time of making payment where not regulated by Constitution.

If the question is not regulated by a constitutional provision, the general rule is that the making of compensation need not precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation; but in some jurisdictions it is held that the compensation must be paid before entry upon the property.⁶⁸

trolling construction of the state of Missouri at the time of the adoption of this clause in the Oklahoma Constitution, and, when there was no such provision in force in any other state, where a contrary construction prevailed, that of the highest court of Missouri should be especially persuasive. All the courts seem to hold that, under such constitutional provisions, consequential damages arising from the change of the established grade may be recovered by the abutting owner. See, also, section 1, art. 1, c. 10, Sess. Laws 1907-08, and section 443, Wilson's Rev. & Ann. St. 1903. The only difference seems to be as to whether same shall be ascertained in an eminent domain proceeding, or in an action at law for damages. The majority of the courts having passed on the question appear to hold the latter. The first legislature of the state after its erection passed an act entitled 'An act amending section 28 of article 9 of chapter 17, of the Statutes of Oklahoma, 1893, and regulating the method of procedure in the condemnation of private property for both public and private use.' Sess. Laws 1907-08, art. 1, c. 20, pp. 258,

261. Neither the eminent domain act as brought over from the territory of Oklahoma, nor as thus amended, provides for the assessment of consequential damages in the case of public improvements made by a municipality. This evident legislative construction of section 24 of article 2 accords with that placed on the similar provision of the Missouri Constitution by the Supreme Court of the state. Consequential damages would be difficult to ascertain before the improvements had been made." *Overholser v. Oklahoma Interurban Traction Co.* (Okla., 1911), 119 Pac. 127.

68. Lewis, *Eminent Domain* (3d Ed.), § 678.

Payment before taking. While it is necessary that compensation shall be adequately provided for before taking, it is not necessary that the payment itself be actually made at or before the taking unless the constitutional provision expressly so requires. *De Hensen v. District Court of Second Judicial Dist.*, 11 Ariz. 379, 94 Pac. 1125.

The constitutions of many states require that before private property can be taken under condem-

§ 1516. Waiver of right to prepayment of compensation.

The right to prepayment of compensation may be waived by a license, express or implied, to go on the land and make the improvement.⁶⁹

§ 1517. Interest as part of compensation.

The right to interest in condemnation proceedings is largely governed by the statutes prevailing in the particular jurisdiction. Reference should be made to the statutes of the particular state and the decisions thereunder, and to standard works on the law of eminent domain.⁷⁰

nation proceedings for public purposes, payment thereof must be made or tendered. In such jurisdictions it is necessary that the constitutional provision be complied with, and it is not sufficient merely to make provision for payment after the taking. On the other hand, the constitution in many states merely provides that the property of a person shall not be taken or damaged for public use without just compensation therefor, and in such states such provisions are not construed to mean that payment must be made in advance of the actual taking of the property, but they merely require that just compensation must be made for the property taken and it is left to the legislature to determine the manner of taking and the time and manner of payment. *State v. Several Parcels of Land*, 79 Neb. 638, 113 N. W. 248.

69. *Snyder v. Chicago*, S. F. & C. R. Co., 112 Mo. 527, 20 S. W. 885.

Prepayment of award may be waived by the landowner by his acquiescence in the condemnation

proceedings and the taking possession of his land. *Woolard v. Nashville*, 108 Tenn. 353, 67 S. W. 801.

70. See *Lewis, Eminent Domain* (3d Ed.), § 742.

See also note in 15 Am. & Eng. Ann. Cas. 108.

In Missouri, the amount of the judgment rendered against the city must be paid into court, to avoid payment of interest, where there is a dispute as to the ownership of the property condemned, for the owner is entitled to interest on the amount of the award from the date of final judgment until the money is paid to him or paid into court for him, as on judgments in other cases. *Martin v. St. Louis*, 139 Mo. 246, 41 S. W. 231.

Payment into court stops interest. *C. S. F. & C. R. R. v. Eubanks*, 130 Mo. 270, 32 S. W. 658.

In *Hilton v. St. Louis*, 99 Mo. 199, 12 S. W. 657, it was suggested that interest ought not to run on the damages assessed while the original owner remains in its undisturbed possession; but in a

7. TITLE AND RIGHTS ACQUIRED, ABANDONMENT, AND REVERSION.

§ 1518. Title acquired by municipality.

A municipality takes *only the estate in the property condemned that is necessary for the purpose* for which the property is condemned;⁷¹ and generally an easement is sufficient, and in such case it is held that only an easement is taken, except perhaps where the statute contemplates and authorizes the taking of a fee.⁷² For instance, it is generally held that where land is condemned for school buildings,⁷³ or for an aqueduct,⁷⁴ or for a sewer or ditch,⁷⁵ or to improve a stream,⁷⁶ *only an easement is acquired* by the municipality.

subsequent case this suggestion is criticised. *Martin v. St. Louis*, 139 Mo. loc. cit. 256, 41 S. W. 231.

Similar provision of state constitution, sec. 21, art. 2; *K. C. C. & S. Ry. Co. v. Story*, 96 Mo. 611, 10 S. W. 203.

71. *Atlanta v. Jones*, 135 Ga. 376, 69 S. E. 571.

The general rule is well settled that the authorities of a municipality empowered to condemn land for public purposes cannot take any more land or any greater estate in the land than is necessary for the purpose for which the right of eminent domain is sought to be exercised. *Re Harlem River Bridge*, 77 N. Y. S. 737, 74 App. Div. 197, affirmed in 174 N. Y. 26, 66 N. E. 584.

Can take only such an interest as is reasonably necessary for the purpose of the improvement. *Newton v. Newton*, 188 Mass. 226, 74 N. E. 346.

Construction of statutes authorizing taking of water or franchises of water company, see *Ken-*

nebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; *Martin v. Gleason*, 139 Mass. 183, 29 N. E. 664.

72. § 1519 *post*.

73. *Lazarus v. Morris*, 212 Pa. St. 128, 61 Atl. 815, where the statute provides merely for a taking without any reference to the estate to be taken.

74. *Harback v. Boston*, 10 Cush. (Mass.) 295.

75. *Palmer v. Harris County*, 29 Tex. Civ. App. 340, 69 S. W. 229. But see *Dingley v. Boston*, 100 Mass. 544.

Statute conferring fee, see *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851.

76. *Newton v. Newton*, 188 Mass. 226, 74 N. E. 346.

Statutory provision that title "to all lands so taken shall vest in said city" does not vest fee in city where it takes land for a new channel for a brook, where the condemnation proceedings state the intention merely to acquire the right to improve the channel

Of course the municipality, on condemning property, cannot obtain a greater interest than that possessed by the one against whom the proceeding is instituted.⁷⁷

Where a statute authorizes only an easement to be acquired by condemnation, the *condemnation judgment cannot vest the municipality with the fee* of the land, or with the exclusive use thereof, since the statute enters into and forms a part of the judgment, and limits and qualifies the nature of the condemnation therein ordered.⁷⁸

§ 1519. Power of legislature to authorize a fee to be condemned.

Statutes in some jurisdictions authorize a municipality to condemn the fee title to property, as distinguished from a mere easement; and it is well settled that the enactment of such statutes is within the power of the legislature,⁷⁹ and this is so even though the use of the fee may not be permanent,⁸⁰ or though an easement only

and the right to build over the brook and use its waters is expressly reserved to the owners. *Conklin v. Old Colony R. Co.* 154 Mass. 155, 23 N. E. 143.

77. *Brigham City v. Rich*, 34 Utah 130, 97 Pac. 220.

78. *Illinois Central R. Co. v. Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530.

79. *Re Clinton Street Police Station Site in City of New York*, 123 N. Y. S. 198, holding that fee in particular case, was a qualified fee.

It is ordinarily within the discretion of the legislature, in the absence of constitutional restriction, to determine whether property condemned shall be taken in fee or whether it shall be taken only to the extent

necessary for the public use and so long as that use continues, which is usually described as the taking of an easement in land. *Burnett v. Commonwealth*, 169 Mass. 417, 48 N. E. 758.

"The owner may, if the legislature so declares, be divested of the fee, although the public use is special, and not of necessity perpetual." *Re Water Com'rs*, 96 N. Y. 351, 358.

80. *Boston v. Talbot*, 206 Mass. 82, 91 N. E. 1014, where it was said in regard to the construction of a subway that "a taking in fee of adjacent land likely to be seriously injured in the progress of the work might be more economical than a taking only of that which would be needed permanently."

is required to accomplish the purpose in view.⁸¹ For instance, the legislature may authorize a municipality to condemn the title in fee simple of land for public streets, since it is the exclusive judge of the amount of land and the estate therein which is required to be condemned to subserve the public end.⁸²

So the legislature sometimes confers on municipal authorities the power to determine whether certain lands shall be taken in fee or merely an easement taken,⁸³ and this is undoubtedly within the power of the legislature.

§ 1520. Construction of statute as to whether it authorizes condemnation of fee.

No precise words in a statute are necessary to authorize the condemnation of a fee,⁸⁴ and it is not neces-

Legislature has the power to determine what estate shall be taken, even if the public use is special and not necessarily permanent. *Eldridge v. Binghampton*, 120 N. Y. 309, 314, 24 N. E. 462.

81. *Sweet v. B.*, N. Y. & P. R. Co., 79 N. Y. 293.

82. *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325.

83. *Re Commissioner of Public Works*, 10 N. Y. S. 705, 57 Hun (N. Y.) 419.

84. "There are no sacramental words which must be used in a statutory power to take and hold lands in order to give a right to take the lands in fee. Any language in the statute which makes its meaning clear is sufficient, and a very little more than 'take and hold' has been held enough." *Newton v. Perry*, 163 Mass. 319, 39 N. E. 1032.

"Take in fee" means to take the lands and not merely an

easement. *Titus v. Boston*, 161 Mass. 209, 36 N. E. 793.

Word "take" does not necessarily import the taking of real estate in fee. *Harback v. Boston*, 10 Cush. (Mass.) 295.

A provision that "the title to all lands so taken shall vest in the city of Boston," in a drainage statute, was held to mean a fee simple title, and that the words "will bear no other fair and reasonable construction." *Dingley v. Boston*, 100 Mass. 544, 554, followed in *Page v. O'Toole*, 144 Mass. 303. But see *Conklin v. Old Colony R. Co.*, 154 Mass. 155, 28 N. E. 143.

Under a statute authorizing the condemnation of "all outstanding interests of every kind, character, or description, whether the same be legal or equitable," etc., in certain water works, the condemnation vests the municipality with absolute title to the property condemned and not merely an easement. *Wood v. Mobile*, 107 Fed. 846, 47 C. C. A. 9.

sary that the authority to take a fee be given in express terms.⁸⁵

On the other hand, inasmuch as *eminent domain statutes are to be strictly construed*, where the statute is silent on the subject or is not clear as to whether it was intended to authorize or require a taking of a fee or only an easement, the well settled rule of construction is that the statute will be construed to authorize the taking of the interest only which is required by the necessity of the contemplated use.⁸⁶

85. **Intention of law controls.** "It is not necessary that the authority to take a fee be given in express terms, or that exact or technical language should be used in the enabling act, in order that the fee or the whole title of the owner pass by the condemnation proceedings. In the absence of express and precise provisions, the intention of the act and the construction to be put upon its terms may be gathered from its general scope and tenor, and the nature of the public use for which the condemnation is authorized. If the legislative intention to vest the fee is thus made clear, and this intention is consistent with the language employed, effect will be given to the intention. This is especially true where a remaining private ownership is inconsistent with the use for which the land is taken, and where the purposes of the condemnation will not be satisfied by the taking of a lesser estate or easement." *Driscoll v. New Haven*, 75 Conn. 92, 52 Atl. 618

86. *Reed v. Winona*, 100 Minn. 167, 110 N. W. 1119, followed in

Smith v. Minneapolis, 112 Minn. 446, 128 N. W. 819; *People ex rel. v. Gloversville*, 112 N. Y. S. 387, 128 App. Div. 44.

"In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied, as in the case at bar, with the taking of an easement." *McCombs v. Stewart*, 40 Ohio St. 647.

No implication ought to be indulged that a greater interest or estate is taken than is absolutely necessary to satisfy the language and object of the statute making the appropriation. The land is taken for an avenue, and this purpose is fully satisfied by the taking of an easement in the land for the street or highway. There is nothing inconsistent in the public use of the land for an avenue, and the retention of the landowners of the fee, subject to the easement. It is not necessary that exact or technical language should be used in a statute for taking private property for public use in order to vest the fee in the public; but it must clearly appear, before this effect can be given to a statute, that

It is settled, however, at least in some jurisdictions, that the mere fact that a statute vests in the municipality a fee to the property condemned does not necessarily mean a fee simple absolute but often means a fee in trust for the particular purpose for which the property was condemned.⁸⁷

it was the intention of the legislature, disclosed by the act itself, to take a fee." *Washington Cemetery v. Prospect Park R. Co.*, 68 N. Y. 591, followed in *Re Commissioner of Public Works*, 10 N. Y. S. 705, 57 Hun (N. Y.) 419.

Channel for brook. Where statute contains no provision as to the vesting of title, a municipality takes only such estate as is necessary for its purpose, where land is condemned for a new channel for a brook. *Conklin v. Old Colony R. Co.*, 154 Mass. 155, 28 N. E. 143.

Lateral support. Condemning an easement to provide lateral support for a street does not divest the owner of his rights in the property, subject to the easement. *Dodson v. Cincinnati*, 34 Ohio St. 276.

87. "The term 'title in fee,' as used in the statute and in these proceedings, must be construed in the light of the purposes for which the statute was enacted. The lands taken for the bridge and its structural approaches were necessarily taken in fee simple absolute, because their taking was accompanied by a physical entry and appropriation on the part of the city to the exclusion of the public and adjoining owners. Not so, however, in the case of

lands taken for widening of streets and changing of street lines, because this was simply a taking of 'title in fee' for the purposes to which such lands were to be devoted, viz., for streets in which the adjoining owners and the general public would have the easements pertaining to public streets. That this dual use of the term 'title in fee' is not without authority is shown by the fact that by section 970 of its charter the city of New York is authorized to acquire title, for the use of the public, to all or any lands required for streets, parks, approaches to bridges and tunnels; and by section 990 of the charter it is provided at what time the city shall become 'seised in fee' of lands taken for streets or parks. The authority given in section 970 is to acquire lands for the use of the public, although it specifies purposes for which the city must take an absolute title, as well as other purposes for which it can only acquire a title affected by a trust. Section 990 describes the title of the city in lands taken for streets and parks as a 'title in fee,' although the real title in the one case is quite different from that in the other." *Re Harlem River Bridge*, 174 N. Y. 26, 66 N. E. 584.

§ 1521, *post*.

§ 1521. Effect of statute authorizing condemnation of fee.

If the statute does provide for a taking of the fee, a fee simple absolute is ordinarily acquired by the municipality;⁸⁸ and in such a case the condemnor cannot condemn less than the fee,⁸⁹ unless the statute is merely permissive.⁹⁰ So if the statute makes it optional with the municipality to condemn a fee or an easement, an easement only will be presumed to have been taken, in the absence of circumstances to show the contrary, where an easement would be sufficient.⁹¹

88. *Re Water Com'rs*, 96 N. Y. 351; *Sweet v. Buffalo*, N. Y. & P. R. Co., 79 N. Y. 293, aff'g 13 Hun 643.

Reversion, § 1524, *post*.

89. Where the statute provides that the fee shall vest in the municipality on condemnation, an easement as distinguished from the fee cannot be condemned. *Charlottesville v. Maury*, 96 Va., 383, 31 S. E. 520 (riparian water right cannot be condemned alone without condemning any of abutting lands); *Roanoke City v. Berkowitz*, 80 Va., 616. To same effect, *Re Water Com'rs*, 96 N. Y. 351.

90. May take less than fee in some cases. Under a statute authorizing a city to acquire title "in fee" to any lands deemed necessary for construction of a bridge and approaches and to acquire any right or easement necessary for temporary purposes, the term "title in fee" is not equivalent to the term "a fee simple absolute," or "an absolute fee," as defined by the statutes, and the language quoted is not mandatory in requiring the

city to take the land in fee simple absolute, but it was intended thereby to confer authority to take such estate in the land as essential for the purposes of carrying out the public improvement. *Re Harlem River Bridge*, 77 N.Y. S. 737, 74 App. Div. 197, aff'd in 174 N. Y. 26, 66 N. E. 584.

A statute authorizing a condemnation of "any land or interests in lands" for a park or boulevard, an easement may be taken by condemning a right of way for a boulevard across railroad tracks. *Commissioners of Parks & Boulevards v. Michigan Central R. Co.*, 90 Mich. 385, 51 N. W. 447, Justice Grant dissenting on the ground that "no power to condemn an easement can be inferred where the only power given by the statute is to condemn the land itself."

91. Where a statute conferred power on a city, for drainage purposes, to improve the brooks and natural streams flowing through the city by widening etc., and for such purpose to take land "in fee simple or otherwise," on

§ 1522. Title acquired to streets and alleys.

It has been stated in a preceding chapter that ordinarily the title to streets and alleys is in the abutting owner and not in the municipality.⁹² This rule applies equally well where property is condemned for a street or alley and the title is acquired by the exercise of the right of eminent domain, since the general rule that unless a statute expressly or by necessary implication authorizes the taking of the fee, an easement only is taken, applies where property is condemned for a street or alley, the theory being that no greater interest is necessary to subserve the interests of the municipality.⁹³

So the general rule, in the absence of statutory provisions to the contrary, is that where a part of a railroad right of way is condemned for a street crossing, the municipality acquires only an easement.⁹⁴

either side of the channels of any brook, etc., and the municipality took lands thereunder for the purpose of improving one of the brooks in the city but did not determine that a taking of the fee was necessary, and an easement would be sufficient for all the purposes contemplated by the improvement, an easement only is taken. *Newton v. Newton*, 188 Mass. 226, 74 N. E. 346.

92. § 1305 *ante*, vol. 3.

93. *Smith v. Minneapolis*, 112 Minn. 446, 128 N. W. 819; *People ex rel. v. Gloversville*, 112 N. Y. S. 387, 128 App. Div. 44; *Mott v. Eno*, 90 N. Y. S. 608, 97 App. Div. 580, *rev'd* on other grounds in 181 N. Y. 346, 74 N. E. 229; *Rhode Island Hospital Trust Co. v. Hayden*, 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107.

A municipality which has condemned land for street purposes acquires only an easement

therein, as distinguished from the fee, unless there is a statute which expressly or by necessary implication authorizes a taking of the fee. *Tacoma Safety Deposit Co. v. Chicago*, 247 Ill. 192, 92 N. E. 153, 31 L. R. A. (N. S.) 868, 20 Am. & Eng. Ann. Cas. 568; *Illinois Trust & Savings Bank v. Chicago*, 247 Ill. 264, 93 N. E. 167; *Sears v. Chicago*, 247 Ill. 204, 93 N. E. 158.

94. *Harris v. Chicago*, 162 Ill. 288, 44 N. E. 437.

Title required where crossing over railroad is condemned. Under express authority to condemn property for a street over a railroad right of way, a municipality cannot acquire the exclusive right of the land, but only a joint use with the railroad company. *Illinois Cent. R. Co. v. Chicago*, 138 Ill. 453, 28 N. E. 740.

"The use by the public is, as

It has been said that the taking of the fee simple absolute, either for alleys or streets, can never be necessary;⁹⁵ but if the statute expressly provides that the fee of land taken for street purposes shall vest in the municipality, it ordinarily acquires an absolute title in fee simple on condemnation of property for a street.⁹⁶

matter of fact, subject and subordinated to the use by the railroad company. The trains of the railroad company have a prior right to passage over the crossings. The public, at whatever inconvenience it may be to the interests or the business of the individual citizen is compelled to wait until the cars of the company have passed." *Illinois Central R. Co. v. Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530.

A municipality which condemns land of a railroad company for a public street acquires every right and assumes every burden enjoyed or borne by a municipality in the appropriation of land for street purposes from a private owner and the fact that a railroad company is the owner in no way differentiates the rule from that applicable to an individual owner of land so appropriated. *Pennsylvania R. Co. v. Edgewood Borough*, 220 Penn. 45, 69 Atl. 60.

Municipality acquires nothing but a mere right of way. *St. Louis & S. F. R. Co. v. Fayetteville*, 75 Ark. 534, 87 S. W. 1174.

When lands in use as a railroad right of way are condemned for the purpose of opening a street across such right of way, the municipality ordinarily

obtains a common right with the railroad company for the use of the land condemned and the railroad company continues to use its right of way for its corporate purposes not inconsistent with its use as a street crossing. *New York Central & H. R. R. Co. v. Buffalo*, 200 N. Y. 113, 118, 93 N. E. 520.

Additional tracks. Cannot deprive railroad company of right to lay as many additional tracks as business requires, where street over right of way is kept open. *Hogan v. Chicago & A. R. Co.*, 208 Ill. 161, 69 N. E. 853, *aff'd* 105 Ill. App. 136.

95 *Paul v. Detroit*, 32 Mich. 108.

96 *New York Central & H. R. R. Co. v. Buffalo*, 200 N. Y. 113, 93 N. E. 520; *Mott v. Eno*, 181 N. Y. 346, 74 N. E. 229; *Hamersley v. New York*, 56 N. Y. 533; *De Varaigne v. Fox*, Fed. Cas. No. 3, 836. 2 Blatchf. 95.

Legislature may authorize taking of fee for street. "Upon the principle that statutes conferring compulsory powers to take private property are to be strictly construed, it follows that, when the estate or interest to be taken is not defined by the legislature, only such an estate or interest can be taken as is necessary to accomplish the purpose in view,

§ 1523. Title acquired to parks.

The authorities are conflicting as to whether a municipality acquires a fee or merely an easement where it condemns property for a public park. In some jurisdictions it is settled that, in the absence of a statute to the

and, when an easement is sufficient, no greater estate can be taken. It is on this principle that where the legislature has authorized the taking of land for the purposes of streets, without defining the estate that may be taken, or expressly authorizing the taking of the fee, it is held that only an easement can be taken. This is construed, under such statutes, to be the extent of the grant of authority; *but no well-considered case can be found which holds that the legislature might not authorize the taking of the fee, if it deemed it expedient.*" Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325, per Justice Mitchell.

Street across railroad. Where a charter provision enacts that on payment of the amount awarded in condemnation proceedings, the fee of the land shall vest in the municipality, and the latter condemns a right of way for a street across railroad tracks, the municipality acquires the fee to the land subject to the easement of the railroad company. New York Central & Hudson River R. Co., v. Buffalo, 200 N. Y. 113, 93 N. E. 520.

In Minnesota, however, under a statute providing for a condemnation of streets and alleys and that "the city shall become

vested with the title to the property taken and condemned absolutely, for all purposes for which the city may ever have occasion to use the same," it is held that the city becomes vested with title which is not absolute, but only such title as appropriate to the use of the street or alley, and hence restricts the title to the usual and familiar easement. Smith v. Minneapolis, 112 Minn. 446, 128 N. W. 819. In an earlier case in the same state the charter of St. Paul provided that in all cases the land condemned for streets should "be vested absolutely in the city of St. Paul in fee simple." It was held, however, in Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325, in an opinion rendered by Justice Mitchell, that even such broad language must be construed as referring to only a qualified fee—"that is, the fee simple for street purposes — which gives the city absolute control over the land for those purposes, but that its title is not proprietary, but what might be termed a sovereign or prerogative one, which it, as an agency of the state, holds in trust for the public for street purposes, and which it can neither sell nor devote to a private use."

contrary, the municipality acquires only an easement.⁹⁷

In other jurisdictions, the contrary rule prevails, and it is held that the necessities of the case require that the municipality take a fee.⁹⁸

97. *Newton v. Manufacturer's R. Co.*, 115 Fed. 781, 53 C. C. A. 559.

§§ 1153-1157 *ante*, vol. 3.

Title acquired to park. "There is some authority for holding that the proper maintenance of a public park requires that the municipality shall own the fee of the lands (*Driscoll v. New Haven*, 75 Conn. 92, 52 Atl. 618); but the rule most consistent with principle is that an easement only is acquired in property which is condemned and taken for such purpose. No other interest is necessary to the use. See *McCombs v. Stewart*, 40 Ohio St. 647; *Devine v. Lord*, 175 Mass. 384, 56 N. E. 570; *Newton v. Mfg. Co.*, 115 Fed. 781, 53 C. C. A. 559. In some cases statutes relating to parks have been somewhat liberally construed in favor of the grant of the power to take a fee title. See *Brooklyn Park Co. v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70. By the statute under which the board of park commissioners was proceeding in this case the board is 'authorized and empowered to receive in whole or in part as gift or donation and to acquire by purchase or donation through the agency of its board of park commissioners for the use by the public of lands lying within the corporate limits of such city, and if by condemnation then in the manner hereafter set forth, and to

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thereafter control and from time to time lay out, alter, improve, operate and maintain such lands for public parks and parkways.' Chapter 293, p. 513, Gen. Laws, 1903. The right to take the fee is not expressly granted by this statute, nor is it conferred by fair implication. It is not necessary that the board should hold the fee of the land to enable it 'to hold, control, and from time to time lay out, alter, improve, operate and maintain such lands for public parks and parkways.' The easement acquired is perpetual, and is broad enough to enable the board to do whatever is necessary for the operation and maintenance of a park or parkway, and this is all that the necessities of the case require. The fact that the resolution announced the intention to acquire the fee of the land is of no consequence. The statute, and not the resolution, determines the estate which can be acquired under such proceedings. *Reed v. Winona*, 100 Minn. 167, 110 N. W. 1119.

98. See *Hellen v. Medford*, 188 Mass. 42, 73 N. E. 1070, 69 L. R. A. 314, 108 Am. St. Rep. 459; *Brooklyn Park v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70, rev'g 3 Lans. (N. Y.) 429.

Compare *Devine v. Lord*, 175 Mass. 384, 56 N. E. 570.

Title to park as a fee. "The uses for which a public park are

§ 1524. Reversion where use abandoned or impossible.

If the municipality takes only an easement by condemnation proceedings, the abandonment by the public of the use for which the property was condemned causes the title in fee to revert to the original owner or his grantees.⁹⁹

acquired are continuous and peculiarly exclusive. They are inconsistent, and must ever be inconsistent, with the existence and exercise of any of the incidents of private ownership therein. They are inconsistent with the enjoyment of private rights, whether upon the surface of the ground thereof, or to the highest heavens above, or the lowest earth beneath. "The idea of a public park implies more than a use by the public which is susceptible of coexistence with a private right capable of concurrent exercise." The existence of a park implies the probability of improvements and transformations oftentimes extensive and costly, and which, in the nature of things, must be undisturbed. It implies something more than the right of public passage, however frequent and exclusive. The right of access in the capacity of owner is an essential incident of beneficial ownership. Without it there can be no enjoyment. This right of access incident to ownership cannot be preserved to the original landowner where it is swallowed up in the oftentimes large tracts of public parks, or whenever land contiguous to the particular piece is not retained by him. *Brooklyn Park v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Washington*

Cemetery v. Prospect Park & C. I. R. Co., 68 N. Y. 591; *Holt v. City Council of Somerville*, 127 Mass. 408. The legislature, in the charter of the defendant city, has authorized it 'to take' by the right of eminent domain 'any property or property rights' which might be needed for park purposes. This taking thus authorized in this connection must, by reasons of the considerations stated, be construed to mean such a taking as will be consonant with the purpose, in view, and therefore a taking which divests the other parties to the proceedings of all their title or interest in the property taken, and vests the same in the city. The city, therefore, upon the allegations of the complaint, acquired and has the fee of the lands condemned in its proceedings against the retreat for the insane." *Driscoll v. New Haven*, 75 Conn. 92, 52 Atl. 618, 621.

Statute vesting fee in municipality gives it title to system of drains in farm condemned for park. *Baker v. Rochester*, 48 N. Y. S. 764, 24 App. Div. 383.

Statute providing title to park shall vest in "people of the county" is valid. *St. Louis County Court v. Griswold*, 58 Mo. 175.

99. *Benham v. Potter*, 52 Conn. 248; *Harris v. Elliott*, 10 Pet. (U. S.) 25, 9 L. Ed. 333.

Furthermore, some statutes expressly provide for a reversion where the condemning party ceases to use the property.¹

On the other hand, in the absence of a statute to the contrary, if the municipality acquires by the condemnation proceedings a fee simple absolute, the property does not revert to the owner in case the use thereof for public purposes is discontinued.²

In some jurisdictions, however, even where the fee of land used for public streets is in the municipality, it is held that the title is in trust for street purposes and that if the street is discontinued, the land will revert to

Where the fee is not taken, a discontinuance of the public use vests the whole estate in the original owner. *Lyford v. Laconia*, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062; *Wood v. Mobile*, 107 Fed. 846, 47 C. C. A. 9.

Reversion where municipality acquired only an easement. *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856; *Lazarus v. Morris*, 212 Pa. 128, 61 Atl. 815; *Newton v. Manufacturers' R. Co.*, 115 Fed. 781, 53 C. C. A. 599.

Recovery back of damages paid. Where only an easement is taken and there is a reversion on an abandonment of the use, the municipality is not entitled to recover back the money paid the landowner as damages. *Hampton v. Coffin*, 4 N. H. 517.

1. *Atlanta v. Jones*, 135 Ga. 376, 69 S. E. 571.

2. *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, rev'g 3 Lans. (N. Y.) 429; *Heyward v. New York*, 8 Barb. (N. Y.) 486.

Where a fee is taken, the weight of authority is that there

is no reversion but when the particular use ceases the property may be disposed of for either public or private uses. *Lewis, Eminent Domain* (3 Ed.), § 861; *Wood v. Mobile*, 107 Fed. 846, 47 C. C. A. 9, aff'g 99 Fed. 615.

"Where land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. But this is where the property is not taken, but the use only. Then, the right of the public being limited to the use, when the use ceases the right ceases. Where the property is taken, the owner paid its true value, and the title vested in the public, it owns the whole property, and not merely the use; and, though the particular use may be abandoned, the right to the property remains. The property is still held in trust for the public by the authorities." *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 243, 6 Am. Rep. 70; *People ex rel. v. Purdy*, 130 N. Y. S. 1077, 72 Misc. Rep. 122.

the abutting owners, who hold it discharged of the public trust.³

If one whose land is condemned makes a deed of the property to the party condemning, his reversionary rights on the cessation of use of the property by the condemnor depend to some extent on the terms of the conveyance.⁴

§ 1525. What constitutes abandonment.

What constitutes abandonment of the public use is in most instances a *question of fact* to be determined from the circumstances of each particular case,⁵ and is largely a *question of intention* on the part of the municipality.⁶ It follows that where an intention to abandon the use is not shown, mere *non-user* of an easement acquired by condemnation does not destroy the easement.⁷ An abandonment cannot be established by proof merely of a failure for the time to use the property, nor of a temporary use of it not inconsistent with an intention to use it for the purpose for which it was taken.⁸

It has been stated that it is well settled that real estate may be condemned "for one purpose, and thereafter

3. *Kimball v. Kenosha*, 4 Wis. 321.

§ 1415 *ante*, vol. 3.

4. *Atlanta v. Jones*, 135 Ga. 376, 69 S. E. 571.

5. *Lewis, Eminent Domain* (3d Ed.), § 862.

6. See *Stevens v. Norfolk*, 42 Conn. 377; *New York v. Carleton*, 113 N. Y. 284, 21 N. E. 55.

7. It has been said that acts, to show an abandonment, "must be of a conclusive character, and clearly established by the evidence. They must show an *intention* to abandon the intended use." *Curran v. Louisville*, 83 Ky. 628, 632.

8. *Corr v. Philadelphia*, 212 Pa. 123, 61 Atl. 808.

Long delay in using property for the purposes for which it was condemned is not an abandonment of it where the city keeps itself in position to use it for the purposes for which condemned. *Curran v. Louisville* (Ky. App. 1912), 144 S. W. 1057.

Lease of property subject to right of city to use it held not an abandonment. *Curran v. Louisville* (Ky. App., 1912), 144 S. W. 1057.

Pleading. Alleging actual abandonment of any intention to use land for a public purpose sufficiently pleads abandonment. *Corr v. Philadelphia*, 212 Pa. 123, 61 Atl. 808.

by legislative consent be applied to another *of a kindred kind* without working a reversion to the original proprietor.”⁹

§ 1526. Rights acquired by municipality.

By condemning property and paying compensation therefor, the municipality, whether it acquires a fee or merely an easement, obtains a perpetual and paramount *right to use the property in any reasonable way* for the purpose for which the property was condemned, unless it is afterwards condemned for some other public use.¹⁰

9. *Curran v. Louisville*, 83 Ky. 628, 632, 7 Ky. Law Rep. 734.

Turnpike established by statute as a public highway, no new assessment of damages allowable. *State v. Maine*, 27 Conn. 641.

Misuser. Where land is condemned for a canal, the use of it for a street and for water pipes and sewerage purposes is not inconsistent with its former public use. *Malone v. Toledo*, 28 Ohio St. 643.

10. **Duration.** If the taking of property is authorized for a public use, either of a permanent or temporary nature, the appropriation lasts during the continuance of that use. *Waterbury v. Platt*, 75 Conn. 387, 53 Atl. 958, 96 Am. St. Rep. 229.

Street. Land condemned by a municipality for street purposes is, by such act, converted into a public street although not yet opened as a street. *Brown v. Scruggs*, 141 Mo. App. 632, 636, 125 S. W. 537.

Water. Condemning lands through which a stream runs does not of itself confer the right

to divert water. *Emporia v. Soden*, 26 Kan. 492.

Taking land for municipal water supply held to include an easement of a right to flow water over the land, where the easement was one that could not be left outstanding consistently with the proper exercise of the right of the municipality in the land. *Inhabitants of Walpole v. Massachusetts Chemical Co.*, 192 Mass. 66, 78 N. E. 140.

Exclusive possession of surface is acquired by condemnation of land for protection of water supply. *Newton v. Perry*, 163 Mass. 319, 39 N. E. 1032.

Wharf condemned by city cannot be unconditionally leased for a term of years for private business. *Belcher Sugar Refining Co. v. St. Louis Grange Elevator Co.*, 82 Mo. 121.

Buildings. If the municipality acquires the fee to land taken for a street, subject to the right of the owner to remove the buildings thereon, its subsequent conversion of the materials of the buildings makes the municipality liable to the owner. *Schuchardt v. New*

Where a municipality condemns land for a street and proceeds to open the street for public use, there is more or less conflict in the authorities in regard to the rights of the municipality in the soil excavated, in so far as the use of it on other streets is concerned, etc., as has been noticed at some length in a preceding volume.¹¹

§ 1527. Effect of condemnation on rights of owner.

Generally the owner of the land condemned retains the right to use the premises for any purpose not inconsistent with the public right.¹² For instance, where a municipality is authorized by statute to take land and water for the purpose of a water supply, and it takes the bed of a stream and the water, the owner retains the right to make any use of the stream and the water not interfering with the municipal purpose.¹³ But if a fee

York, 53 N. Y. 202, 59 Barb. (N. Y.) 295.

Liens as affected by condemnation. Effect of condemnation proceedings to discharge land from lien of a previous judgment or mortgage, see Lewis, *Eminent Domain* (3d Ed.), §§ 896-898.

If the land is mortgaged and the mortgagee is not made a party to the condemnation proceeding, the property remains subject to the mortgage. *Rieck v. Omaha*, 73 Neb. 600, 103 N. W. 283.

11. § 1309, *ante*, vol. 3.

12. *Lyford v. Laconia*, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062.

13. *Kane v. Baltimore*, 15 Md. 240.

Water Supply. Where the use of a pond and river is taken for a water supply, a railway company may nevertheless take sufficient of the water for its engines where such use does not interfere with

the water supply of the municipality. *Framingham Water Co. v. Old Colony R. Co.*, 176 Mass. 404, 57 N. E. 680.

Where the waters of a pond have been condemned for a water supply, private rights of boating and fishing may be prohibited to protect the purity of the water. *Sprague v. Minon*, 202 Mass. 467, 89 N. E. 93.

On condemning the water of a lake for a water supply, surplus waters flowing down an outlet may be used by abutters, and they may prevent unreasonable pollution or unreasonable diminution of the water by third persons. *Weeks-Thorn Paper Co. v. Glenside Woolen Mills*, 118 N. Y. 1027, 64 Misc. Rep. 205.

Where a municipality, to obtain a water supply, condemned waters flowing through certain land, but the right to use the water for farm purposes was reserved to a

simple absolute is condemned, it would seem that the former owner would have no more right to use the property than any other person, even though the use does not interfere with the public use.¹⁴

Condemnation proceedings divest the title of one who had an equitable title at the time but thereafter received the legal title.¹⁵

8. PROCEDURE.

§ 1528. Scope of subdivision.

The procedure in condemnation proceedings instituted by a municipal corporation is the same, except in so far as it is affected by particular statutes or charter provisions fixing a more or less different procedure, as if any other corporation or body was the condemnor; and inasmuch as the general rules are practically the same, regardless of whether the party condemning is a public or a private corporation, reference should be made to general treatises and encyclopedic articles relating to the law of eminent domain, after ascertaining what statute or charter provision governs the procedure, and carefully studying all of the contents thereof. Furthermore, as said in the preface to a recent work on Eminent Domain, "the procedure in eminent domain differs so widely throughout the United States, depending as it does entirely upon local statutes, that the decisions of one state are of little value in considering similar provisions arising in a different state, and depending upon different statutory provisions."¹⁶

Therefore, it has been deemed advisable merely to refer in a very general way to a few of the rules regulat-

riparian proprietor, he had no right to divert the waters of the brook flowing through his farm as against a lower riparian proprietor. *Fosgate v. Hudson*, 178 Mass. 25, 59 N. E. 809.

14. Pumping Station for water supply, entry on land by original

owner a trespass. *Reading v. Davis*, 153 Pa. St. 360, 26 Atl. 62.

15. *Buckwalter v. School Dist.* No. 42, 65 Kan. 603, 70 Pac. 605.

16. *Nichols, Eminent Domain*, preface.

ing the procedure without any attempt to cite the decisions except incidentally.

§ 1529. What law governs.

In determining the procedure to be followed in condemnation proceedings by a municipality, the statutes and charter provisions must be carefully and thoroughly examined to determine whether the general statute relating to condemnation proceedings governs, or whether a particular statute or charter provision, differing to some extent from the general statute, is applicable, and it should be noticed that in many municipalities the procedure is different according to the purpose for which the property is to be condemned, and the procedure to condemn land for streets, for instance, may be, to some extent at least, different from the procedure to condemn land for a park or for other purposes, according to the provisions of different statutes or charter provisions the one relating to streets and the other relating to parks.¹⁷

17. What law governs. The procedure in condemnation proceedings is to be determined by the particular statute or charter provision which governs the exercise of the power of eminent domain for the purpose for which the property is condemned. *Fishblatt v. Atlantic City*, 81 N. J. L. 64, 79 Atl. 887.

In *Mississippi*, a municipality condemning land for a street must proceed under the general eminent domain statute. *Illinois Cent. R. Co. v. Mississippi*, 94 Miss. 759, 765, 48 S. 651.

St. Louis. The right of eminent domain expressly conferred by the charter upon St. Louis, is not regulated by code practice, or by general statutes, but by special pro-

visions of the charter. The fact that there may be difference in details in this respect, between the general state laws and charter provisions is immaterial. *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943; *St. Louis v. Gleason*, 15 Mo. App. 25, 93 Mo. 33. "Condemnation proceedings to acquire lands for streets, parks, water-works, sewers and the like, clearly fall within municipal regulations." Hence, a charter which does not follow the procedure prescribed in the code of practice relating to such matters, is not for that reason out of harmony with the constitution or laws, and therefore the charter provision must control. *Kansas City v. Marsh Oil Co.*, 140 Mo. l. c. 472, 41 S. W. 943.

When a state delegates to a municipality the right to condemn private property for a public use, and does not in the act delegating such authority provide a method for its exercise, the general law of the state prescribing the procedure, and the method of ascertaining the damages is, by implication, a part of the law delegating the power.¹⁸

Where the power of eminent domain is delegated to a municipality and it frames its own charter, it may provide a plan or code of procedure for condemning property, and if such special procedure is not inimical to the general scope of the policy of the constitution and the statutes, such special provisions govern as against the provisions of general law.¹⁹

18. *Stowe v. Newborn*, 127 Ga. 421, 56 S. E. 516.

19. **Home rule charter procedure.** "The constitutional power in the legislature to delegate to cities in Missouri the right of eminent domain to condemn property for parks for the common health and pleasure of the people cannot be questioned at this late day. Further, when such grant is made by both Constitution and Enabling Act, as in this case, then the right of a city of the size of Kansas City, in framing and adopting its charter, to provide a plan or code of procedure for exercising the right of eminent domain is no longer an open question. These questions when new were not taken as granted and settled and answered as of course. To the contrary, they have been threshed out at the bar and settled by the appellate bench in a line of decisions familiar to students of municipal law, on full deliberation, on reason as well as authority, and need no new exposition.

Further, it is settled law that when special charter provisions relating to procedure in condemnation cases are not inimical to the general scope of the policy of our Constitution and laws, then such special provisions govern as against the provisions of general law—that is, such special provisions may be likened to exceptions read into or grafted on the general law. * * * Again, it must be taken as the accepted doctrine that powers granted, and charter provisions adopted pursuant, relating to the exercise of the right of eminent domain by a city of the class of Kansas City in establishing parks, boulevards and streets, pertain peculiarly to the domestic municipal affairs of such city and therefore come within the purview of its powers freed from interference by the Legislature, so long as such provisions do not contravene the general policy of our laws and Constitution." *Brunn v. Kansas City*, 216 M. 108, 117, 115 S. W. 446.

§ 1530. Special proceeding and not a civil action.

It has been repeatedly held that a condemnation proceeding is a "special proceeding" and not a "civil action."²⁰

§ 1531. Construction of procedure statutes.

Statutes prescribing the method of procedure to condemn lands or easements therein, are to be *construed strictly*. This is especially true when the right of eminent domain is conferred upon a private corporation as distinguished from a public or municipality.²¹ At the

20. *King v. New York*, 36 N. Y. 182; *Re Opening of 163d Street*, 131 N. Y. 569, 30 N. E. 66; *Johnson City Southern R. Co. v. South & W. R. Co.*, 148 N. C. 59, 61 S. E. 683, 687, in which it is said that in many respects the proceeding, unless otherwise prescribed by statute in such proceeding, is assimilated to that prevailing in courts of equity.

As a special proceeding. The condemnation of land by virtue of the power of eminent domain is a special proceeding, and the legislature has almost unlimited power in fixing the terms and conditions upon which such condemnation may be made. *Richardson v. Centerville*, 137 Iowa 253, 114 N. W. 1071.

Distinguished from special assessment. Proceedings instituted under the power of eminent domain, while separate and distinct from an assessment for a local improvement levied under a city's power of taxation, may involve as an incident thereto an assessment for a local improvement. *Re New York*, 192 N. Y. 459, 465, 85 N. E. 755.

21. *Johnson City Southern Ry. Co. v. South & W. R. Co.*, 148 N. C. 59, 61 S. E. 685.

Procedure must be strictly followed. *State v. Jersey City*, 54 N. J. L. 49, 22 Atl. 1052; *Re Washington Park Com'rs*, 52 N. Y. 131.

Strict construction of procedure statutes. "It has been held by this court, in a long line of decisions, that proceedings for the condemnation of private property for public use being in rem and purely statutory, every material requirement of the statute authorizing such proceeding must be strictly complied with. And unless it affirmatively appear upon the face of the proceedings that every essential prerequisite of the statute conferring the authority has been complied with, such proceedings will be void." *St. Louis v. Kock*, 169, Mo. 587, 591, 70 S. W. 143.

The law authorizing condemnation proceedings should be strictly construed, and every prerequisite to the exercise of the jurisdiction observed. *St. Louis v. Gleason*, 89 Mo. 67, 14 S. W. 768. 93 Mo. 38, 8

same time, it is sufficient that there be a *substantial* and *bona fide* compliance with the statutory requirements.²²

§ 1532. Matters to be considered before instituting condemnation proceedings.

Before condemnation proceedings are instituted it is generally necessary to *attempt to agree with the owner* on a price for the property. If no agreement can be reached, then the necessary preliminary steps must be taken, as required by the statute or charter, or both, including the passing of an ordinance or the like authorizing the condemnation. It is also necessary to consider the question of proper and necessary parties to the proceeding, and reference should be made to all statutory and charter provisions relating thereto.²³

S. W. 348, 15 Mo. App. 25; Shaffner v. St. Louis, 31 Mo. 264; Leonard v. Sparks, 63 Mo. App. 585.

The circuit court exercises a special jurisdiction and the facts showing jurisdiction must affirmatively appear. St. Louis v. Gleason, 93 Mo. 33, 8 S. W. 348, 15 Mo. App. 25; St. Louis v. Frank, 9 Mo. App. 579.

Every presumption is indulged in favor of the jurisdiction of a court of general jurisdiction, and this principle applies to condemnation proceedings. Buddecke v. Ziegenhein, 122 Mo. 239, 26 S. W. 696.

When the power to condemn is vested in one tribunal it cannot be exercised by another, and when two or more are required to act conjointly, less than the whole number cannot condemn. St. Louis v. Gleason, 93 Mo. 38, 8 S. W. 348, 15 Mo. App. 25.

Right of trial by jury is not applicable to cities, since a municipal corporation is not "an incor-

porated company," within the meaning of art. 12, § 4, of Const. Kansas City v. Vineyard, 128 Mo. 75, 30 S. W. 326.

Numerous continuances will not deprive the court of jurisdiction, although a particular charter (as Kansas City) may require a disposition at the first term of court. Lovitt v. Russell, 138 Mo. 474, 40 S. W. 123.

22. Graves v. Middletown, 137 Ind. 400, 37 N. E. 157.

23. See Lewis, Eminent Domain (3d Ed.), §§ 497-540.

Vote as condition precedent. "When the taking is by a municipal corporation, it usually must be authorized by a vote of the governing body, and this must be passed in such manner and by such formalities as are required by law. No general rule can be laid down, except that the statute must be strictly complied with." Lewis, Eminent Domain (3d Ed.), § 506.

§ 1533. Petition.

The proceedings to condemn property for public use are ordinarily instituted by an *application in writing* to the officer or tribunal whose jurisdiction is to be invoked. Such petition must comply with all statutory and charter provisions, including those relating to the signature of a certain proportion of the property owners, the statement of the names of the persons interested in the property to be condemned, the description of the property, the statement of the purpose of the taking, the statement of the necessity for the taking, and the statement as to the inability to agree with the land owner, etc.²⁴

The petition must state all *jurisdictional facts*, and hence it must show the existence of the right of the condemning party to exercise the power of eminent domain.

§ 1534. Notice of proceedings.

Where property is sought to be appropriated by condemnation proceedings, notice must be given to the own-

Chapter on Public Improvements, *post*.

Consent. Right to condemn property for a sewage-disposal plant as conditioned on consent of certain officers of the borough and of the state board of health, where the disposal plant is located outside of the municipality. *Florian Park v. Madison*, 78 N. J. L. 446, 78 Atl. 753.

24. See Lewis, *Eminent Domain* (3d Ed.), §§ 541-563.

Description of property. The property sought to be condemned must be described with reasonable certainty and that description must be followed in the subsequent orders and in the verdict of the jury and judgment of the court.

Helm v. Grayville, 224 Ill. 274, 79 N. E. 689.

Necessity. In the absence of any statute requiring proof of necessity for acquiring the land sought to be condemned, it is not necessary for the municipality to show necessity. *Re Buffalo*, 189 N. Y. 163, 81 N. E. 954.

Every provision of the statute conferring the power of condemnation must be strictly complied with and such compliance must affirmatively appear on the face of the proceeding. *Manda v. Orange*, 75 N. J. L. 251, 66 Atl. 917, holding that where power of condemnation depends upon adoption of certain statutes by a city, such adoption must be shown in condemnation proceedings.

ers of the land sought to be appropriated.²⁵ It is almost universally held, however, that notice by *publication* or *posting* is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending.²⁶

If a statute or charter provision fixes the contents of the notice, as it usually does, such provision should be strictly followed.

§ 1535. Remedies to prevent taking of or injury to property or for wrongful taking or injury.

The prevailing rule is that an entry upon private property under color of the eminent domain power will be *enjoined* until the right to make such entry has been perfected by a full compliance with the constitution and the laws.²⁷ So *ejectment* is a proper remedy to recover possession of property which has been wrongfully taken or is wrongfully retained by one claiming to act under the power of eminent domain.²⁸ And, in a proper case, *trespass* will lie, as will an action on the case or an action of *forcible entry and detainer*.²⁹

25. Lewis, Eminent Domain (3d Ed.), §§ 564-586.

In Missouri, the assessment is void unless notice and hearing are given. *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910. Notice by publication is sufficient. *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600; *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513; *Buddecke v. Ziegenhein*, 122 Mo. 239, 26 S. W. 696. Under statute, landowner is not entitled to notice of an ordinance providing for condemnation, but only to notice of proceedings to condemn. *Joplin Consolidated M. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

Name of owner. The names

of known owners of the land sought to be condemned must be set forth in the petition; if the owner is unknown, there must be an order of publication, and a correct description of the land must be set forth. *Sieferer v. St. Louis*, 141 Mo. 586, 43 S. W. 163.

Sufficiency of notice, see *Fishblatt v. Atlantic City*, 81 N. J. L. 64, 79 Atl. 887.

26. Lewis, Eminent Domain (3d Ed.), 568.

27. Lewis, Eminent Domain (3d Ed.), § 901.

28. Lewis, Eminent Domain (3d Ed.), § 927.

29. *Id.*, §§ 931, 953.

§ 1536. Recovery of compensation or damages.

If the taking is lawful, and the statute provides a definite and complete remedy for obtaining compensation for the property so taken or injured, such statutory remedy is exclusive.³⁰ However, if the condemnor alone can put the statutory remedy into operation, and he fails to do so, then the statutory remedy is not exclusive.³¹

Furthermore, if the taking or injury is unlawful because not authorized by statute or because the statutory conditions have not been complied with, the statutory remedy is not exclusive, in the absence of an explicit provision to the contrary, and the owner may resort

30. See note to Blackwell, E. & S. R. Co. v. Bebout, 19 Okla. 63, 91 Pac. 877, in 14 Am. & Eng. Ann. Cas. 1150.

Right of one whose property has been taken for public use without his consent and without condemnation proceedings, to maintain action for compensation or for permanent damages, see extensive note in 28 L. R. A. (N. S.) 968.

In those states in which the law, as held by the courts, permits the occupation of property before compensation is made, it is competent for the legislature to authorize such an occupation of private property upon providing the owner with an adequate remedy whereby he can obtain the just compensation to which he is entitled. In such cases the statutory remedy is exclusive of all other remedies and supercedes the common law actions for interfering with the owners possessions. But if no remedy is provided by the state, or if the

statutory remedy is taken away by repeal or if the initiative is given only to the party condemning who fails to pursue it, the owner may have his common law action. Lewis, Eminent Domain (3d Ed.), § 872.

The statutory or charter method of ascertaining damages is exclusive. Paret v. Bayonne, 39 N. J. L. 559.

Where the statute itself provides a specific remedy for the recovery of damages, such remedy is exclusive. Lewisburg Bridge Co. v. Union Co., 232 Pa. 255, 81 Atl. 324.

If a person has lost his right to recover damages in eminent domain proceedings, as provided for by the statutes, by his own delay in enforcing the remedy, he cannot resort to an action on contract for the purpose of recovering his damages. Hodgdon v. Haverhill, 193 Mass. 327, 79 N. E. 818.

31. Id.

to an appropriate common law remedy for such taking or injury.³²

32. *Id.*

"The property of a private citizen cannot be taken for a public use without just compensation first being paid. It is the right of a person whose land is being so appropriated to demand compensation in advance of appropriation, but the mere existence of this right cannot, in any sense, cause a failure to exercise the same to operate as a forfeiture of the right. The owner may well forego the payment in advance or the assessment in advance of his damages without forfeiting the right in an ordinary suit ulti-

mately to recover the value of his premises thus appropriated. This right to the common law remedy for the recovery of damages for the wrongful appropriation of one's property is one that inheres in our very system of laws, and, unless the same be expressly superseded by some statutory enactment providing a special remedy, the latter will be presumed to be merely cumulative of the former, and the owner may have his election as to which remedy he will adopt." *Atlanta v. Hunnicutt*, 95 Ga. 138, 22 S. E. 130.

CHAPTER 33.

DEDICATION.

1. NATURE AND KINDS, AND OTHER GENERAL RULES.
2. WHO MAY DEDICATE.
3. PLATS AND MAPS.
4. INTENTION TO DEDICATE.
5. ACCEPTANCE.
6. REVOCATION.
7. ESTOPPEL TO ASSERT OR DENY DEDICATION.
8. RIGHTS AND TITLE ACQUIRED OR AFFECTED.
9. MISUSER AND ABANDONMENT.

1. NATURE AND KINDS, AND OTHER GENERAL RULES.

- | Sec. | Sec. |
|---|---|
| 1537. General considerations and scope of chapter. | 1542. Necessity for specific grantee. |
| 1538. Definition and nature. | 1543. Purposes for which dedication is proper. |
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| 1540. Statutory dedications. | 1545. Conditions and reservations by dedicator. |
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2. WHO MAY DEDICATE.

- | Sec. | Sec. |
|--|---|
| 1546. General rules. | 1552. Lessors, lessees, and life tenants. |
| 1547. Agent. | 1553. Tenant in common. |
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| 1549. Persons acting in certain representative capacities. | 1555. Holder of equitable title. |
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| 1551. Same—married women. | |

3. PLATS AND MAPS.

- | Sec. | Sec. |
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| 1556. General considerations. | 1559. Purchasers having rights as limited to abutters. |
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4. INTENTION TO DEDICATE.

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| 1561. Necessity for intent to dedicate. | 1568. Intent must be clearly indicated. |
| 1562. How intent shown. | 1569. Presumption as to intention. |
| 1563. User as showing intent to dedicate. | 1570. Sufficiency of evidence to prove intent. |
| 1564. Same—permissive user. | 1571. Evidence admissible to show intent. |
| 1565. Same—time of user. | |
| 1566. Blanks on plat or map as showing intent to dedicate. | 1572. Same—testimony of dedicator as to his intent. |
| 1567. Showing absence of intent to dedicate. | 1573. Intent as question of fact. |

5. ACCEPTANCE.

- | Sec. | Sec. |
|--|---|
| 1574. Power to accept. | 1584. Statutory or charter provisions as to mode of acceptance. |
| 1575. Necessity for acceptance. | |
| 1576. Same—statutory dedication. | 1585. Acts showing intention not to accept. |
| 1577. Same—necessity for acceptance where sale of lots with reference to plat. | 1586. Sufficiency of evidence to show acceptance. |
| 1578. Same—when acceptance will be presumed. | 1587. Time for acceptance. |
| 1579. Mode and sufficiency of acceptance in general. | 1588. Estoppel to accept or enforce dedication. |
| 1580. Same—by acts of municipal officers. | 1589. Acceptance of part as acceptance of all. |
| 1581. Same—bringing action relating to land dedicated. | 1590. Acceptance as subject to conditions. |
| 1582. Same—user by public. | 1591. Acceptance as question of fact. |
| 1583. Same—acceptance by user as affected by statutes. | |

6. REVOCATION.

- | Sec. | Sec. |
|------------------------|---------------------|
| 1592. Right to revoke. | 1593. Rededication. |

7. ESTOPPEL TO ASSERT OR DENY DEDICATION.

Sec.	Sec.
1594. Estoppel to assert dedication.	1595. Estoppel to deny dedication.

8. RIGHTS AND TITLE ACQUIRED OR AFFECTED.

Sec.	Sec.
1596. Persons to whose benefit dedication inures.	1601. Same—title acquired by statutory dedication.
1597. Effect of dedication in general.	1602. Rights and extent of title acquired by municipality.
1598. Effect of dedication on rights of dedicator.	1603. Right of dedicator to sue.
1599. Rights acquired by citizens in general.	1604. Right of municipality to sue.
1600. Title acquired by dedication.	1605. Rights of purchasers and abutters in general.

9. MISUSER AND ABANDONMENT.

Sec.	Sec.
1606. Misuser or diversion of property dedicated.	1610. What constitutes abandonment.
1607. Same—sale or lease of property dedicated.	1611. Same—statutory provisions as to failure to open or work streets within specified time.
1608. Same—power of legislature to authorize diversion or sale.	1612. Effect of abandonment or misuser.
1609. Same—change of use by consent.	

1. NATURE AND KINDS, AND OTHER GENERAL RULES.

§ 1537. General considerations and scope of chapter.

Most of the streets, alleys, squares and parks in municipal corporations have been acquired by a voluntary dedication thereof by the owner to the public. The law relating to dedication is therefore of much importance as a part of the law of municipal corporations, although some phases of the law of dedication are merely incidental to the law regulating municipalities and other phases have nothing whatever to do with municipalities. The latter, including dedications of land outside a municipality for a country road or the like, and the rights

as between individuals where there is an incomplete dedication, will be merely noticed in this chapter but not treated exhaustively.

§ 1538. Definition and nature.

Dedication of land to public use consists in the intentional donation thereof by the owner to some public object or purpose, and the acceptance thereof by the public when an acceptance is necessary.¹ It is essential to

1. *Moragne v. Gadsden*, 170 Ala. 124, 54 So. 518.

Definition. Dedication is the intentional appropriation of land by the owner to some particular public use, reserving to himself no rights therein inconsistent with the free exercise and enjoyment of such use. *Northport, etc. Camp Meeting Association v. Andrews*, 104 Me. 342, 346, 71 Atl. 1027, 20 L. R. A. (N. S.) 976.

The voluntary devotion of private property to public use, without any formal conveyance to a specific grantee for specific uses, is called a dedication. *Lewis, Eminent Domain* (3d Ed.), § 489; *Elliott, Roads and Streets*, 85.

License distinguished. "A parol license to a private individual to exercise some right or privilege in real property, and an implied dedication of the land to some public use, where there has been an acceptance and user by the public, rest upon different and entirely distinct principles of law." *Roundtree v. Hutchinson*, 57 Wash. 414, 107 Pac. 345.

A lease of a part of a homestead to the public to be held

while used for purposes of township is not a dedication where the municipality agreed to pay a dollar rent. *Jasper Tp. v. Martin*, 161 Mich. 336, 126 N. W. 437.

In Massachusetts, it has been said that "the principle of dedication, although of ambiguous origin, has been recognized in this state as in force" from an early date and that "open squares in towns are as much within the principle referred to as highways." *Abbott v. Cottage City*, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143.

Burden of proving a dedication of lands to public use rests on the party who alleges it. *West End v. Eaves*, 152 Ala. 334, 44 So. 588; *Seaboard Air Line R. Co. v. Fairfax*, 80 S. C. 414, 61 S. E. 950.

In pleading a dedication, it is not sufficient merely to allege the conclusion that a street or other public place was duly laid out and dedicated to the public since the facts showing the dedication must be stated. *Moore v. Fowler*, 58 Ore. 292, 114 Pac. 472.

a dedication of property to public use that it is to be forever and irrevocable after acceptance,² and that it be for a *public* use.³

A dedication is peculiar, in so far as it operates to convey a right to real property, in these respects: (1) there need be no writing,⁴ (2) there need be no grantee *in esse*,⁵ and (3) the owner need not part with his title.⁶

It is to be distinguished from *prescription* in that in the latter case adverse user for a prescribed number of years fixes the right without regard to the intent existing in the mind of the owner (although some cases say that after such period a dedication will be presumed), while in case of a dedication user is merely evidence of intent and the effect thereof is always subject to rebuttal by showing that there was no intent to dedicate.⁷

2. *San Francisco v. Canavan*, 42 Cal. 541, 553.

Contra, see *Antones v. Eslava's Heirs*, 9 Port. (Ala.) 527, 545.

3. § 1543 *post*.

There is no such thing as the dedication of property to a private person or corporation. *Pittsburgh, C. C. & St. L. R. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356.

4. § 1562 *post*.

5. § 1542 *post*.

Dedication, while involving the essential features of a gift, and inuring to the benefit of the public as a grant, differs from a grant in that no grantee *in esse* is necessary to its validity. *Athens v. Burkett* (Tenn. Ch.), 59 S. W. 404.

6. § 1600 *post*.

In order to constitute a valid common-law dedication, it is not necessary that the legal title to a street, as shown on a plat,

should have passed by the plat out of the owner, but it is sufficient that he has clearly manifested an intention to set apart for public use the strip designated as a street. *Nelson v. Randolph*, 222 Ill. 531, 78 N. E. 914.

7. *Onstatt v. Murray*, 22 Ia. 457, 466.

§ 1297 *ante*, vol. 3.

Prescription is distinguished from dedication, in that the foundation of the former rests upon an adverse, continuous, uninterrupted use, of such a nature as to impart notice to the owner, for such a period of time as raises a presumption of grant, which period is different in the several jurisdictions. *International & G. N. R. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714.

"The discussion in some of the cases confuses a right or title acquired by dedication with that arising from an adverse posses-

§ 1539. Kinds of dedication and distinguishing characteristics.

Dedications are classified as (a) express and (b) implied, and as (1) common-law and (2) statutory.

A dedication is *express* when the intent is manifested by oral or written words, and is *implied* when the intent must be gathered from the acts of the dedicator.⁸ Other-

sion. The former gets its existence from the consent of the owner, either actual or implied, whilst the latter arises from the assertion of title in hostility to that of the record owner." *Roundtree v. Hutchinson*, 57 Wash. 414, 107 Pac. 345.

8. "An implied dedication is one arising, by operation of law, from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written. It is not founded on a grant, nor does it necessarily presuppose one, but it is founded on the doctrine of equitable estoppel. As said by the Supreme Court of the United States, 'the law considers it in the nature of an estoppel *in pais*,' and holds it irrevocable. It may be established by evidence of conduct, and in many ways." *Cincinnati v. Lessees of White*, 6 Pet. (U. S.) 431, 8 L. Ed. 452, a leading case on the subject of dedication.

"A dedication may be either express or implied. If the owner of land sets it apart for the use of the public, and declares that such is his intention, or where he conveys it to a municipality, or to a trustee, to hold for the use

of the public, the dedication is express. An implied dedication arises by operation of law from the acts of the owner, and is founded on the principle of estoppel *in pais*. It does not assume a grant, but that the owner, by his conduct, or his acquiescence in the use of the public of the land for the specified purpose, until it would be greatly injured or inconvenienced by a deprivation of the use, is estopped from interfering or preventing the public from continuing the use." *Athens v. Burkett* (Tenn. Ch.), 59 S. W. 404, 408.

Common-law dedications are, for convenience of description, frequently subdivided by law writers into two classes—express dedications and implied dedications. The substantial difference between the two consists in the mode of proof. In the former case the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose, while in the latter it is usually by such acts or conduct not directly manifesting the intention, but from which the law will imply the intent. *People v. Marin County*, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659.

wise stated, a dedication is express where the appropriation is formally declared,⁹ and is implied where it arises by operation of law from the owner's conduct and the facts and circumstances of the case.¹⁰

Statutory dedications are necessarily express, while common law dedications may be either express or implied.

A *statutory dedication* is one pursuant to the terms of a statute, and is almost universally created by the filing and recording of a plat.¹¹

A *statutory dedication* differs from a *common-law dedication* in that the former is in the nature of a grant, while the latter generally rests upon the principle of estoppel *in pais*,¹² and the former generally vests the legal title to the grounds set apart for public purposes in the municipal corporation, while the latter leaves the legal title in the original owner.¹³

Statutory provisions as to dedications do not preclude the right to make a common law dedication,¹⁴ and stat-

As examples of express common-law dedication may be mentioned deeds reciting the setting apart of land for a public place, express grants by deed, and recorded plats not executed pursuant to the statute.

Will may create a common-law express dedication. *South Covington, etc. R. Co. v. Newport, etc. R. Co.*, 110 Ky. 691, 62 S. W. 687.

9. *McKinney v. Duncan*, 121 Tenn. 265, 118 S. W. 683.

10. *McKinney v. Duncan*, 121 Tenn. 265, 118 S. W. 683.

An implied common-law dedication arises from the acts of the owner by operation of law and is founded on the doctrine of equitable estoppel, it not being necessary that there be any oral or written words.

11. § 1540 *post*.

12. *Denver v. Clements*, 3 Colo. 472; *Cole v. Minnesota Loan & Trust Co.*, 7 N. D. 409, 117 N. W. 354.

"The law is, that a parol dedication is not a grant; it is a right created in favor of the public, and is in the nature of an estoppel *in pais*. There need be no grantee *in esse* to take the fee, nor is it essential that the legal title should pass from the owner." *Baker City Mut Irr. Co. v. Baker City*, 58 Ore. 306, 113 Pac. 9, 14.

13. *Ryerson v. Chicago*, 247 Ill. 185, 93 N. E. 162; *Patrick v. Young Men's Christian Association*, 120 Mich. 185, 79 N. W. 208.

§ 1601 *post*.

14. § 1540 *post*.

utes describing the manner in which streets or alleys may be laid out and established do not take away the right to dedicate streets and alleys to the public.¹⁵

A *deed* given to a municipality may operate as a dedication, where it provides for a particular use of the property conveyed.¹⁶

So far as the method of dedicating is concerned, it is immaterial whether the property dedicated is for a street, an alley, a square, a park, or for some other public use.¹⁷

§ 1540. Statutory dedications.

Statutory dedications are those made pursuant to the provisions of a statute,¹⁸ but they are not exclusive of

15. *Noyes v. Ward*, 19 Conn. 250.

It seems, however, that common law dedications of public ways are thereby abolished in Massachusetts. § 1540 *post*.

16. A *deed* of property to a municipality for a particular purpose has been held to constitute either a common-law or a statutory dedication. *Avery v. United States*, 104 Fed. 711, 44 C. C. A. 161.

It is necessary to distinguish between the effect of a grant by deed for a public use, and a common-law or statutory dedication for a like purpose, since in the former case the character of the fee conveyed must be ascertained by a construction of the words of the deed. *Mahoning County v. Young*, 59 Fed. 96.

17. § 1543 *post*.

Alley and street. There is no difference between the rule applicable to the modes of dedicating a public alley and that applicable to the dedication of a street.

Kimball v. Chicago (Ill. 1912), 97 N. E. 257; *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403.

18. Plats made by the canal commissioners, in Illinois, have the same effect as statutory plats, under statute of 1833. *Ryerson v. Chicago*, 247 Ill. 185, 93 N. E. 162.

Plat of Ft. Dearborn addition to Chicago, held a statutory plat. - *Williams v. Chicago*, 247 Ill. 240, 93 N. E. 165.

Park. The statutes apply to a dedication of land for a park as well as for other purposes. *Ehmen v. Gothenburg*, 50 Neb. 715, 70 N. W. 237.

Religious use. It has been held that a statute providing that a recorded plat of a town shall describe all the public grounds within the town, and state whether intended for streets, alleys, commons, "or other public uses," and shall vest the fee of such land in the county in trust for the town, does not include a dedication of land for a town

the common-law method.¹⁹ In order to make a statutory dedication of property, the statute or charter provision which governs in the particular jurisdictions should be consulted and carefully followed in every step, and it is necessary, under most statutes and charter provisions, to survey the land and make a plat which must describe the land, be acknowledged, and recorded, and in some jurisdictions must be approved, and must at least substantially comply with the statute in all material matters.²⁰

square to be appropriated to religious denominations. *Patrick v. Young Men's Christian Association*, 120 Mich. 185, 79 N. W. 208.

Land outside municipality. Generally it is held that statutory provisions, relating to dedication by the filing of a plat, include a plat of land lying outside of the municipality. *Sowadzki v. Salt Lake County*, 36 Utah 127, 104 Pac. 111.

To take effect in futuro. A statutory dedication may be made to take effect in the future, in the absence of any statute forbidding it. *Jersey City v. Morris Canal & B. Co.*, 1 Beas. (N. J.) 553; *Trustees of M. E. Church v. Hoboken*, 33 N. J. L. 13, 22, 97 Am. Dec. 696.

19. *East Birmingham Realty Co. v. Birmingham Machine & Foundry Co.*, 160 Ala. 461, 49 So. 448; *Cole v. Minnesota Loan & Trust Co.*, 17 N. D. 409, 117 N. W. 354.

20. *Leadville v. Coronado Mining Co.*, 37 Colo. 234, 86 Pac. 1034, reviewing at some length the decisions in this country holding particular statutes not complied with; *Wyandotte County v. First Pres-*

byterian Church, 30 Kan. 620, 1 Pac. 109.

Statute must be followed.

Illinois. *Thomas v. Metz*, 236 Ill. 86, 86 N. E. 184; *Smith v. Chicago*, 107 Ill. App. 270.

Indiana. *Waltman v. Rund*, 109 Ind. 366, 10 N. E. 117.

Kansas. *Garfield Tp. v. Herman*, 66 Kan. 256, 71 Pac. 517.

Michigan. *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, 40 N. W. 448.

Minnesota. *Downer v. St. Paul & C. R. Co.*, 22 Minn. 251.

Wisconsin. *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407.

"Strict compliance with such statutes ought not to be exacted. But they are to be followed *substantially*, and by this we mean that the divisions into which the tract of land is separated by the acknowledgment and recording of the map should be pointed out with such precision, and the boundaries so fixed therein, as that these may be certainly and definitely located from the data furnished. Otherwise the object of the statute is not attained, and resort to description by metes and bounds rather than by reference

For instance, it is held that the description in a statutory plat must be as definite as is necessary in a conveyance.²¹

Likewise if the statute requires the plat to be made or *certified* by a designated officer, such as the county surveyor, there is no statutory dedication if the plat is made or certified by some other person.²² So it has

to the map will be essential in the transfer of titles." *Coe College v. Cedar Rapids*, 120 Iowa 541, 95 N. W. 267.

In Michigan, it is said that "since 1827 the forms of law required to be followed in this state to effectuate a statutory dedication of land to public use have remained substantially the same." *Grandville v. Jenison*, 84 Mich. 54, 47 N. W. 600.

Width of alley. If plat does not comply with statute as to width of alley, statutory dedication is invalid. *Watson v. Carver*, 27 App. (D. C.) 555.

Reference to known monuments. A plat does not substantially comply with the statute so as to constitute a statutory dedication where it refers to an adjoining tract which had previously been surveyed and subdivided, but without reference to any known or permanent monuments as required by the statute. *Minneapolis & St. Louis R. Co. v. Britt*, 105 Iowa 198, 74 N. W. 933.

Effect of ordinances. Where the entire subject of platting has been fully covered by the statutes of a state, the passage of an ordinance annexing thereto additional requirements is invalid. *Bur-*

roughs v. Cherokee, 134 Iowa 429, 109 N. W. 876.

21. *Coe College v. Cedar Rapids*, 120 Iowa 541, 95 N. W. 267.

Land must be described. *Downer v. St. Paul & C. R. W. Co.*, 22 Minn. 251.

The plat must describe the land dedicated with reasonable certainty. *Columbia v. Bright*, 179 Mo. 441, 79 S. W. 151.

In Arkansas, in a case where it did not appear whether the plat was a statutory one, it was held that it is not essential that the description in a plat be so precise that the location and identity of the land embraced are apparent from the description alone, but extraneous circumstances may be considered to show the application of the description. *Paragould v. Lawson*, 88 Ark. 478, 115 S. W. 379.

22. *Nelson v. Randolph*, 222 Ill. 531, 78 N. E. 914; *Wilder v. Aurora, De K. & R. Electric Traction Co.*, 216 Ill. 493, 75 N. E. 194 (holding certificate by deputy county surveyor 'insufficient'); *Blair v. Carr*, 162 Ill. 362, 44 N. E. 720; *Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212; *Lake View v. LeBahn*, 120 Ill. 92, 9 N. E. 269; *Thomas v. Eckard*, 88 Ill. 593; *Smith v. Chicago*, 107 Ill. App. 270.

been held that a statutory plat cannot be *signed* by an agent.²³

If the statute requires an *acknowledgment* of the plat, it is insufficient to constitute a valid statutory dedication where it is not acknowledged as required by the statute,²⁴ and the acknowledgment taken by one author-

23. *Russell v. Lincoln*, 200 Ill. 511, 65 N. E. 1088.

Filing of statutory plat by one not the owner of the land does not constitute dedication. *Lewis v. Lincoln*, 55 Neb. 1, 75 N. W. 154.

24. *Illinois*. *Thomas v. Eckard*, 88 Ill. 593.

Indiana. *Taylor v. Ft. Wayne*, 47 Ind. 274.

Kansas. *Brooks v. Topeka*, 34 Kan. 277, 8 Pac. 392.

Michigan. *People v. Beaubien*, 2 Doug. (Mich.) 256; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Burton v. Martz*, 38 Mich. 761; *Grandville v. Jenison*, 84 Mich. 54, 47 N. W. 600.

Minnesota. *Baker v. St. Paul*, 8 Minn. 491; *Winona v. Huff*, 11 Minn. 119.

Missouri. *Putnam v. Walker*, 37 Mo. 600.

Ohio. *Satchell v. Doran*, 4 Ohio St. 542.

Oregon. *Nodine v. Union*, 42 Ore. 613, 72 Pac. 582.

Wisconsin. *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407.

Certificate held sufficient. *State v. Schwin*, 65 Wis. 207, 26 N. W. 568.

Acknowledgment by two of three county commissioners held insufficient. *Spalding v. Macomb & W. I. R. Co.*, 225 Ill. 585, 80 N. E. 327.

Failure to state persons making plat were personally known held

not fatal. *Ragan v. McCoy*, 29 Mo. 356.

A plat is not sufficient as a statutory plat where executed and acknowledged by certain of the owners by their attorneys in fact. And the plat is not sufficient as a statutory one as to those owners who acknowledged it in person, since if any of the owners of property covered by a plat fail to comply with the statute, the validity of the entire plat as a statutory dedication is destroyed. *D. M. Goodwillie Co. v. Commonwealth Electric Co.*, 241 Ill. 42, 89 N. E. 272.

Married women. An unacknowledged deed by a married woman to a municipality is void as a dedication where the statute requires married women to acknowledge their deeds. *Tatum v. St. Louis*, 125 Mo. 647, 28 S. W. 1002.

Estoppel. A grantee of lots who conveys to third persons according to an unacknowledged recorded plat of a town is estopped to deny the sufficiency of the dedication because of the want of an acknowledgment. *Giffen v. Olathe*, 44 Kan. 342, 24 Pac. 470.

In Iowa, it has been held that a county judge's order that a town plat be recorded is conclusive on the dedicator as to the sufficiency of the acknowledgment. *Scott v. Des Moines*, 64 Iowa 438, 20 N. W. 752.

ized by law to take such an acknowledgment.²⁵ In some jurisdictions, the plat, before it can be filed, must be *approved* by a certain officer or by a certain board or a certain proportion of the members of a board.²⁶

Furthermore if the statute requires that the plat be *recorded*, and it is not recorded, there is no statutory dedication.²⁷ So failure to comply with the statute in re-

25. *Gosselin v. Chicago*, 103 Ill. 623; *Gould v. Howe*, 131 Ill. 490, 23 N. E. 602; *Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975; *Stewart v. Perkins*, 110 Mo. 660, 19 S. W. 989.

A plat acknowledged before an Illinois commissioner of deeds in the state of New York is not valid as a statutory dedication. *Birge v. Centralia*, 218 Ill. 503, 75 N. E. 1035.

Attorney in fact cannot take acknowledgment. *Gosselin v. Chicago*, 103 Ill. 623; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373; *Earll v. Chicago*, 136 Ill. 277, 26 N. E. 370.

26. *Leadville v. Coronado Min. Co.*, 37 Colo. 234, 86 Pac. 1034.

Approval of plat. A plat approved by less than three-fourths of the members of the council, and not filed with the clerk of the city as required by statute, does not constitute a statutory dedication. *Leadville v. Coronado Mining Co.*, 37 Colo. 234, 86 Pac. 1034.

A statute requiring a municipality to approve a statutory plat, before allowing it to be filed, contemplates that the municipality will examine before approving it. *Guitar v. St. Clair* (Mo., 1912), 112 S. W. 291.

Signature of clerk. If statute requires the approval of the plat by a certain officer before it can be recorded, the mere signature of the officer by his clerk does not constitute an approval, no authority for the signature being shown. *St. Joseph v. Schulz*, 132 Mich. 213, 93 N. W. 432.

In Minnesota, the 1899 statute prohibits the recording of a plat in the office of the register of deeds until first approved by the municipal authorities; and thereunder a grantee cannot compel his grantor to acknowledge and file a plat before presentation to the council for approval. *Nagel v. Dean*, 94 Minn. 25, 101 N. W. 954.

Mandamus. If the statute provides that the plat must be approved by the board of public works, mandamus lies to compel the approval if the board acts arbitrarily or unreasonably in refusing to approve. *Van Husan v. Heames*, 91 Mich. 519, 52 N. W. 18.

27. *Colorado.* *Leadville v. Coronado Min. Co.*, 37 Colo. 234, 86 Pac. 1034.

Illinois. *Rock Island & P. R. Co. v. Johnson*, 204 Ill. 488, 68 N. E. 549.

Kansas. *Brooks v. Topeka*, 34 Kan. 277, 8 Pac. 392.

gard to plats in the following respects have been held fatal to a statutory dedication: failure to state the names of streets described;²⁸ failure to state the location of platted lands;²⁹ failure to state the width of the street.³⁰

On the other hand, the *reservation* in a plat of the trees and rocks on the streets and alleys has been held not to impair the plat as a statutory dedication.³¹

Defects in a plat cannot be cured by subsequent conveyances by the proprietor,³² a subsequent acknowledgment,³³ nor by subsequent conduct of the donor.³⁴ However, defects in a plat, such as irregularities, or defect in the acknowledgment,³⁵ or the omission of a

Missouri. Putnam v. Walker, 37 Mo. 600.

Ohio. Morris v. Bowers, Wright (Ohio) 749.

Recording in county other than where land is situated is insufficient. Nelson v. Madison, Fed. Cas. No. 10110.

Record is notice only for purpose declared by statute. Burton v. Martz, 38 Mich. 761.

Failure to record held important only as it concerned naked legal title. Cass County v. Banks, 44 Mich. 467, 7 N. W. 49.

28. Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774.

29. Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931.

30. Tilzie v. Haye, 8 Wash. 187, 35 Pac. 583.

31. Brown v. Carthage, 128 Mo. 10, 30 S. W. 312.

32. People v. Beaubien, 2 Doug. (Mich.) 256.

Contra. Defects may be cured by a subsequent deed to the municipality. Meachem v. Seattle, 45 Wash. 380, 88 Pac. 628.

A subsequently acquired title on the part of the dedicator will cure the defect in his title and validate the dedication. Kansas City Milling Co. v. Riley, 133 Mo. 574, 34 S. W. 835.

33. Burton v. Martz, 38 Mich. 761.

34. It has been uniformly held that to constitute a statutory dedication, the requirements of the statute must be complied with, and where this has not been done, subsequent conduct of the donor, or of the city, cannot operate to make it such; and, although the intention to dedicate is clearly manifested, the dedication will amount to only a common-law dedication. Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034, holding that the word "conveyed" as used in the indorsement on a plat was ineffectual to pass a title in fee simple to streets dedicated thereby.

35. Parriott v. Hampton, 134 Iowa 157, 11 N. W. 440; Weeping Water v. Reed, 21 Neb. 261, 31 N. W. 797.

seal,³⁶ may be cured by a statute validating such plats notwithstanding the irregularity.³⁷

If the *plat substantially complies with the statute* in all respects, it constitutes a dedication of such portions of the premises as are marked or noted as donated or granted to the public³⁸ so far as the owner is concerned, however, there is some question as to whether an acceptance by the municipality is necessary to complete the dedication so far as the municipality is concerned.³⁹ On the other hand if the plat is for some reason defective or insufficient as a statutory dedication, it is nevertheless effectual to constitute a *common-law dedication* where the intent to dedicate is clearly apparent therefrom, and the property is subsequently accepted by the municipality.⁴⁰ For example, where the plat is

In Arkansas, where the certificate of the officer shows that the grantors appeared before him but fails to show an acknowledgment, but it is evident from the certificate that the appearance could be for no other purpose than to acknowledge the execution of the deed, the certificate is cured by the statutory provision that "all conveyances and other instruments of writing, which are recorded in any county in this state, the proof of execution of which is insufficient, because the officer certifying such execution and acknowledgments omitted any other words in his certificate of acknowledgment, * * * *, or otherwise informal, shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form." *Stuttgart v. John*, 85 Ark. 520, 109 S. W. 541.

36. *Williams v. Milwaukee, In-*

dustrial Exposition Assn., 79 Wis. 524, 48 N. W. 665.

37. Defective statutory dedication may be cured by statute. *Thorndyke v. Milwaukee*, 143 Wis. 1, 126 N. W. 881.

38. *People ex rel. v. Ricketts*, 248 Ill. 428, 94 N. E. 71.

39. § 1576 *post*.

40. *Illinois*. *Owen v. Brookport*, 208 Ill. 35, 69 N. E. 952; *Corning & Co. v. Woolner*, 206 Ill. 190, 69 N. E. 53; *Russell v. Lincoln*, 200 Ill. 511, 65 N. E. 1088; *Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378; *Marsh v. Fairbury*, 163 Ill. 401, 45 N. E. 236; *Earll v. Chicago*, 136 Ill. 277, 26 N. E. 370; *Gould v. Howe*, 131 Ill. 490, 23 N. E. 602; *Maywood County v. Maywood*, 118 Ill. 61, 6 N. E. 866; *Smith v. Flora*, 64 Ill. 93.

Indiana. *Waltman v. Rund*, 10 N. E. 117, 109 Ind. 366.

Iowa. *Coe College v. Cedar Rapids*, 120 Iowa 541, 95 N. W.

accepted by the municipality, the fact that it was not properly acknowledged, does not preclude the dedication taking effect as a common-law dedication.⁴¹

If there has been a valid statutory dedication, acts of the dedicator will be construed as relating to such statutory dedication rather than raise a presumption of a more comprehensive common-law dedication.⁴² If a dedicatory statement is attached to the plat, it must be construed as a whole and no part should be rejected as meaningless if it can be avoided.⁴³

267; *Bradstreet v. Dunham*, 65 Iowa 248, 21 N. W. 592.

Michigan. *Mt. Clemens v. Mt. Clemens Sanitarium Co.*, 127 Mich. 115, 86 N. W. 537; *Ruddiman v. Taylor*, 95 Mich. 547, 55 N. W. 376.

Minnesota. *Downer v. St. Paul & C. Ry. Co.*, 23 Minn. 271; *Man-kato v. Meagher*, 17 Minn. 265 (Gil. 243).

Missouri. *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735; *Campbell v. Kansas*, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; *Rose v. St. Charles*, 49 Mo. 509.

Nebraska. *Pillsbury v. Alexander*, 40 Neb. 242, 58 N. W. 859.

Ohio. *Fulton v. Mehrenfeld*, 8 Ohio St. 440; *Fulton v. Mehrenfeld*, 1 Disn. 151.

Washington. *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446.

Wisconsin. *Smith v. Beloit*, 122 Wis. 396, 100 N. W. 877.

United States. *United States v. Illinois Central R. Co.*, Fed. Cas. No. 15437; *Sargeant v. Indiana State Bank*, Fed. Cas. No. 12,360, aff'd in 53 U. S. (12 How.) 371, 13 L. Ed. 1028; *Banks v. Ogden*, 69 U. S. (2 Wall.) 57, 17 L. Ed. 818.

Defective statutory dedication is good as common-law dedication. *Thorndyke v. Milwaukee*, 143 Wis. 1, 126 N. W. 881.

A defective plat, although recorded, does not operate as a common-law dedication, where the owner remains in possession and ignores the subdivision. *Smith v. Osage*, 80 Iowa 84, 45 N. W. 404, 8 L. R. A. 633.

Intent. A street is not dedicated where the plat does not correspond with the survey, although the plat indicates the existence of a street not intended by the survey, for the reason that the intent to dedicate and the use by the public are wanting. *Bradstreet v. Dunham*, 65 Iowa 248, 21 N. W. 592.

41. *Powell v. Gilman*, 38 Ill. App. 611; *Shea v. Ottumwa*, 67 Iowa 39, 24 N. W. 582; *Miami County Commissioners v. Wilgus*, 42 Kan. 457, 22 Pac. 615; *Giffen v. Olathe*, 44 Kan. 342, 24 Pac. 470; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735.

42. *Hogue v. Albina*, 20 Ore. 182, 25 Pac. 386, 10 L. R. A. 673.

43. *Florida East Coast R. Co. v. Worley*, 49 Fla. 297, 38 So. 618

§ 1541. Parties to dedication.

The owner of the land and the public are the parties to a dedication,⁴⁴ and the dedication must be for the use of the public at large.⁴⁵ There can be no dedication, either statutory or common-law, to a private person or corporation as distinguished from the public.⁴⁶ And it is held that while land may be dedicated for church or religious purposes, such dedication cannot in any event be to a municipal corporation as trustee.⁴⁷

§ 1542. Necessity for specific grantee.

It is well settled that there need be no specific grantee in existence at the time the dedication is made,⁴⁸ since

44. *Athens v. Burkett* (Tenn. Ch.), 59 S. W. 404.

45. *Princeton v. Gustavson*, 241 Ill. 566, 89 N. E. 653.

46. *Pittsburg, C. C. & St. L. R. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356.

"In saying that there is no question of dedication in the case, the term 'dedication' is used in its strictly legal sense. In that sense, dedication is a matter purely between the owner and the public. There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. Some of the cases say that platting a tract of land, recording the plat, and selling lots by reference to such plat, constitutes a dedication of the streets in favor of the purchasers of these lots, even though a dedication to the public is not perfected and completed. The statement is not absolutely correct, as a legal principle, as may be seen from what has already been

said." *Prescott v. Edwards*, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186.

47. *Maysville v. Wood*, 102 Ky. 263, 43 S. W. 403, 39 L. R. A. 93, 80 Am. St. Rep. 355.

Contra, see § 1134 *ante*, vol. 3.

48. *Alabama*. *Antones v. Es-lava's Heirs*, 9 Port. 527.

California. *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *Carpenteria School Dist. v. Heath*, 56 Cal. 478.

Illinois. *Riverside v. MacLain*, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 283, 102 Am. St. Rep. 164.

Michigan. *Patrick v. Young Men's Christian Association*, 120 Mich. 185, 79 N. W. 208.

Minnesota. *Winona v. Huff*, 11 Minn. 119 (Gil. 75).

Missouri. *Board of Regents for Normal School District No. 3 v. Painter*, 102 Mo. 464, 14 S. W. 938, 10 L. R. A. 493.

Ohio. *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Bryant's Lessee v. McCandless*, 7 Ohio (7 Ham.) 135, pt. 2; *Brown v.*

the public is an ever existing grantee, capable of taking a dedication for public uses, and its interests are a sufficient consideration to support them;⁴⁹ and property

Manning, 6 Ohio (6 Ham.) 298, 27 Am. Dec. 255.

Pennsylvania. Scranton v. Griffin, 8 Leg. Gaz. (Pa.) 86.

Texas. Atkinson v. Bell, 18 Tex. 474.

Washington. Meeker v. Puyallup, 5 Wash. 759, 32 Pac. 727.

United States. Coffin v. Portland (C. C.), 27 Fed. 412; Beatty v. Kurtz, 27 U. S. (2 Pet.) 566, 7 L. Ed. 521.

The fact that there never may be any grantees capable of taking the fee is immaterial. Cincinnati v. White's Lessee, 6 Pet. (U. S.) 431, 8 Law Ed. 452.

While parties are necessary to a dedication as well as to a private grant, the interests of those beneficially entitled to dedications will not be permitted to lapse or fall for want of a person to take the legal title. Vick v. Vicksburg, 2 Miss. 379, 31 Am. Dec. 167.

If land is granted for cemetery purposes to a community, which is unable as such to receive it, and title is not conferred upon the individual members of the community because of the indefiniteness of the description of the grantees, equity will appoint trustees to control the property for the purposes specified, where there is no statute to the contrary. Hunt v. Tolles, 75 Vt. 48, 52 Atl. 1042.

A map laying out a town and marking off certain land as a

public square, followed by the sale of lots with reference to such map, is a dedication without regard to the fact that the town is not yet organized. San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405.

Public plat or public user may show dedication of street without regard to whether a city is incorporated. Gwynn v. Homan, 15 Ind. 201.

Dedication need not be limited to any particular locality but may be to the public at large and limited only by the wants of the community. Bryant's Lessee v. McCandless, 7 Ohio 135, pt. 2.

Dedication for a training ground and burial place, although for use of only a limited portion of the public, is valid as a charitable use. Mowry v. Providence, 10 R. I. 52.

Where property is dedicated to the "people of" a municipality for particular purposes, the beneficiary is the public at large since those who are not so may become people of the municipality if, and when, they choose, or they may avail themselves of the dedication without becoming people of the municipality. Saucier v. New Orleans, 119 La. 179, 43 So. 999.

49. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914; Warren v. Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

may be dedicated to an unincorporated municipality.⁵⁰

If there is no municipality in existence at the time of the dedication, the easement or fee vests in the municipality on its creation.⁵¹

§ 1543. Purposes for which dedication is proper.

At common-law, dedications were confined to the purpose of highways but in this country the doctrine has been given a wider application, and its limits have been judicially defined as extending to public squares common lots, burying grounds, school lots, etc.⁵² In fact, a

50. *Harn v. Dadeville*, 100 Ala. 199, 14 So. 9; *Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008; *New Orleans v. United States*, 10 Pet. (U. S.) 662, 9 L. Ed. 573.

General rule that fee cannot remain in abeyance does not apply where property is dedicated to public use. *Kennedy's Ex'rs v. Jones*, 11 Ala. 63.

51. *Waggeman v. North Peoria*, 160 Ill. 277, 43 N. E. 347.

"The title to land which has been dedicated to public use, as for a highway or public square in a city, is in the city as trustee for the public; and it has been held, in the case of such a dedication of land in a proposed city to be thereafter built, that the fee will remain in abeyance until the proper grantee or city comes *in esse*, when it will vest in such city. A dedication to the public may exist where there is no city or town or corporate entity to take as grantee; and in such case, while the fee may remain in the individual who dedicates the land, he will be estopped from setting it up as against the public who may be interested in the use of the land

according to its dedication." *Gordon County v. Calhoun*, 128 Ga. 781, 58 S. E. 360.

An act of Congress donating a right of way for highways over public land is a grant to the public as a continuing body, so that if the highway remains a rural one, it is under the supervision of the county, but when the territory over which the road runs comes within the limits of an incorporated city, the city then becomes the trustee of the same public in supervising and controlling the highway. *Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593.

Statutory dedication. Where there is a statutory dedication but no municipality was then in existence, the fee in the streets and other public grounds as shown by the plat, remains in abeyance subject to vest in the corporation as soon as created. *Stevenson v. Lewis*, 244 Ill. 147, 91 N. E. 56.

52. *Lake Erie, etc., R. Co. v. Whithan*, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. Rep. 355; *Baker v. Johnston*, 21 Mich. 319.

dedication may now be made for any purpose which is for the use and enjoyment of the public at large.⁵³

Land may be dedicated for a street, or alley, or other highway;⁵⁴ public parks;⁵⁵ public squares or com-

53. *Lewis*, *Eminent Domain* (3d Ed.), § 489.

54. *Alabama*. *Steele v. Sullivan*, 70 Ala. 589.

Connecticut. *Noyes v. Ward*, 19 Conn. 250.

Georgia. *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 265.

Illinois. *Grube v. Nichols*, 36 Ill. 92; *Princeton v. Gustavson*, 241 Ill. 566, 89 N. E. 653.

Iowa. *Baldwin v. Herbst*, 54 Iowa 168, 6 N. W. 257.

Missouri. *Garnett v. Slater*, 56 Mo. App. 207.

New Jersey. *Smith v. State*, 23 N. J. L. 712.

Texas. *Heilbron v. St. Louis S. R. Co.*, 52 Tex. Civ. App. 575, 113 S. W. 610, 979.

A *cul de sac* may be dedicated so as to become a public highway. *Stone v. Brooks*, 35 Cal. 489; *Cemetery Ass'n v. Meninger*, 14 Kan. 312; *People v. Van Alstyne*, 3 Keyes (N. Y.) 35, 3 Abb. Dec. 575; *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692.

"The common-law upheld immemorially dedications by landowners and acceptance by the public as a valid method of creating highways, and this doctrine became, at an early day, part of the jurisprudence of our state;" and statutory provisions forbidding loss of title to land by use of it as a road by the public, less than a specified time, does not abolish common-law dedications

for road purposes. *State v. Muir*, 136 Mo. App. 118, 117 S. W. 620.

Statutory provisions as to approval by judge of layout of highway held not applicable where road established by dedication. *Paulsen v. Wilton*, 78 Conn. 58, 61 Atl. 61.

Sidewalks. May dedicate land for. *Boughner v. Clarksburg*, 15 W. Va. 394.

In Massachusetts, however, under a statute providing that "no way opened and dedicated to the public use, which has not become a public way, shall be chargeable upon a city or town as a highway or town way, unless the same is laid out and established by said city or town in the manner prescribed by the statutes of the commonwealth," acceptance by a municipality of a way dedicated to public use does not make it a public way unless laid out and established by the municipality in the manner prescribed by the statutes of the commonwealth. *Guild v. Shedd*, 150 Mass. 255, 22 N. E. 896.

Right to dedicate as affected by condition of property. The fact that a dedicated street, in its condition at the time of dedication, is in several places not susceptible of use as a highway, but requires the spending of money and labor to make it passable, does not affect the validity

mons;⁵⁶ public wharves and landings;⁵⁷ for public buildings;⁵⁸ for school houses;⁵⁹ for pious and religious

of the dedication. *Webb v. De-mopolis*, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62.

Rededication. Where a highway has been dedicated to the public so as to make the duty to repair it rest on a city, the latter cannot dedicate it to the town. *Guthrie v. New Haven*, 31 Conn. 308.

55. *Northport Wesleyan Grove Campmeeting Ass'n v. Andrews*, 104 Me. 342, 71 Atl. 1027, 20 L. R. A. (N. S.) 976.

56. *Macon v. Franklin*, 12 Ga. 239.

Public squares. "In the early case of *Pearsall v. Post*, 20 Wend 111, 136, Cowen, J., intimated that the doctrine of dedication applicable to streets and ways did not extend to public squares in cities or villages; but, when the case reached the Court of Errors, a contrary view was expressed by Chancellor Walworth, who said that in ancient times in England the law of dedication, which was applicable to thoroughfares, was properly applicable to market places and promenades, although they were not highways in the ordinary sense of the term. *Post v. Pearsall*, 22 Wend. 425, 433. 'It is now generally admitted' says Mr. Justice Holmes in *Abbott v. Cottage City*, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143, 'that open squares in towns are as much within the principle referred to as highways, and it has been

held in numerous decisions that such squares may be dedicated to public uses.'" *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716, 719.

Open squares in towns are as much within the principles of dedication as highways, and the fact of dedication may be established in the same manner as in the case of highways and streets. *Thorndyke v. Milwaukee*, 142 Wis. 1, 126 N. W. 881.

The words "public square" will be understood to be the platted ground devoted to public purposes and not the territory of the streets adjoining the sides of the public square. *DeWitt v. Clinton*, 194 Ill. 521, 62 N. E. 780.

It has been said that the name "public square" has acquired a legal meaning, indicating that certain property has been dedicated to the public use for governmental purposes. *People ex rel. v. Willison*, 237 Ill. 584, 86 N. E. 1094; *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305.

Dedication by city of public square for county buildings. *Victoria v. Victoria County* (Tex., 1910), 128 S. W. 109, rev'g 115 S. W. 67.

57. *Mankato v. Williard*, 13 Minn. 13; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407.

58. See *State v. Travis County*, 85 Tex. 435, 21 S. W. 1029.

59. See *Kemper v. Collins*, 97 Mo. 644, 11 S. W. 245.

uses,⁶⁰ including cemeteries;⁶¹ and for other public

60. *Wyandotte County v. First Presbyterian Church*, 30 Kan. 620, 1 Pac. 109; *Cooper v. First Presbyterian Church*, 32 Barb. (N. Y.) 222; *Hunter v. Trustees of Sandy Hill*, 6 Hill. (N. Y.) 407, 411; *Ludlow v. Rector, etc., of St. John's Church*, 124 N. Y. S. 75, 68 Misc. Rep. 400.

Church purposes. "It is presumed that in the nineteenth century, in a Christian land, no argument is necessary to show that church purposes are public purposes, and that the inhabitants of a town have an interest in ground reserved for such a use. To deny that church purposes are public purposes is to argue that the maintenance, support and propagation of the Christian religion is not a matter of public concern. Our laws, although they recognize no particular religious establishment, are not insensible to the advantages of Christianity, and extend their protection to all, in that faith and mode of worship they may choose to adopt." *Hannibal v. Draper*, 15 Mo. 634.

Ordinarily dedication "is limited to a strictly public use, and yet it may have a broader significance; or, at least, the principle which underlies and supports it may be invoked to support an appropriation to uses not strictly and technically public. It would be a useless labor to trace in the old common-law the history of the doctrine of pious and charitable uses. It is enough to say that after a variety of decisions and

legislation the law seemed to culminate and be settled by the statute of 43 Eliz., c. 4 (1601), commonly called 'the statute of charitable uses,' and from that time on the validity of appropriations to such uses was considered a settled thing at common law. And while in this country that statute as a whole has not been accepted as of force in all the states, yet the principle which underlies it has been universally recognized; at least, so far as any question like the one before us is concerned." *Wyandotte County v. First Presbyterian Church*, 30 Kan. 620, 1 Pac. 109, 112.

§ 1134 *ante*, vol. 3.

61. *Wormley v. Wormley*, 207 Ill. 411, 69 N. E. 865, 3 L. R. A. (N. S.) 481; *Redwood Cemetery Ass'n v. Baudy*, 93 Ind. 246; *Tracy v. Bittle*, 213 Mo. 302, 112 S. W. 45; *Hunter v. Sandy Hill*, 6 Hill. (N. Y.) 407.

Cemetery dedicated for inhabitants of town only and not for the general public held nevertheless a valid dedication. *Mowry v. Providence*, 10 R. I. 52.

Dedication of land for a cemetery is valid on the theory that it is made to a pious or charitable use, although not distinctively a public one. *Benn v. Hatcher*, 81 Va. 85, 59 Am. Rep. 645.

The owner of a cemetery who plats it and sells lots retains the fee to driveways laid out on the plat, and does not dedicate them to a public use. *Mt. Hope Cemetery Ass'n v. New Mt. Hope Ceme-*

uses.⁶² Likewise there may be a dedication of an *easement* in earth for the lateral support of a street grade.⁶³

So the right to have land kept free from buildings within reasonable limits, for purposes of light, air, and prospect, can be acquired by dedication.⁶⁴

On the other hand, with the possible exception of dedications to religious and pious uses, a dedication cannot be for a *private use*,⁶⁵ unless authorized by statute. In other words, the use must be one which the public, as distinguished from a few individuals, may enjoy;⁶⁶

tery Association, 246 Ill. 416, 92 N. E. 912.

A dedication of a cemetery as "English Grave Yard" held not a dedication to the Protestant Episcopal Church or any parish thereof. *St. Paul's Parish v. East St. Louis*, 245 Ill. 470, 92 N. E. 322.

62. May be dedicated for pleasure grounds or for erection of water works. *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77.

Public market, see *Heffron v. Galveston*, 33 Tex. Civ. App. 52, 75 S. W. 370.

63. *Williams v. Hudson*, 130 Wis. 297, 110 N. W. 239.

64. *Attorney-General v. Vineyard Grove Co.*, 181 Mass. 507, 64 N. E. 75.

65. *Bailey v. Culver*, 12 Mo. App. 175; *Trustees of Methodist Episcopal Church v. Hoboken*, 33 N. J. Law 13, 97 Am. Dec. 696.

Public must be chief beneficiary. *Todd v. Pittsburg, Ft. W. & C. R. Co.*, 19 Ohio St. 514.

The fact that one who dedicated an alley did so with expectation to gain a certain benefit therefrom does not show that the alley was for a private purpose. *Fairbury*

Union Agricultural Board v. Holly, 169 Ill. 9, 48 N. E. 149.

66. Street must be for use of public and not merely for the use of certain persons. *Bangor House v. Brown*, 33 Me. 309.

Where a plat is made for a city addition and it dedicates certain land as a park and certain other land as a tennis court, "for and to the use of the occupants of said subdivision," there is no dedication for a public use, since the occupants may at their pleasure exclude the public entirely and devote such ground to their own private purposes. *People ex rel. v. Ricketts*, 248 Ill. 428, 94 N. E. 71.

Thus, the very nature of the user may be such as to preclude a possible user by the public at large, and hence prohibit a dedication, as where the user is to deposit wood or other articles on a public landing, since in such a case the user would necessarily be confined, for lack of space, to a few individuals. *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513.

Compare *Mowry v. Providence*, 10 R. I. 52.

but it is not necessary that all the public actually *will* enjoy it, provided they *may* enjoy it.⁶⁷

For example, the following uses have been held not public and hence not a subject for dedication: private passway;⁶⁸ for the use of a corporation formed purely for scientific purposes;⁶⁹ the right to fish in private waters;⁷⁰ the right to float logs in a stream during spring freshets;⁷¹ etc. So a dedication cannot be made for a use prohibited by statute, as for a street less than a fixed width.⁷²

Land cannot be dedicated to a railroad company, for the reason that there cannot be a dedication to a private

67. "It is argued that the dedication is to the inhabitants of a portion of the city, and that to constitute a public use it is not necessary that the whole public shall be permitted to share in the benefits, but that it is sufficient if a portion of the inhabitants of a city be permitted to do so. It is not essential to a public use that its benefits should be received by the whole public, or even a large part of it. The benefit may be limited actually to the inhabitants of a small locality; but the use must be in common, and upon the same terms, however few the number who avail themselves of it. 'A public use, whether for all men or a class, is one not confined to privileged persons. The smallest street is public, for all have an equal right to travel on it; but a way used by thousands, which may be shut against a stranger, is private. *Burd Orphan Asylum v. School District*, 90 Pa. 21. The use of land for a public park is a public use, and the right to such use may be acquired by the

exercise of the power of eminent domain. In such case every individual has the same right to the use of the park, of which he cannot be deprived. In the dedication of land for a park, the dedication may restrict the use, either as to its character, or as to the persons who may use it. A park dedicated for the benefit of other property, and restricted to the use of the owners of such property or residents therein, is not dedicated for a public use, but remains private property, and is not exempt from taxation." *People ex rel. Scott v. Ricketts*, 248 Ill. 428, 94 N. E. 71.

68. *Witty v. Golay*, 9 Ky. L. Rep. 195.

69. *California Academy of Sciences v. San Francisco*, 107 Cal. 334, 40 Pac. 426.

70. *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718.

71. *Munson v. Hungerford*, 6 Barb. (N. Y.) 265.

72. *Philadelphia v. Ball*, 147 Pa. St. 243, 23 Atl. 564.

use,⁷³ unless a statute authorizes such a dedication;⁷⁴ but a railroad company may dedicate a part of its land for a public use.⁷⁵

§ 1544. Property which may be dedicated.

Unless otherwise provided by statute, all kinds of property may be dedicated,⁷⁶ including land situated outside the corporate limits.⁷⁷ So a *sewer* may be dedicated,⁷⁸ as may a well,⁷⁹ or a *bridge*. Land under tide water may be dedicated,⁸⁰ but land flowed by a navigable river cannot be dedicated as a highway.⁸¹ Title in fee may be dedicated or the interest may be limited to a mere easement.

§ 1545. Conditions and reservations by dedicator.

One dedicating land to the public, may impose reasonable conditions,⁸² and if they are not complied with the

73. *Southern R. Co. v. Standiford*, 21 Ky. L. Rep. 1023, 53 S. W. 668.

74. *Dedication to railroad company*. Statute authorizing railroad company to take land by voluntary grant or by condemnation does not permit acquisition of title by dedication. *Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble*, 112 Mich. 4, 70 N. W. 319.

75. § 1548 *post*.

76. *Railroad lands may be dedicated by railroad company*. *Southern Pacific Co. v. Pomona*, 144 Cal. 339, 77 Pac. 929; *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155.

77. *Meridian v. Poole*, 88 Miss. 108, 40 So. 548.

78. *Richmond v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877.

79. *Thompson v. McPherson* (Ky., 1909), 124 S. W. 272.

80. *Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547.

81. *Simmons v. Mumford*, 2 R. I. 172, 185.

82. *Young v. Landis Tp.*, 73 N. J. L. 266, 62 Atl. 1133; *Rowan's Ex'rs v. Portland*, 47 Ky. (8 B. Mon.) 232.

See *Dickerson v. Detroit*, 99 Mich. 498, 58 N. W. 645.

The dedication of land as a highway need not be plenary but may be partial, and a limited right only may be dedicated where the circumstances clearly show such intent. *Gowen v. Philadelphia Exch. Co.*, 5 Watts & S. (Pa.) 141, 40 Am. Dec. 489.

Where the dedication is pursuant to a deed, the dedication is subject to conditions imposed by the deed, where not inconsistent with the use of the property for the ordinary purposes

acceptance is a nullity,⁸³ unless they have been waived by the dedicator.⁸⁴ For instance, if land is dedicated for

83. § 1590 *post*.

84. **Waiver by silence.** Where there is a condition in a dedication as to the place on the land dedicated where a building should be erected, but a building was erected in another spot by the muni-

cipality, with knowledge of and without objection from the dedicator, it was held that his silence was a waiver of the condition. *Forney v. Calhoun County*, 84 Ala. 215, 4 So. 153.

for which it is used. *Spring Lake Borough v. Polak* (N. J., 1910), 78 Atl. 50.

A dedication can take effect only according to its terms. Thus, where land was dedicated for a street on condition that neighboring proprietors should dedicate the same street through their lands, it was held that the opening of the street by the city by condemnation through the other lands did not amount to a fulfillment of the condition. *St. Louis v. Meier*, 77 Mo. 13.

The reservation by the owner of a "strip of land one foot in width along the east and south boundaries of a certain lot, until the owners of the lot shall give ten feet along said boundaries for an alley," does not imply a dedication of the strip of ground to public use before fulfillment of the condition. *Creamer v. McCune*, 7 Mo. App. 91.

A dedication of land by the owner for a city school, upon condition that the city or community, within five years, make designated improvements on it, does not become operative where the condition is not complied with within the designated time,

there being no acquiescence on the part of the proposed grantee in the dedication. *Kemper v. Collins*, 97 Mo. 644.

Same in conditional dedication of land for municipal building. *Clark v. Brookfield*, 81 Mo. 503.

A covenant in a conveyance to a city for a street and market-house, that the lot shall revert and the grantee reconvey when the ground ceases to be used for a market, runs with the land, the grantors retain the fee subject to the easement, and abandonment gives a right of re-entry. *Baker v. St. Louis*, 75 Mo. 671.

Atlantic City, in New Jersey, as trustee for the public, has the right to accept a deed for a grant to the public of a right of way over land on the ocean front for the purpose of a board walk; the deed containing a negative covenant granting in effect also a right of light, air, and view over and across the oceanward land from the board walk, notwithstanding this latter right is limited by a reservation to the donors of the privilege of placing thereon a certain kind of structure, when the use to which those structures shall be confined is de-

a public way, the dedicator may limit the use to pedestrians only or in any other way which he sees fit.⁸⁵ Likewise dedication for a road may limit the use of the road to certain winter months in each year.⁸⁶

85. *Trenton Water Power Co. v. Donnelly*, 7 N. J. L. 659, 73 Atl. 597.

The dedication of a public way over the land of the dedicator may be limited to use by travelers on foot only, or to horses un-

attached to vehicles, or in any other way which the dedicator sees fit. *Poole v. Huskinson*, 11 M. & W. 827.

86. *Hughes v. Bingham*, 135 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454.

fined for the purpose of regulating the kind of structure and the number of structures which could and would likely be erected. *Atlantic City v. Associated Realities Corp.* (N. J., 1908), 70 Atl. 345, rev'g 67 Atl. 937.

Where a right of way along a beach is dedicated, a condition may be imposed as to moving the walk oceanward in case of certain accretions. *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822.

Reservations. Where a deed dedicates lands for streets but reserves a strip of land of a certain width for railway purposes, such strip does not become a part of the street as dedicated. *Provident Trust Co. v. Spokane*, 63 Wash. 92, 114 Pac. 1030.

Reservation in plat of "trees and rocks" on the surface of the streets and alleys does not impair the force and effect of a plat as an absolute statutory dedication. *Brown v. Carthage*, 128 Mo. 10, 30 S. W. 312.

Reserving, in dedication of street, space improved for market house, does not prevent city ad-

ding such space to the street and charging cost of improvement against abutting property. *Philadelphia v. Slocum*, 14 Phila. (Pa.) 141.

Park expressly reserved from public use held not dedicated. *Baker v. Vanderburg*, 99 Mo. 378, 12 S. W. 462.

Easement. Where an easement in certain land is dedicated for the maintenance of city water supply pipes, no condition can be attached, since the easement is not capable of seisin. *Gray v. Cambridge*, 189 Mass. 405, 76 N. E. 195, 2 L. R. A. (N. S.), 976.

Construction of reservation. A reservation in a plat will not be extended by an equitable construction. *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988.

Remedy for breach of condition. If the municipality failed to perform in compliance with a binding condition accepted by the municipality, the owner may sue at law for the breach of the condition, but cannot himself close the street. *Port Huron v. Chadwick*, 52 Mich. 320, 17 N. W. 929,

Of course, the dedicator may specify the use to which the dedicated property is to be put.⁸⁷ So where land is dedicated as a street the right may be reserved to construct and operate a railroad thereon or to permit others to operate a railroad thereon.⁸⁸ So the dedicator may base the dedication on the condition that no right of way over the land be granted to any railroad company.⁸⁹ And the fact that restrictions on the use of real property have become useless, by change of the character of the surrounding property and neighborhood, do not authorize the disregarding of such restrictions, where the restrictions attach to the abutting property, as a vested right, by virtue of the original dedication.⁹⁰ So the ded-

87. *South Park Com'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 93 N. E. 910; *Buffalo v. Delaware, L. & W. R. Co.*, 39 N. Y. S. 4.

88. *Ottawa O. C. & G. R. Co. v. Larson*, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59; *Tallon v. Hoboken*, 60 N. J. L. 212, 37 Atl. 895; *Ayres v. Pennsylvania R. Co.*, 52 N. J. L. 405, 20 Atl. 54, 48 N. J. L. 44, 3 Atl. 885.

See also *Corey v. Edgewood*, 18 Pa. Super. Ct. 216.

"The dedication of an easement or passageway over McClelland avenue, however, was not made absolute in the general public. Dodge reserved the right, which affected all lands then owned by him, to select one or more railway corporations to which he might also grant an easement or right of passage over this street. This reserved right of course, should not be construed as giving Dodge power to thus enable railways to wholly occupy and use the avenue, to the entire exclusion of the general

public, for to so construe the provision would constitute a repugnant clause, enabling Dodge to entirely defeat the dedication to the public, restricted though it was, and which therefore could not be upheld." *Oklahoma City & T. R. Co. v. Dunham*, 39 Tex. Civ. App. 575, 88 S. W. 849.

Dedication by a railroad company reserving right to occupy street for purpose of operating a railroad, does not relieve it from constructing and operating its road in a legal and proper manner. *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59.

Dedication of street subject to railroad right of way is valid, such reservation not destroying the purpose of the grant. *Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, 29 N. E. 484.

89. *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822.

90. *Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185, holding that

icator, even in a statutory dedication, may reserve the fee,⁹¹ or all the *mineral* under the surface of the streets dedicated.⁹² On the other hand, the dedicator cannot attach a condition which will destroy the chief characteristic of the purpose of the dedication or take the property from the control of the duly authorized public officers,⁹³ or a condition which is against public policy;⁹⁴ but if the condition is void the dedication does not fail but it takes effect just as if the invalid condition had not been imposed.⁹⁵ For example, if land is dedicated for a street but with the reservation that it shall not be public, the reservation is void because repugnant to the grant.⁹⁶ So a reservation of the right to revoke defeats the dedication.⁹⁷ And a reservation to the dedicator of any dam-

where land was dedicated as public grounds "forever to remain vacant of buildings," and the open spaces were dedicated for a park because the adjacent street was within a residence district, the gradual disappearance of residences from the street and their replacement by business houses was immaterial.

91. Where streets and alleys are dedicated by a statutory plat, "for street purposes only," the fee is reserved to the dedicator, although in the absence of such a provision, the statute prescribes that the plat shall operate as a conveyance in fee simple. *Dubuque v. Benson*, 23 Iowa 248.

92. *Tousley v. Galena Mining & Smelting Co.*, 24 Kan. 328; *Dubuque v. Benson*, 23 Iowa 248, holding that a declaration in the plat that streets and alleys are dedicated "for street purposes only" reserves minerals under the street.

93. *Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, 29 N. E. 484.

Repugnant conditions. A reservation in a dedication, inconsistent therewith, and which tends to defeat the purposes thereof is void, as a repugnant condition. *Riddle v. Charlestown*, 43 W. Va. 796, 28 S. E. 831.

A person cannot dedicate a street to public use and reserve therein a private use for an individual. *Noblesville v. Lake Erie & W. Railway Co.*, 130 Ind. 1, 29 N. E. 484.

94. *Richards v. Cincinnati*, 31 Ohio St. 506.

95. *State v. Spokane Street Ry. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739.

96. *Haight v. Keokuk*, 4 Iowa 199.

97. *San Francisco v. Canavan*, 42 Cal. 541.

ages recoverable against the municipality, in case the bed of the street is thereafter condemned for public use, is so inconsistent with the dedication as to be void.⁹⁹ Likewise, a condition in a dedication of land for streets that the abutting lots shall be free from *assessments for improvements* of the streets is void.¹

One who dedicates land for a park cannot impose the condition that failure of the municipality to keep the land in "good condition" for a park should cause a reversion to the donor, since such condition is too uncertain.² So there cannot be a dedication to a part only of the public,³ unless a statute or charter provision authorizes it. Furthermore, the right of a dedicator to annex conditions to the dedication does not include the creation of a *monopoly*, and hence reservations to the dedicator of the exclusive right to use the streets for street railroads, lighting appliances, sewers, gas, water works, and telephone lines, are void because they create a monopoly and unduly restrict the municipal authorities in their control over the most important interests of the city.⁴ So it is self-evident that after the dedication is complete, the dedicator cannot restrict or change the uses to which it was made,⁵ or otherwise impose conditions.⁶

99. *Riddle v. Charlestown*, 43 W. Va. 796, 28 S. E. 831.

1. *Richards v. Cincinnati*, 31 Ohio St. 506.

Freedom from assessments. In New Jersey, however, a condition in a dedication of land for street purposes as a public approach to a county bridge that the expense of opening street shall be borne by the public, and that the owners of property bordering on the street be freed from municipal assessments therefor, or for other street improvements unless solicited by a majority in interest of

the said owners is a valid condition, and if the dedication is special, they cannot be assessed. *Perth Amboy Trust Co. v. Perth Amboy*, 75 N. J. L. 291, 68 Atl. 84.

2. *Armstrong v. St. Marys*, 21 Ohio Cir. Ct. Rep. 16.

3. § 1538 *ante*.

4. *Jones v. Carter*, 45 Tex. Civ. App. 450, 101 S. W. 514.

5. *Trustees of Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696.

6. *Spring v. Pittsburg*, 204 Pa. 530, 54 Atl. 310.

2. WHO MAY DEDICATE.

§ 1546. General rules.

The owner of the land, or an agent duly authorized thereto by him, can make a valid dedication.⁷ No one else can, completely and absolutely, dedicate land to public use.⁸ Thus one claiming title to land which is in the

7. *Athens v. Burkett* (Tenn. Ch.), 59 S. W. 404.

Riparian owners may dedicate their right of property in wharves. *Buffalo v. Delaware L. & W. R. Co.*, 39 N. Y. S. 4.

The majority of proprietors of town are entitled to dedicate, where claims of minority could be satisfied out of remainder of common estate. *Alves' Executors v. Henderson*, 55 Ky. (16 B. Mon.) 131.

8. *Alabama*. *Johnson v. Dadeville*, 127 Ala. 244, 28 So. 700.

Florida. *Bruce v. Seaboard Air Line Ry.*, 52 Fla. 461, 41 So. 883.

Illinois. *Schneider v. Sulzer*, 212 Ill. 87, 72 N. E. 19; *People v. Herbel*, 96 Ill. 384; *Baugan v. Mann*, 59 Ill. 492; *Edwardsville v. Barnsbát*, 66 Ill. App. 381.

Kansas. *Brooks v. Topeka*, 34 Kan. 277, 8 Pac. 392.

Missouri. *Longworth v. Sedevic*, 165 Mo. 221, 65 S. W. 260; *McBeth v. Traque*, 69 Mo. 642.

Nebraska. *Warren v. Brown*, 31 Neb. 8, 47 N. W. 633.

New York. *Klug v. Jeffers*, 85 N. Y. S. 423, 88 App. Div. 246.

Rhode Island. *State v. Richmond*, 1 R. I. 49.

Texas. *Corsicana v. Anderson*, 33 Tex. Civ. App. 596, 78 S. W. 261.

Wisconsin. *Bushnell v. Scott*,

21 Wis. 457, 94 Am. Dec. 555; *Lawe v. Kaukauna*, 70 Wis. 306, 35 N. W. 561.

One not the holder of a legal title cannot dedicate although in actual possession and occupancy. *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. 835.

Only owner of an unlimited estate in fee can dedicate. *Seaboard Air Line R. v. Fairfax*, 80 S. C. 414, 61 S. E. 950.

A plat made and recorded by one not the owner of land does not constitute a dedication as against the owner. *Hope v. Shiver*, 77 Ark. 177, 90 S. W. 1003; *Lewis v. Lincoln*, 55 Neb. 1, 75 N. W. 154.

That subsequently acquired title does not inure, see *Boerner v. McKillip*, 52 Kan. 508, 519, 35 Pac. 5; *Lee v. Lake*, 14 Mich. 12, 90 Am. Dec. 220. But see *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. 835, and § 1555 *post*, as to legal title subsequently acquired by holder of equitable title.

Statutory plat. If a plat is not made by the owner of the lands covered by the plat, it is at most a common-law plat as distinguished from a statutory one. *Ingraham v. Brown*, 231 Ill. 256, 83 N. E. 156.

A street across railroad right of way cannot be dedicated by

actual adverse occupancy of another, cannot, as against such adverse occupant, make an absolute and final dedication of such lands.⁹

If the title of the dedicator is conditional and his title fails, the dedication will fail.¹⁰ So if a right of way has been granted or otherwise conferred on a third person, the owner cannot dedicate property so as to destroy such right of way, or otherwise interfere therewith.¹¹

On the other hand, if part of the land dedicated does not belong to the dedicator, the dedication is nevertheless valid as to the part owned by him.¹²

Furthermore, one who has attempted to dedicate land, but who had no power to do so, may be estopped to deny the dedication.¹³

§ 1547. Agent.

If the dedication is by the agent of the owner, it must be shown that he was given power to dedicate,¹⁴ or that he was permitted by the owner to appear to possess authority to dedicate.¹⁵

Of course if an agent dedicates land where he has no authority to do so, the owner is bound thereby if he afterwards *ratifies the acts* of the agent with knowledge of the facts.

private individual. *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 71, 57 S. W. 742.

9. *Bruce v. Seaboard Air Line Ry.*, 52 Fla. 461, 467, 41 So. 883.

10. *Gridley v. Hopkins*, 84 Ill. 528.

11. *State ex rel. v. Morgan's, Louisiana & T. R. & S. S. Co.*, 111 La. 120, 35 So. 482; *South Berwick v. York County*, 98 Me. 108, 56 Atl. 623; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Sarcoxie v. Wild*, 64 Mo. App. 403.

12. *Earll v. Chicago*, 136 Ill. 277, 26 N. E. 370.

13. § 1595 *post*.

14. *Kansas City v. Banks*, 9 Kan. App. 885, 61 Pac. 333. This case reported in full in the *Pacific Rep.*; not reported in full in 9 Kan. App.

A power of attorney confers no implied authority to dedicate. *Wirt v. McEnery*, 21 Fed. 233.

15. *Southern Pacific Co. v. Pomona*, 144 Cal. 339, 77 Pac. 929.

§ 1548. Corporations.

A municipality may itself dedicate property,¹⁶ unless specially restricted,¹⁷ as may the state.¹⁸ So private corporations may make dedications, unless forbidden by statute or their charter, of a part, but not all, of their property, where in furtherance of the chartered business.¹⁹ So it is well settled that a railroad company may make a dedication of a highway across its right of way and tracks.²⁰

16. *Victoria v. Victoria County* (Tex., 1910), 128 S. W. 109, reversing on other grounds 115 S. W. 67.

Land for streets. A municipality may dedicate its own lands for streets. *Story v. New York Elevated R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146.

Timber lands. In Texas, however, it was held that a town given power to sell and alienate all public lots could not dedicate timber lands to the common use of the citizens. *Wright v. Victoria*, 4 Tex. 375.

School commissioners given power by statute to cause school sections to be surveyed in such manner as to command the highest price in lots, not exceeding eighty acres each, held authorized to plat school lands into lots and streets and to dedicate the streets to the public. *Roberts v. Matthews*, 137 Ala. 523, 34 So. 624, 97 Am. St. Rep. 56.

17. *Illinois & St. Louis R. & C. Co. v. St. Louis*, Fed. Cas. 7007.

All public corporations, unless prohibited by statute, have power to devote to the public use for

streets and roads, lands of which they are owners, and they make dedications by grant or in the manner prescribed by statute. *Elliott, Roads & Streets* (3d Ed.), § 160.

18. *Snowden v. Loree*, 122 Fed. 493, aff'd in 128 Fed. 419, 63 C. C. A. 161.

19. Corporation organized to purchase and deal in land may dedicate part of a tract for streets and parks. *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. 866; *Jersey City v. Morris Canal & B. Co.*, 12 N. J. Eq. 547, 555.

A corporation organized to build and operate a summer hotel plant and develop mineral springs cannot dedicate all its property, where not expressly authorized so to do by its charter. *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 79 N. E. 133, 8 L. R. A. (N. S.) 966.

Railroad company may dedicate. *Williams v. New York & N. H. R. Co.*, 39 Conn. 509.

20. *Bacon v. Boston & M. R. R.*, 83 Vt. 421, 76 Atl. 128; *Northwestern Pacific R. Co. v. Spokane*, 64 Fed. 506, 12 C. C. A. 246.

In order to constitute a dedication by a private corporation, it is held in some jurisdictions that a *vote of the directors* is necessary,²¹ while in other jurisdictions, it is held that the corporation may be bound by *long acquiescence or other conduct* showing an intent to dedicate.²²

§ 1549. Persons acting in certain representative capacities.

An *executor* expressly authorized by the will to sell land may make a valid dedication by platting lands with public places designated thereon and selling lots pursuant to such plat.²³ On the other hand, if an executor has a mere naked power of sale, he cannot dedicate land.²⁴ So an *administrator*, with authority only to sell lands to pay debts, cannot dedicate.²⁵ A *guardian*, pursuant to an order of court, may dedicate a part of his ward's property;²⁶ and land may be dedicated by *commissioners* appointed in partition proceedings, under the court's order.²⁷

If *trustees* are the legal owners of property, they may dedicate part of it, provided they do not violate the terms of the trust.²⁸

21. Unless authorized by its directors, the president or general manager of a corporation cannot dedicate its land to public uses. *West Point v. Bland*, 106 Va. 792, 56 S. E. 802.

22. *Southern Pacific Co. v. Pomona*, 144 Cal. 339, 77 Pac. 929; *Larson v. Chicago, etc., R. Co.*, 19 S. D. 284, 103 N. W. 35.

Authority of president of corporation to dedicate land may be inferred from silence and acquiescence of the corporation in the public use. *West End v. Eaves*, 152 Ala. 334, 44 So. 588.

23. *Earle v. New Brunswick*, 38 N. J. L. 47, 50.

24. *Bloomfield v. Ketcham*, 25

Hun (N. Y.) 218, rev'd on other grounds in 95 N. Y. 657.

25. *Davis v. Bonaparte*, 137 Iowa 196, 114 N. W. 896.

Administrator cannot make a statutory plat. *People ex rel. v. Detroit Board of Public Works*, 41 Mich. 724.

26. *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

27. *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

28. *Prudden v. Lindsley*, 29 N. J. Eq. 615, 616.

Dedication by trustee. Where legal title has passed from the United States to a trustee, the latter is the only one competent to dedicate the land. *Diamond*

§ 1550. Persons under disability.

Express dedications cannot, as a general rule, be made by infants or persons of unsound mind,²⁹ or other persons under disability.³⁰

§ 1551. Same—married women.

In so far as a married woman is concerned, she undoubtedly has the power to *dedicate expressly* her lands in those jurisdictions where enabling statutes authorize her to deal with her separate property as if unmarried, and in such cases she is bound by an *implied dedication* based on estoppel the same as if a *feme sole*.³¹

On the other hand, there is apparently some conflict as to *whether a married woman may be estopped by her conduct* to deny a dedication of her property, where it is necessary to obtain the signature of her husband in order to convey her property.³² Generally, a husband cannot dedicate the *homestead* without the signature of his wife.³³

Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. 448.

29. See Elliott, Roads & Streets (3d Ed.), § 155.

30. Indians. Where the owner is under a disability to dedicate, as where he is an Indian and the approval of the Secretary of the Interior is necessary, a dedication of lands cannot be presumed. State v. O'Laughlin, 19 Kan. 504.

31. Marriage of woman, after taking steps to dedicate her land, held not to prevent presumption of dedication against her. Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749.

Where a husband consents to a highway across the homestead, and his wife makes no objection to such use, it is properly held

that she consents to the dedication. Centerville Tp. v. Jenter, 125 S. D. 314, 126 N. W. 575.

32. Married women. The power of a married woman to dedicate land for roads and streets is considered at some length in Elliott, Roads & Streets (3d Ed.), §§ 152, 153, 156.

In Alabama, a dedication cannot be established against a married woman by equitable estoppel or an estoppel *in pais* where she cannot make a conveyance unless her husband joins. Vansandt v. Weir, 109 Ala. 224, 19 So. 424, 32 L. R. A. 201.

33. Jasper Tp. v. Martin, 161 Mich. 336, 126 N. W. 437.

Homestead. A dedication of property as a public street creates

§ 1552. Lessors, lessees, and life tenants.

The *lessor* of property cannot dedicate it without the consent of the lessee, so as to affect the rights of the lessee;³⁴ and likewise the *lessee* cannot dedicate unless authorized by his lessor.³⁵ Likewise, a *life tenant* cannot dedicate any interest in the fee so as to affect the remainderman,³⁶ and *vice versa*.

§ 1553. Tenant in common.

A tenant in common cannot dedicate the common property to public use without the consent of his cotenants, since all the cotenants must join to make a dedication of their property effectual.³⁷

§ 1554. Mortgagor or grantor in deed of trust, and vendors.

A mortgagor, or the grantor in a trust deed to secure a debt, has no authority to dedicate land, as against the mortgagee, or *cestui que trust* and those claiming under him.³⁸

an encumbrance and where the property is covered by a homestead, it cannot be made by the husband alone. *Cordano v. Wright* (Cal., 1911), 115 Pac. 227; *San Francisco v. Grote*, 120 Cal. 59, 52 Pac. 127, 41 L. R. A. 335, 65 Am. St. Rep. 155.

34. *Manitou v. International Trust Co.*, 30 Colo. 467, 70 Pac. 757.

35. *Cockrell v. Dallas* (Tex. Civ. App., 1908), 111 S. W. 977; *Durham v. Southern R. Co.*, 121 Fed. 894.

If lessee dedicates with consent of lessor, he is regarded as the agent of lessor in regard thereto. *New Haven v. New York, N. H. & H. R. Co.*, 72 Conn. 225, 44 Atl. 31.

36. *McKinney v. Duncan*, 121 Tenn. 265, 118 S. W. 683.

37. *California*. *Niles v. Los Angeles*, 125 Cal. 572, 58 Pac. 190.

Missouri. *St. Louis v. Laclede Gas Light Co.*, 96 Mo. 197, 9 S. W. 581, 9 Am. St. Rep. 334; *McBeth v. Trabue*, 69 Mo. 642.

Rhode Island. *Daniels v. Almy*, 18 R. I. 244, 27 Atl. 330.

Tennessee. *Scott v. State*, 33 Tenn. 629.

Texas. *Heilbron v. St. Louis S. R. Co.*, 52 Tex. Civ. App. 575, 113 S. W. 610.

38. *Alabama*. *Hoole v. Attorney General*, 22 Ala. 190.

New Jersey. *Kiernan v. Jersey City*, 80 N. J. L. 273, 78 Atl. 228, 31 L. R. A. (N. S.) 1023; *Hague v. West Hoboken*, 23 N. J. Eq. 354.

Virginia. *Newport News & O. P. R. & E. Co. v. Lake*, 101 Va. 334,

On the other hand, if the mortgagee assents to the dedication by the mortgagor, he will be bound thereby as will those claiming under him,³⁹ and the mortgagee's assent will be implied from the acceptance of a stipulated sum per lot as the mortgagor sells lots pursuant to a plat, and the execution of releases therefor.⁴⁰

If the owner of land has agreed to sell an interest in it by a writing duly executed and recorded, he cannot thereafter dedicate it to a public use.⁴¹

§ 1555. Holder of equitable title.

The owner of a full equitable title may dedicate the land so as to bind him so far as his title is concerned.⁴² For instance, the equitable owner of public lands may make a valid dedication before a *patent* is issued to him,⁴³ and if a patent is afterwards acquired, the dedi-

43 S. E. 566; Gate City v. Richmond, 97 Va. 337, 33 S. E. 615.

West Virginia. Walker v. Summers, 9 W. Va. 533.

A sale under the mortgage avoids the dedication. Moore v. Little Rock, 42 Ark. 66; McShane v. Moberly, 79 Mo. 41.

One who has given a trust deed on his property, which has been foreclosed, cannot dedicate it. Granite Bituminous Paving Co. v. McManus, 144 Mo. App. 593, 129 S. W. 448.

39. Hoole v. Attorney General, 22 Ala. 190.

40. Boone v. Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

41. South Baltimore Harbor & Improvement Co. v. Smith, 85 Md. 537, 37 Atl. 27.

42. Mankato v. Meagher, 17 Minn. 265.

The owner of an equitable estate may make an effective dedi-

cation. Meachem v. Seattle, 45 Wash. 380, 88 Pac. 628.

43. Wilder v. St. Paul, 12 Minn. 192.

One entitled to a patent, although it has not been issued, can dedicate land. Rube v. Sullivan, 23 Neb. 779, 37 N. W. 666.

So where a certificate of purchase is by statute prima facie evidence of legal title to school lands, one holding such a certificate from the state may dedicate the land. Watkins v. Lynch, 71 Cal. 21, 11 Pac. 808.

Cemetery. Homesteader, who has platted portion of his claim for burying ground used by public, dedicates it as such, though patent has not been received. Hagaman v. Dittmar, 24 Kan. 42.

On the other hand, where one is proceeding to obtain his patent to land, his knowledge of public travel over the land does not constitute a dedication, since he is

cation is complete.⁴⁴

On the contrary, a mere squatter upon government land cannot dedicate it.⁴⁵ So, a party in possession, without title, cannot make a valid dedication of public lands, which will bind his successors in the possession.⁴⁶

3. PLATS AND MAPS.

§ 1556. General considerations.

Before considering the rules relating to intent to dedicate and acceptance of the dedication, a brief reference to the law relating to plats and maps in general, in con-

not required to take any steps until his rightful patent has been determined. *Harding v. Jasper*, 14 Cal. 642.

Occupants of town site may make a valid common law dedication of land. *Mankato v. Warren*, 20 Minn. 144; *Mankato v. Williard*, 13 Minn. 13; *Mankato v. Meagher*, 17 Minn. 265.

A claimant of public lands, before his right to a deed is established, may dedicate so as to bind him by an estoppel *in pais* (*McCloskey v. Pacific Coast Co.*, 160 Fed. 794, 87 C. C. A. 568), and if he afterwards acquires the legal title the dedication is effective (*Meachem v. Seattle*, 45 Wash. 380, 88 Pac. 628).

In Alaska, streets and public ways, which town site settlers have set apart for public use, will be protected by the courts from trespassing claimants, although dedicated before any formal application for entry under the town-site act. *MacIntosh v. Nome*, 1 Alaska 492.

"Streets and alleys set apart

and recognized by town-site settlers as necessary for the public use will be protected from trespassing settlers by the courts, although dedicated prior to the formal application for entry under the town-site act." Judge Wickersham in *MacIntosh v. Nome*, 1 Alaska 492, 496, following *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, 30 L. Ed. 469.

44. *Reid v. Edina Board of Education*, 73 Mo. 295.

Where after land was platted and the plat was filed, the dedicatory acquired the legal title where before he had merely an equitable title, and then sold lots with reference to the plat, such acts constitute a ratification of the plat as filed. *Meachem v. Seattle*, 45 Wash. 380, 88 Pac. 628.

45. *Gentleman v. Soule*, 32 Ill. 171, 83 Am. Dec. 264.

46. *Cyr v. Madore*, 73 Me. 53; *Lewis v. Portland*, 25 Ore. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736; *Lownsdale v. Portland*, Fed. Cas. 8579.

nection with the law of dedication, is deemed advisable, since the most *usual way of dedicating land for streets, alleys, parks, etc., is by a plat or map* of land, showing thereon certain public places, such as streets, alleys, parks, squares, etc.⁴⁷

Definition. Some cases hold that a plat is a subdivision of land into lots, streets and alleys, marked upon the earth, and represented on paper; and that it includes a survey marked upon the ground so as to identify the streets, blocks and lots.⁴⁸ Other cases decide that platting "may consist alone in drawings and statements upon paper, and does not imply such markings and subdivisions upon the lands as to distinguish them from unplatted lands."⁴⁹

Effect, and questions for solution. A plat, when filed, if it substantially complies with the statute in all respects, operates as a statutory dedication.⁵⁰ On the other hand, if, for any reason, it is not sufficient to constitute a statutory dedication, it is at least *evidence of an intent to make a common-law dedication* of the public places indicated thereon,⁵¹ and operates as a com-

47. Blanks on plat or map as showing intent to dedicate, see § 1566 *post*.

48. *Burke v. McCowen*, 115 Cal. 481, 47 Pac. 367; *McDaniel v. Mace*, 47 Iowa 509.

49. *Chandler v. Kokomo*, 137 Ind. 295, 36 N. E. 847.

A plat is not a mark on the land, but a representation of the land on paper, appealing to the eye by means of lines and memoranda, rather than by words alone. *Thompson v. Hill* (Ga., 1912), 73 S. E. 640.

50. § 1540 *ante*.

Necessity for acceptance, § 1576 *post*.

51. § 1540 *ante*.

Offer to dedicate but not a completed dedication. It is well settled that merely laying out grounds, platting and surveying them, without actually throwing them open to public use or actually selling lots with reference to the plat, will not, as a general rule, show a dedication. *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

The mere making of a map, where not recorded or exhibited to the public and where no lots are sold with reference thereto, does not of itself ever constitute a complete dedication. *Mobile v.*

mon-law dedication of the public places indicated thereon if (1) the intent to dedicate is not rebutted and there has been an acceptance of the dedication or, in some jurisdictions, (2) if there has been a sale of lots with reference to such plat. Touching the latter proposition, however, there is much dispute, as noted hereafter, and there is considerable confusion in the decisions due to a failure to distinguish clearly between the effect of such a sale as between the grantor and the grantee and its effect as between the grantor and the public. Strictly speaking, there can be no dedication to a private person, and, hence, it is improper to speak of the sale as a dedication as between the grantor and the grantee, although that is often done. As between the grantor and grantee the situation is simply this: the grantor is estopped, as against the grantee, to deny the existence of such public places or to revoke his act of setting them aside for public use, and this is too well settled to require citation of authority, and it is doubtful if the rule has ever been denied so far as the rights between the grantor and the grantee are concerned.⁵² Furthermore,

Fowler, 147 Ala. 403, 41 So. 468; Loughman v. Long Island R. Co., 81 N. Y. S. 1097, 83 App. Div. 629; Kruger v. Constable, 116 Fed. 722. But see Price v. Stratton, 45 Fla. 535, 33 So. 644.

52. Florida East Coast R. Co. v. Worley, 49 Fla. 297, 38 So. 618, rule applied to owner of lots adjoining park, or separated from it merely by a street; Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Rusk v. Berlin, 173 Ill. 634, 50 N. E. 1071; Marsh v. Fairbury, 163 Ill. 401, 45 N. E. 236; McDonald v. Stark, 176 Ill. 456, 52 N. E. 37; Conrad v. West End Hotel & Land Co., 126 N. C. 776, 36 S. E. 282; Davis v. Morris, 132 N. C.

435, 43 S. E. 950; Heard v. Connor (Tex. Civ. App., 1905), 84 S. W. 605; Martinez v. Dallas, 102 Tex. 54, 109 S. W. 287, aff'd in 113 S. W. 1167.

"When an owner of land makes a plat thereof, showing lots, streets, and public grounds, and sells the lots with reference to the plat, the purchasers of the lots acquire, as apurtenant thereto, every easement, privilege, and advantage which the plat represents as belonging to them, as a part of the town, or to their owners as citizens of the town. The sale and conveyance of lots according to the plat imply a covenant that the streets and

the rights of the grantee against the grantor, do not de-

other public places indicated on the plat shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use." *Stevenson v. Lewis*, 244 Ill. 147, 91 N. E. 56; *Carter v. Portland*, 4 Ore. 339; *Kuck v. Wakefield* (Ore., 1912), 115 Pac. 428.

A sale by reference to a plat constitutes a dedication which cannot be revoked. *Brewer v. Pine Bluff*, 80 Ark. 489, 97 S. W. 1034.

Rule not limited to streets. "The rule that when owners of land in a city or village lay out the same into lots, with streets and avenues intersecting the same, and sell the lots with reference to such streets and avenues, they cannot thereafter deprive their grantees of the benefit of having such streets and avenues kept open, applies to a similar dedication of urban lands to be used as an open square or public walk or park." *White v. Moore*, 123 N. Y. S. 1012, 139 App. Div. 269.

Parks. The rule in regard to the creation of an estoppel to deny the dedication of streets, where the owner of land plats it and sells lots or blocks with reference to the plat, applies equally as well to parks laid out in such plat. *Poudler v. Minneapolis*, 103 Minn. 479, 115 N. W. 274; *Cole v. Minnesota Loan & Trust Co.*, 17 N. D. 409, 117 N. W. 354

Division among tenants in common. Where tenants in common plat land and divide it among themselves, on receiving certain lots and blocks, the fact that lots and blocks are still owned by the several alleged dedicators or their privies, is of the same force in effectuating the dedication, *inter sese*, as if sale of lots had been made to third parties. Either may object to a revocation of the dedication, if the objection be manifested in apt time. *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

Collateral attack on plat. The correctness of a plat cannot be collaterally attacked, since the plat is as much a part of the evidence of the title of the purchaser of lots as his deed, and cannot be changed or disputed by the proprietor as his interests may suggest. *Christian v. Eugene*, 49 Ore. 170, 89 Pac. 419, holding that a mistake in the description, terms, or platting of streets and alleys, can only be corrected or established by a proceeding in equity for that purpose, to which all persons interested in the results are parties.

Adverse possession. Rights of purchaser according to a plat to have a street and alley remain open are lost by twenty years adverse possession by a third person. *Swedish Evan. L. Church v. Jackson*, 229 Ill. 506, 511, 82 N. E. 348.

pend upon whether the offer to dedicate, by such platting and sale, is accepted by the municipality.⁵³

On the other hand, as between the grantor and the public, there is a conflict in the cases as to whether the sale is an acceptance of the offer to dedicate. But the general and better rule is that it is not an acceptance by the municipality of the public places noted on the plat, and hence is not a completed dedication.⁵⁴

So far as the effect of a sale of lots is concerned, it makes no difference whether the conveyance is according to a plat made by the grantor, or an existing plat made by another,⁵⁵ or whether it is made with reference to a map instead of a plat.⁵⁶ However, it has been held that conveying a lot, as bounded on an unopened street laid down on a *city map*, is not a dedication of the street, so as to deprive the grantor of his right of compensation when his land is actually taken by the opening of the street;⁵⁷ but it has been said by an eminent law writer

53. *Swedish Evan. L. Church v. Jackson*, 229 Ill. 506, 82 N. E. 348; *Littler v. Lincoln*, 106 Ill. 353.

"If a statutory plat, acknowledged and recorded in conformity with the statute, fails to become effective as a conveyance of the legal title to the streets and public grounds because not accepted by the municipal corporation, or because no municipal corporation is in existence which can accept it, or because of a deed of vacation before acceptance, private rights which may have accrued are not, therefore, lost." *Stevenson v. Lewis*, 244 Ill. 147, 91 N. E. 56.

54. § 1577 *post*.

55. *Baker City Mut. Irr. Co. v. Baker City*, 58 Ore. 306, 113 Pac. 9.

Where lots are sold with refer-

ence to a town plat it is immaterial that the plat was laid out by one who had no title. *Oregon City v. Oregon & C. R. Co.*, 44 Ore. 165, 74 Pac. 924.

56. *McAndrews & Forbes Co. v. Camden* (N. J., 1911), 78 Atl. 232.

Sale of lots by map estops grantor. *King v. Dugan*, 150 Cal. 258, 88 Pac. 925; *McAndrews & Forbes Co. v. Camden* (N. J., 1911), 78 Atl. 232.

It is immaterial by whom or for what purpose the map was originally made. *London & San Francisco Bank v. Oakland*, 90 Fed. 691, 33 C. C. A. 237, aff'g 86 Fed. 30.

57. *Re Opening of Brooklyn Street*, 118 Pa. St. 640, 12 Atl. 664, 4 Am. St. Rep. 618.

A deed referring to a street as a boundary is not a dedication

that "the contrary would seem to be the better doctrine since the owner could readily make the conveyance without recognizing the streets, or could expressly reserve his rights."⁵⁸ Moreover, if the plat is made by public officers *without authority of law*, it has been held that the sale of lots with reference thereto does not operate as a dedication.⁵⁹

§ 1557. Sufficiency of description.

If a public place is claimed to be dedicated by a plat, the description of the land dedicated ought, it seems, without regard to whether the dedication is a statutory or common-law one, to be at least definite enough so that it can be made certain, or to show at least enough to enable a competent surveyor to ascertain with certainty the property designed to be set aside.⁶⁰

where no street exists at the time either by dedication or by the plan of lots or otherwise. *Hogan v. Burneson*, 44 Pa. Super. Ct. 409.

In New Jersey, however, dedication may be by a sale of land with reference to a city map on which the land is laid off with streets, so as to preclude the grantor from claiming compensation for the lands taken for the street. *Clark v. Elizabeth*, 40 N. J. L. 172.

58. *Lewis, Eminent Domain* (3d Ed.), § 492.

§ 1562 *post*.

59. *Seeger v. Mueller*, 133 Ill. 86, 24 N. E. 513.

60. "The rule in Illinois with respect to certainty of description in statutory or in common-law dedication, to be followed by federal courts where Illinois titles are involved (*Jackson v. Chew*, 12 Wheat. 153, 6 L. Ed. 583), is thus given in *Village of Winnetka*

v. Prouty, 107 Ill. 218: "To make a good dedication, either under the statute or at the common-law, requires a definite and certain description of that which is proposed to be dedicated. * * * An instrument of conveyance ought, upon its face, to show at least enough to enable a competent surveyor to find with absolute certainty that which is assumed to be conveyed." *Sanders v. Riverside*, 118 Fed. 720, 724, 55 C. C. A. 240.

Inaccuracy in other parts. Inaccuracy in a map dedicating streets in delineating lands outside of the streets and blocks shown on the map does not invalidate it as a dedication of such streets. *London & San Francisco Bank v. Oakland*, 90 Fed. 691, 33 C. C. A. 237, *aff'd* 86 Fed. 30.

Statutory plat, § 1540 *ante*.

Rule as to corporate boundaries, § 259 *ante*, vol. 1.

§ 1558. Construction of plats and maps.

Without attempting to consider exhaustively the decisions construing particular plats and maps, to determine just what amount of property was thereby dedicated, suffice it to state that a *plat must be construed as a whole*,⁶¹ and that where the meaning is doubtful, *the practical construction put upon it by the parties will be accepted by the courts*.⁶²

So in construing a plat it may be considered in connection with the evidence as to representations made by those making the plat, and also their subsequent conduct.⁶³

61. *Guitar v. St. Clair* (Mo., 1912), 142 S. W. 291.

Where a plat of land on a navigable stream leaves a space between the stream and the lots, it shows an intention to dedicate the space to the public use, but the establishment by the owner of a ferry thereon shows a reservation to the extent of the uninterrupted and exclusive use for that purpose. *Newport v. Taylor Ex'rs*, 55 Ky. (16 B. Mon.) 699.

Public landing. Dedication of land as a "public landing" is equivalent to a dedication as a "public levee." *Napa v. Howland*, 87 Cal. 84, 25 Pac. 247.

Where a street is laid out bordering on navigable water, it will be presumed that it was intended to be dedicated for both a highway and a landing. *Holmes v. Cleveland, C. C. & R. Co.*, 3 Ohio Dec. 416.

Reservation of right to use public square for court house purposes, held to give county no right to erect thereon a jail and a cess

pool. *Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008.

Construction of deed of land for street, see *Re Van Alst Avenue* in New York City, 128 N. Y. S. 371, 143 App. Div. 564.

62. *Provident Trust Co. v. Spokane*, 63 Wash. 92, 114 Pac. 1030.

Where land is platted with an eighty foot street designated thereon and thereafter is replatted and the street is designated as ninety feet wide, the conflict in the plats requires a reference to them by all the parties interested, and if the municipality has opened the street only eighty feet wide it cannot after a long term of years claim the extra ten feet, it being presumed that the municipality accepted the eighty foot roadway. *Indianapolis v. Board of Church Extension*, 28 Ind. App. 319, 62 N. E. 715.

63. *Cole v. Minnesota Loan & Trust Co.*, 17 N. D. 409, 117 N. W. 354.

It has been stated by a standard author that it is a *safe rule to resolve doubts "against the donor, and, within reasonable limits, to construe the dedication so as to benefit the public rather than the donor."*⁶⁴

Of course *the intention of the donor* is the important matter to be determined but oftentimes it is very difficult to determine such intention from the face of the plat or map.

The construction of a map or plat, like that of other written instruments is generally for the court, at least when complete and unambiguous, and in such a case parol evidence as to the meaning of the map or plat is usually inadmissible;⁶⁵ however, if the map or plat is uncertain and ambiguous, parol evidence is oftentimes admissible.

A common, a square, and a park are largely the same, although strictly speaking there is more or less difference between them. In earlier times the term "public square" was held to relate almost exclusively to grounds occupied by the court house and owned by the county.⁶⁶ If the words "public square" are written or printed on a plat, it is construed as a dedication of the part so designated to public use,⁶⁷ and the same rule applies to

64. Elliott, Roads and Streets (3d Ed.), § 130.

65. Elliott, Roads and Streets (3d Ed.), § 131.

66. Westfall v. Hunt, 80 Ind. 174; State v. Eastman, 109 N. C. 785, 13 S. E. 1019.

67. Rhodes v. Brightwood, 145 Ind. 21, 43 N. E. 942.

The term "square," when used to designate a certain portion of ground within the limits of a municipality, indicates a public use, either for purposes of a free passage or to be ornamented for grounds of pleasure, amusement,

recreation or health. Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402, 65 Am. St. Rep. 625.

Square. "In Methodist Church v. Hoboken, 33 N. J. L. 13, a map was made called the 'Loss Map' in 1804, on which was delineated a plot marked with the word 'Square.' Concerning this, Mr. Justice Depue in 1868 says: 'The word "Square" as a term of dedication imported a complete and unrestricted abandonment to the public uses above indicated.'"

Control over by legislature.

the word "square" alone.⁶⁸ The word "common" as used in a plat means a piece of ground left open for common and public use for the convenience and accommodation of the inhabitants of the municipality.⁶⁹ In legal contemplation, a "common" is not synonymous with "park."⁷⁰

Land need not be expressly marked on a plat or map as a park, in order to be dedicated as such.⁷¹

Where the proprietors of a town site designate a block in the plat simply "square," there is evidenced an intention to dedicate it to the use of the public, but not to any particular use, and where no private rights have intervened in the lots surrounding the square, the legislature may designate and determine to what particular public use such block shall be devoted. *Daughters v. Riley Co. Com'rs*, 81 Kan. 548, 106 Pac. 297; *Franklin County v. Lathrop*, 9 Kan. 453.

§ 1606 *post*.

68. *Frauenthal v. Slaten*, 91 Ark. 350, 121 S. W. 395; *Daughters v. Riley County*, 81 Kan. 458, 106 Pac. 297.

69. *Newport v. Taylor's Ex'rs*, 55 Ky. (16 B. Mon.) 699, 807; *Cincinnati v. White*, 6 Pet. (U. S.) 431, 8 Law Ed. 452.

If a plat marks a space as "common," the dedication is for a public square and the uses are not limited except as to such as are public uses. *Hoyt v. Gleason*, 65 Fed. 685.

Misuser, § 1606 *post*.

70. *Goode v. St. Louis*, 113 Mo. 257, 20 S. W. 1048.

71. In *Weger v. Delran*, 61 N. J. L. 224, 39 Atl. 730, a map was

made which was entitled "Plan of Bechtold's 4th addition to the Town of Progress," on which all the blocks except the *locus in quo* were divided into numbered lots. The property in dispute was distinguished from the other blocks by a different coloring, by the delineation of trees and paths, and by a rough representation of a fountain in the center. The Court of Errors and Appeals held that the property so marked was devoted to public uses.

In *Fessler v. Town of Union*, 67 N. J. Eq. 14, 56 Atl. 272, a map was made indicating an open space 150 feet wide and between 200 and 300 feet long marked "Liberty Place," in which there was laid down a small lake shaped like an elongated egg marked "Indian Pond." The map showed also within the open space some flower beds and representations of trees. It was held that the property comprised in the open space was dedicated to public uses.

In *Bayonne v. Ford*, 43 N. J. L. 292, a map was made on which was laid out an open space which was marked "Annette Park now belonging to R. Graves." It was held that the property represented by this section of the map was de-

The construction of deeds wherein a municipality is the grantee as to whether certain provisions therein create a condition subsequent, has been briefly considered in a preceding chapter.⁷² And it has been there stated that the rules applicable to the construction of deeds in general without regard to whether a municipality is a party to the deed are controlling, and that reference should be made to general treatises on the subject of deeds.⁷³

§ 1559. Purchasers having rights as limited to abutters.

There is some conflict of opinion as to whether a purchaser of a lot with reference to a plat, showing streets and alleys, has a right to insist upon the opening of a street on which his property does not abut or whether his rights in regard to such streets and public ways and other public places is limited to those places on which his land abuts. The rule that the purchaser has a right, as against the original owner, to have *all* the streets and alleys, designated upon the map, kept open and unobstructed has been laid down in a few jurisdictions,⁷⁴

voted to public uses as a public park.

In *Price v. Plainfield*, 40 N. J. L. 608, a map was made upon which there was a plot of about three acres represented on the map by a space in which was written the word "Park." This was held by the Court of Errors and Appeals to be a dedication of the plot to public uses as a public park.

Putting the word "Park" on plat, and sale of lots, implies a dedication for park purposes. *Florida East Coast R. Co. v. Worley*, 49 Fla. 297, 38 So. 618.

Grove. Where there is on a plan an open square marked "Alliquippa Grove," colored in green,

with serpentine paths through it, and lots were sold pursuant to such plans, such land is dedicated as a park, the word, "grove," being considered equivalent to park. *Morrow v. Highland Grove Traction Co.*, 219 Pa. 619, 69 Atl. 41.

72. § 1122 *ante*, vol. 3.

73. See Devlin on Deeds.

74. *Conrad v. Land Co.*, 126 N. C. 776, 36 S. E. 282; *Hughes v. Clark*, 134 N. C. 457, 46 S. E. 956, 47 S. E. 462.

In *Pennsylvania*, it is held that a dedication by a sale of lots according to a plat cannot be revoked by the vendor, "and the purchaser of each lot abutting on one of the streets or' alley, as well as all other persons pur-

while the contrary has been held in other jurisdictions.⁷⁵

chasing and owning lots on the plan, may assert the public character of the streets and alleys and the right of the public to use them. *Re Southwestern State Normal School*, 213 Pa. 244, 62 Atl. 908.

In *Re Opening of Pearl Street*, 111 Pa. 565, 572, 5 Atl. 430, it was said, per curiam: "When (a grantor) sells and conveys the lots according to a plan which shows them to be on streets, he must be held to have stamped upon them the character of public streets. Not only can the purchasers of lots abutting thereon assert this character, but all others in the general plan may assert the same. The proprietor is in no condition afterwards to revoke this dedication." In *Quicksall v. Philadelphia*, 177 Pa. 301, 304, 35 Atl. 609, Justice Fell cited the language above quoted with approval and also said: "The sale of lots according to a plan which shows them to be on a street implies a grant or covenant to the purchaser that the street shall be forever open to the use of the public, and operates as a dedication of them to public use. The right passing to the purchaser is not the mere right that he may use the street, but that all persons may use it." The above language was quoted with approval in *Woodward v. Pittsburgh*, 194 Pa. 193, 198, 45 Atl. 91, and the opinion in *Quicksall v. Philadelphia*, 177 Pa.* 301, 35 Atl. 609, was commended and followed in *Osterheldt v. Phila-*

delphia, 195 Pa. 355, 361, 45 Atl. 923. And it was held in *Morrow v. Traction Co.*, 219 Pa. 619, 69 Atl. 41, 123 Am. St. Rep. 677, that where a sale of lots was made according to a plan, not only the streets and alleys, but also an open square shown on the plan, was dedicated to the public, and the owners of lots on the plan were entitled to an injunction to prevent the obstruction of the streets or the square for private purposes. *Jessop v. Kittanning*, 225 Pa. 583, 74 Atl. 553.

In *New York*, it is said that if land is dedicated by a sale pursuant to a map showing streets, a purchaser has the right to have the condition as to streets, where it appears that they are not too remote, remain the same as when he purchased the premises. *Kelly v. Penfield*, 122 N. Y. S. 811, 126, App. Div. 993.

75. *Thorpe v. Clanton*, 10 Ariz. 94, 85 Pac. 1061; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639; *State v. Hamilton*, 109 Tenn. 276, 70 S. W. 619.

"The plaintiff insists that as incident to each lot he purchased by the plan he acquired a right to use every street shown upon the entire tract. While cases are to be found which support this hard and fast rule, it cannot be sustained upon principle. The right is not based upon a covenant that the ways exist. *Howe v. Alger*, 4 Allen (Mass.) 206. It arises merely by way of estoppel. The time came when the grantor could no longer deny that streets

§ 1560. Vacation of plat.

In some jurisdictions statutes provide more or less in detail for the vacation of a plat where lots have not been

existed as represented on the plan. "That time was when purchasers of lands, upon a consideration enhanced by the inducements held out by the proclamation of these landholders, acquired such rights with reference to their house lots thus purchased, and the convenient and indispensable enjoyment of them, as would render it fraudulent on the part of the vendors to revoke their agreement by changing or abolishing the location of the streets laid down on their recorded plan, with reference to which their sales and conveyances had been made." *Walker v. Manchester*, 58 N. H. 438, 441. Since this is the foundation of the right here involved, it follows that all the elements of an estoppel by conduct must exist. One of these elements is that the representation made must be material to the action about to be taken. If the representation is immaterial, there is no estoppel. *Comings v. Wellman*, 14 N. H. 287, 292; *Stevens v. Dennett*, 51 N. H. 324, 333. The true rule, then, is that there is an estoppel to deny the existence of the ways shown upon the plan so far, and so far only, as the existence of the ways would be material to the owner of the land purchased. "In some cases it is held that the purchaser of a lot described as bounded on a street or way is entitled to have it kept open for the whole distance

shown by the plat or description; but the decision in every case has been based upon substantial equities. It could not have been otherwise; for estoppels arise upon equities, and are enforced for their protection." *Cooley, J., in Bell v. Todd*, 51 Mich. 21, 16 N. W. 304. How far the lay-out of the whole tract into some 200 lots concerns the purchaser of an individual lot is a question of fact, to be settled in the superior court. In the language above quoted the relation must be such as to create substantial equities before the relief here sought can be granted." *Douglass v. Belknap Springs Land Co.* (N. H., 1911), 81 Atl. 1086.

In *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639, the Supreme Court of Rhode Island held that a complainant, who bought a lot with reference to a plat, one side of which was bounded by an avenue, who sought to have a fence, obstructing said avenue and also other streets, removed, might have a technical right to have the obstruction from such other streets removed, but as such removal would be of no real benefit to him, and he would oblige the defendant to incur additional trouble and expense to protect his property, would not be granted relief in equity.

The Supreme Court of Tennessee in the case of *State v. Hamilton*, 109 Tenn. 276, 70 S.

sold in reliance thereon, or with the consent of all the purchasers where lots have been sold.⁷⁶ But a plat cannot be vacated, as authorized by statute, even though no lots have been sold, where it will result in the destruction of valuable intervening private rights created by the dedicator, who in such a case is estopped to deny the existence of the dedication without regard to whether the dedication is a statutory or a common-law one.⁷⁷ So, a statutory plat of a street cannot be vacated under the statutory provision forbidding vacation when lots have been sold, except under certain circumstances, where the dedicator has leased lots in the plat for a long term of years, since there is no difference in principle between sales and leases.⁷⁸

W. 619, approves the rule as laid down in *Jones on Easements*, § 347, as follows: "When land is sold by reference to the plan upon which several streets and avenues are laid out the grantee does not necessarily acquire an easement in all said streets or ways. He acquires an easement in the street or way upon which his lot is situate, and in such other streets or ways as are necessary or convenient to enable him to reach a highway. He acquires no easement in the street or way which his land does not touch and which does not lead to the highway; and he is not entitled to an injunction or other remedy by reason of an obstruction to such street or way."

Park. Non-adjacent to park, sale with reference to plat, no rights in park. *Stover v. Steffey*, 115 Md. 524, 81 Atl. 33.

76. *Saunders v. Chicago*, 212 Ill. 206, 72 N. E. 13; *Lee v. Harris*, 206 Ill. 428, 69 N. E. 230, 99 Am.

St. Rep. 176; *Brown v. Taber*, 103 Iowa 1, 72 N. W. 416; *Merchant v. Marshfield*, 35 Ore. 55, 56 Pac. 1013.

In the absence of a statute, a public square as shown on a plat cannot be vacated by an instrument signed by the party making the plat and others, where some of the abutting property owners fail to join therein. *Moore v. Kleppish*, 104 Iowa 319, 73 N. W. 830.

A vacation of a recorded plat divests all public rights in nominal streets designated in the plat but never used as such nor accepted by the municipality. *Hart v. Ainsworth*, 89 Neb. 418, 131 N. W. 816.

77. *Stevenson v. Lewis*, 244 Ill. 147, 91 N. E. 56.

78. *Stevenson v. Lewis*, 244 Ill. 147, 91 N. E. 56, which involved the plat of a tract of land in the city of Zion by John Alexander Dowie, the leases running until January 1st, 3000.

4. INTENTION TO DEDICATE.

§ 1561. Necessity for intent to dedicate.

The vital principle underlying a dedication is the intention to dedicate.⁷⁹ The rule that an intent to dedicate is essential to a dedication is so elementary and so thoroughly settled that it is deemed unnecessary to cite the multitude of authorities so holding. In fact this question is never disputed, but the real issue generally involved is whether the facts in the particular case show

79. *Athens v. Burkett* (Tenn. Ch.), 59 S. W. 404.

Intent to dedicate need not exist immediately at the time that the public asserts a use. *International & G. N. R. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714.

Motive as distinguished from intent. Where the intent of one in moving back his fence and making place for an alley, was to appropriate the space to the public, such intent will be allowed its full force notwithstanding the motive may have been to oblige and accommodate a third person. *Tise v. Whitaker-Harvey Co.*, 146 N. C. 374, 59 S. E. 1012.

Sewer constructed by private person is not dedicated by being placed in a public street, unless there was an intention to dedicate it. *Oak Cliff Sewerage Co. v. Marsalis*, 30 Tex. Civ. App. 42, 69 S. W. 176.

The building of a causeway through the water and permitting people to use it as a street does not constitute a dedication of the causeway as an extension of a city street, where it was never extended across the river so as to connect with any street in the op-

posite city, nor was any ferry ever established, nor was it ever worked as a street, nor opened to the general public by the municipality. *Morris & E. R. Co. v. Jersey City*, 63 N. J. Eq. 45, 51 Atl. 387, aff'd without opinion in 71 N. J. Eq. 308, 71 Atl. 1135.

Lease as showing intention. Where it was claimed that land designated on a plat as a park was thereby dedicated as such, the fact that the proprietor in his lease of lots made the lease subject to his right to "use, lay out and lease all lands not already laid out or designated as streets or avenues" tends to show that it was not his intention to dedicate the park to the public. *Bartlett v. Harmon*, 107 Me. 451, 78 Atl. 842.

The act of the United States in reserving a bayou and a space along its banks on the maps of the United States, together with the silence and inaction of the federal government as to the disposition of such property, for nearly a century, shows a dedication of it for public uses. *Zagame v. New Orleans*, 128 La. 388, 54 So. 916.

an intention on the part of the owner to dedicate his land to a public use.⁸⁰ However, the statement that there must always be an intent to dedicate is not wholly correct, at least if the word intent be taken in the sense of an *actual intent*, inasmuch as the basis of a common-law dedication often rests on mere conduct of the owner of land relied on by others to their injury so as to constitute an estoppel *in pais* against the owner, and effectuate a dedication notwithstanding that there was never in the mind of the owner any actual intent to dedicate, the theory being that the owner must be held to intend the reasonable and necessary consequences of his acts.⁸¹

80. **Intent necessary.** The rule that an intent to dedicate is necessary applies equally well where the alleged dedication is by a municipal corporation. *Collins v. Macon*, 69 Ga. 542, holding that the use by a city of its property for a specific purpose does not constitute a dedication of it for that purpose.

81. "It may be more correct to say that there must be either an actual intent to dedicate or such conduct on the part of the owner as clearly manifests such intention, accompanied by circumstances which would render it inequitable for him to deny that he so intended." Lewis, *Eminent Domain* (3d Ed.), § 494.

Conduct as indicating intent. "Although the authorities state the rule to be that the intent of the owner to dedicate must be clearly shown, yet the intent which the law means is that expressed in the visible conduct or open acts of the owner. The public or individuals have a right to rely on the owner's conduct, as indicating his intent, such as

would reasonably lead one to infer a dedication rather than a secret intent. Neither is it true that such intent in every case must exist in the mind of the owner. If his open and known acts are of such a character as to induce the belief that the owner intended to dedicate, and the public or individuals acted upon such conduct, and acquired rights which would be lost if the owner were allowed to reclaim the land, it will amount to a dedication. *Elliott on Roads and Streets* (3rd Ed.), 138, 139, and 140." *Kuck v. Wakefield*, 58 Ore. 549, 115 Pac. 428.

"Conduct of the owner may, under certain circumstances, work a dedication of a right of way, on his part, though an actual intent to dedicate may not exist." *Tise v. Whitaker-Harvey Co.*, 146 N. C. 374, 59 S. E. 1013.

The intention to dedicate need not actually exist in the mind, but it must appear to exist. *German Bank of Evansville v. Brose*, 32 Ind. App. 77, 69 N. E. 300.

In other words, the acts of the owner must be such as to show an intent to dedicate or else must be such as to estop him from denying that such was his intent.⁸²

As illustrating the rule that there need not be an actual intent to dedicate, it is held that if the owner of land either intentionally or by gross negligence induces the public to believe that he has dedicated his premises, he is estopped to contradict the dedication to the prejudice of those misled by his action.⁸³ In brief, the intent

"We adhere to the rule declared in * * * *Faust v. City of Huntington*, 91 Ind. 493, and *City of Indianapolis v. Kingsbury*, 101 Ind. 201—that when the declaration, acts, and conduct of the landowner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to public use, and others have in good faith acted upon his open acts and declaration, the fact that the landowner may have entertained a different intention from that manifested by his acts and declaration is of no consequence. Such secret intentions cannot prevail against the force of his conduct and acts, upon which the public, or those dealing with him, have relied." *Pittsburg, C., C. & St. L. Ry. Co. v. Noftsker*, 148 Ind. 101, 47 N. E. 332.

The general rules as to intent as declared in other branches of the law apparently govern the question of intent so far as dedication is concerned, and it follows that the intent to dedicate need not always in fact exist in the mind of the owner, but it is sufficient that his acts and conduct indicate an apparent intent

to dedicate. See *Elliott Roads & Streets* (3d Ed.), § 140.

82. *Eureka v. McKay & Co.*, 123 Cal. 666, 56 Pac. 439.

83. *Wilder v. St. Paul*, 12 Minn. 192.

Mistake. "Where a party's acts are sufficient to constitute a dedication of a street, he will not be heard, ten years thereafter, to say that his act, showing an intention to dedicate, was the result of a mistake." *Louisville v. Mutual Life Ins. Co.* (Ky., 1912), 143 S. W. 782.

"If the owner throws open a way to the public, and so conducts himself as to induce a well founded and reasonable belief that he has a correct knowledge of all the facts, and that, having this knowledge, he intends to dedicate the way to public use, he will be held to have made a dedication in case it appears that others, influenced by his conduct, and acting in good faith and without negligence, have acquired rights in the belief that a dedication had been made, even though it should afterwards turn out that the owner acted under a mistake." *Elliott, Roads & Streets* (3d Ed.), § 139.

may be actual or presumed, as in other branches of the law where intent is material. Likewise, there is no need of an *actual* intention to dedicate where a statute provides that roads used for a certain number of years as public highways shall be public highways.⁸⁴

§ 1562. How intent shown.

The intent to dedicate, as already explained, being necessary to constitute a dedication, such intent, or the absence of such intent, may be evidenced in a multitude of ways.⁸⁵

84. *Ellsworth v. Grand Rapids*, 27 Mich. 250.

§ 1611 *post*.

Under a charter provision that all streets and avenues in the city, which have been thrown open for public use and used continuously for five years, shall be deemed public streets, the owner cannot be said to have thrown streets open within the statute by merely permitting the land to lie open and unfenced. *Strong v. Brooklyn*, 68 N. Y. 1.

In California, a statute provides that all roads shall be public highways where used for five years by the public as highways. *Southern Pacific Co. v. Pomona*, 144 Cal. 339, 77 Pac. 929.

85. **Non-assertion of right.** A dedication must result from an active, and not a passive, state of the owner's mind, and a mere non-assertion of a right will not establish a dedication unless the circumstances are such as to show a purpose to dedicate the land to a public use. *Palmer v. Chicago*, 248 Ill. 201, 93 N. E. 765; *Birge v. Centralia*, 213 Ill. 503,

75 N. E. 1035; *Chicago v. Hill*, 124 Ill. 646, 17 N. E. 46; *Chicago v. Borden*, 190 Ill. 430, 60 N. E. 915.

Conduct of the owner of land on both sides of a street in selling a street after its abandonment and a new way substituted therefor, amounts to a dedication of the new for the old way, because of acquiescence therein. *Moore v. Meroney*, 154 N. C. 158, 69 S. E. 838.

Representations of owner on sale of lots as to use of land for a street may show intent to dedicate. *Mason City v. Day* (Iowa, 1899), 78 N. W. 198.

Filing proceedings for partition, which adopt and recognize a map on which streets have been laid out, constitutes a dedication, where partition is made. *Vanatta v. Jones*, 42 N. J. L. 561; *Bailliere v. Atlantic Shingle Cooperage & Veneer Co.*, 150 N. C. 627, 64 S. E. 754.

Petition by abutters to establish a street and agreeing to donate sufficient land therefor amounts to a dedication where acted upon by an ordinance di-

A dedication may be made in every conceivable way

recting a street to be established of a certain width. *Grace v. Walker*, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482, modifying 61 S. W. 1103.

Owner constructing board walk in front of his premises for his own convenience does not dedicate it to the public, but may remove it. *Commonwealth v. Barker*, 140 Pa. St. 189, 21 Atl. 243.

But building of a sidewalk by a property-owner pursuant to an ordinance requiring the construction of sidewalks held to show dedication by the owner of the land occupied by the walk as a sidewalk. *Bloomfield v. Allen* (Ky., 1912), 141 S. W. 400.

Offer by owner of land to unite with adjoining owners in a dedication is not sufficient of itself, there being nothing further done, to show an intention to dedicate. *Re Bellefield Avenue*, 2 Pa. Super. Ct. 148.

Dock. Act of a city in abstaining from any control over a dock does not show a dedication of it to public use. *Boston v. Lecraw*, 17 How. (U. S.) 426, 15 Law Ed. 118.

Consent to deposit of earth. Abutting owner dedicates his property for the use of lateral support for a street where he consents that the municipality deposit earth upon the margin of his lot in such quantity and in such a way as to form a lateral support for the earth of the street as raised and graded, so as to preclude him from thereafter requiring the dirt to be removed.

Williams v. Hudson, 130 Wis. 297, 110 N. W. 239.

Consent to use as cemetery. Where the owner of land consents to the use of a particular tract of land for a place for the interment of the dead for more than twenty years, an intention to dedicate will be conclusively presumed. *Roundtree v. Hutchinson*, 57 Wash. 414, 107 Pac. 345.

Failure to pay taxes. The fact that the owner never paid taxes on certain property claimed to have been dedicated does not show an intent to dedicate. *Illinois Insurance Co. v. Littlefield*, 67 Ill. 368; *Municipality No. 2 v. Palfrey*, 7 La. Ann. 497.

Dedication by railroad company must be made by directors or recognized by them or arise from such public use as to justify the inference of ratification. *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155.

Sufficiency of evidence to show intent to dedicate crossing over railroad track, see *Benson v. St. Paul, M. & N. R. Co.*, 73 Minn. 481, 76 N. W. 261; *Larson v. Chicago, M. & St. Paul R. Co.*, 19 S. D. 284, 103 N. W. 35; *Michigan Cent. R. Co. v. Hammond*, W. & E. C. Electric R. Co., 42 Ind. App. 66, 83 N. E. 650.

New purpose. Where land is dedicated for one purpose only and thereafter a part of it is built upon by the donor for another public purpose and so used by the public for many years, the intention to dedicate such part of the property for the new purpose is

by which the intention of the party can be manifested.⁸⁶ The intention may be manifested by (a) a written grant, (b) by affirmative acts or (c) by permissive conduct.⁸⁷ There need not be a formal grant or written conveyance but any act of the owner of land clearly indicating an intention to dedicate it for public use is sufficient,⁸⁸ since it is well settled that no particular form or ceremony is necessary to dedicate land for public use.⁸⁹

While the intent to dedicate may be shown by a deed or writing,⁹⁰ no writing is necessary, since it is conceded

sufficiently established. *Pott v. School Directors of Pottsville*, 42 Pa. St. 132, 141.

Deed as dedication. A mere deed of land to a municipality for a consideration, although contemplating its appropriation for a certain public use, does not constitute a dedication. *State v. Woodward*, 23 Vt. 92, 98.

86. *West Point v. Bland*, 106 Va. 792, 56 S. E. 802.

The intention to dedicate a strip as a street may be established in any conceivable way by which it may be made manifest that it was intended to set the strip aside. *People v. Chicago & N. W. R. Co.*, 239 Ill. 42, 87 N. E. 946.

"The offer of the owner to dedicate may be manifested in a hundred different ways, and the acceptance of the offer by the public may be manifested in a like number of ways." *Los Angeles v. Kysor*, 125 Cal. 463, 58 Pac. 90.

An act of the legislature incorporating a municipality may operate as a dedication of streets under some circumstances, but an act of incorporation which refers to streets in defining the boundaries

of the municipality does not constitute a dedication of such boundary streets where the streets are referred to merely to fix the boundaries. *Eureka v. McKay & Co.*, 123 Cal. 666, 56 Pac. 439.

Urban as distinguished from suburban ways. An intention to dedicate is more readily inferred in the case of a street in a town or city than a country road. *Quinn v. Anderson*, 70 Cal. 454, 11 Pac. 746; *Harding v. Jasper*, 14 Cal. 642.

87. See *Schettler v. Lynch*, 23 Utah 305, 64 Pac. 955.

88. *Brooks v. Topeka*, 34 Kan. 277, 8 Pac. 392.

89. *Wormley v. Wormley*, 207 Ill. 411, 69 N. E. 865, 3 L. R. A. (N. S.) 481; *Carter v. Barkley*, 137 Iowa 510, 115 N. W. 21; *Roundtree v. Hutchinson*, 57 Wash. 414, 107 Pac. 345.

No particular words are necessary. *Thompson v. McPherson* (Ky., 1909), 124 S. W. 272.

90. If the dedication is in writing no particular wording is necessary. *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501,

to be the settled law, without exception, that a *common-law dedication may be by parol*.⁹¹

Furthermore, where there is no writing, the dedication need not be evidenced by *words* but may result wholly from the actions and conduct of the owner of the land claimed to have been dedicated.⁹² Thus, where the public has used the land for a public purpose for a long time, with the knowledge of the owner and without objection from him, an intent to dedicate will generally be presumed.⁹³ However, it has been aptly expressed that the *intent is to be ascertained from the acts of the owner and not from the purpose hidden in his mind*,⁹⁴ and all the acts of the owner should be considered together.⁹⁵

Moreover, the *intent must be a present one*, and not a mere declaration of future intention.⁹⁶ In short, it is the intent at the time of the alleged dedication that is to be considered and not the intent at any subsequent time.⁹⁷

91. *Illinois*. Marlow v. Rich, 252 Ill. 442, 96 N. E. 921.

Missouri. State v. Transue, 131 Mo. App. 323, 111 S. W. 523.

Nebraska. Anderson v. Nelson, 86 Neb. 752, 126 N. W. 314.

Texas. Menczer v. Poage, 55 Tex. Civ. App. 415, 118 S. W. 863.

Virginia. Bellenot v. Richmond, 108 Va. 314, 61 S. E. 785.

92. Gest v. Kenner, 2 Handy (Ohio) 86.

93. § 1563 *post*.

94. East Birmingham Realty Co. v. Birmingham Machine & Foundry Co., 160 Ala. 461, 49 So. 448.

The intent can only be considered so far as it is manifested by the owner's acts. Frauenthal v. Slaten, 91 Ark. 350, 121 S. W. 395.

Intention without acts. The

intention to dedicate is not one merely existing in the mind of a person, but it is an intention manifested by his words and acts, to which the courts must give effect. Cole v. Minnesota Loan & Trust Co., 17 N. D. 409, 117 N. W. 354.

Mere intent signifies nothing but it must be followed by acts and hence the intent of the owner to give must be followed by an abandonment of his exclusive enjoyment of the thing. International & G. N. R. Co. v. Cuneo, 47 Tex. Civ. App. 622, 108 S. W. 714; Flack v. Green Island, 122 N. Y. 107, 25 N. E. 267.

95. People v. Jones, 6 Mich. 176.

96. Boerner v. McKillip, 52 Kan. 508, 35 Pac. 5.

97. Ruch v. Rock Island, Fed. Cas. 12,105.

To elaborate and illustrate more fully, the intent may be shown in the following ways:

First, the intent may be shown by a *written instrument* executed especially for the purpose of dedicating land to the public, as, for instance, where a *plat is executed and recorded* as provided for by statute so as to constitute a statutory dedication.⁹⁸

Second, the intent of the owner to dedicate may be evidenced by his express act in *filing a plat or map* of his property, without regard to whether it is sufficient as a statutory plat, where it shows thereon certain places designated as streets, alleys, parks, etc.⁹⁹ This is one of the clearest ways of declaring an intention to dedicate.¹ It should be remembered, however, that it does not *necessarily* follow that the filing of such a plat or map, at least if insufficient to create a statutory dedication, shows an intention to dedicate, but the effect thereof may be over-

Intent to dedicate may be formed after public commenced to use the highway. *Havana v. Biggs*, 58 Ill. 483.

98. § 1540 *ante*.

99. *Owen v. Brookport*, 208 Ill. 35, 69 N. E. 952.

"A survey and plat alone are sufficient to establish a dedication, if it is evident from the fact of the plat that it was the intention of the proprietor to set apart certain grounds for public use." *Clark v. McCormick*, 174 Ill. 164, 170, 51 N. E. 215.

Filing of map by the owner of land, showing streets, etc., has always been held to constitute an offer to dedicate. *Anaheim v. Langenberger*, 134 Cal. 608, 66 Pac. 855.

To show the intention of the alleged dedicator, a map made by him, without regard to whether it

was ever filed for record, is undoubtedly admissible to show his intention to dedicate. *Keyport v. Freehold & A. H. R. Co.*, 74 N. J. L., 480, 65 Atl. 1035.

Map held to show intention of railroad company not to dedicate a crossing over its right of way for a street. *Atlanta v. Texas & P. R. Co.*, 56 Tex. Civ. App. 226, 120 S. W. 923.

Marking "county block" on plat held not, under particular statute, to show intent to dedicate it to the county. *Hennepin County v. Dayton*, 17 Minn. 260.

1. *Grandville v. Jenison*, 84 Mich. 54, 47 N. W. 600.

Filing of plat containing tract marked "public square," followed by its use as a park, constitutes a complete dedication. *Lacy v. Oskaloosa*, 143 Iowa 704, 121 N. W. 542.

come by other acts of the owner tending to show that he did not thereby intend to dedicate such property.²

Third, if the owner plats his property and then sells lots pursuant to the plat, his intent to dedicate public places on such plat is shown and he is estopped to deny a dedication as against such purchasers, and it seems his only way to retain the property so dedicated is to vacate the plat if he can obtain the consent of the purchasers, and the statute authorizes a vacation in such a case or does not forbid it.³ So where the proprietor of land

2. The mere filing of a plat of a town with a petition for its incorporation does not show a dedication of a street indicated on the plat. *De Nefe v. Agency City*, 143 Iowa 237, 121 N. W. 1049.

3. *East Birmingham Realty Co. v. Birmingham Machine & Foundry Co.*, 160 Ala. 461, 49 So. 448; *Roberts v. Mathews*, 137 Ala. 528, 34 So. 624, 97 Am. St. Rep. 56; *Valdez Bank v. Von Gunther*, 3 Alaska, 657.

Sale of lands with reference to plat showing a park is dedication. *Schertzer v. Hillman Inv. Co.*, 52 Wash. 492, 100 Pac. 982, following *Lueders v. Tenino*, 49 Wash. 521, 95 Pac. 1089.

The making of a plat, laying off the land into lots and blocks separated by streets and alleys, and the sale of lots thereafter by the owner is evidence of the most satisfactory character of a common-law dedication. *Nelson v. Randolph*, 222 Ill. 531, 78 N. E. 914.

"Though our statute declares that no covenant shall be implied in any conveyance of real estate (B. & C. Comp. 5338), it

has repeatedly been held by this court that a sale and conveyance by a proprietor of a town site of lots therein, with reference to an existing plat of the premises, indicating streets as a boundary, amounted to an irrevocable parcel dedication of the highways, when no express grant thereof to the public had been made." *Baker City Mut. Irr. Co. v. Baker City*, 58 Ore. 306, 113 Pac. 9, 14.

If one buys land with reference to a map showing streets, etc., restrictions in the deed do not affect or limit the dedication of the streets. *East Birmingham Realty Co. v. Birmingham Machine & Foundry Co.*, 160 Ala. 461, 49 So. 448.

"As a condition precedent to a common-law dedication, which is implied from the sale of lots by reference to a plat thereof, exhibited or improperly recorded, there must, in the absence of an acceptance, have been either a survey of the land, or some physical evidence upon the ground, to indicate the location and extent of the easement intended by the donor to be devoted to the use of the public," *Nedine v.*

sells and conveys lots in conformity and with reference to a *city map*, on which his land is laid off into lots with streets, etc., such sales are a recognition and adoption of the maps and amounts to a dedication of designated streets and public places to public use.⁴

Fourth, the intent to dedicate may be shown by *recitals in a deed* in which the rights of the public are recognized.⁵

Union City, 42 Ore. 613, 72 Pac. 582.

Plat made by third person. Where owners of real estate convey according to the descriptions contained in a plat made by another and by reference thereto, they adopt the entire plat with all its dedications, even though the plat is not sufficient as a statutory plat, so as to become estopped to deny that there has been a common-law dedication of the property designated as public places in said plat. *Thomas v. Metz*, 236 Ill. 86, 86 N. E. 184.

Park. A platting of land with parcels therein designated as parks, and a sale of lots with reference thereto, ordinarily constitutes a dedication of such parcels. *Northport W. G. C. Ass'n v. Andrews*, 104 Me. 342, 71 Atl. 1027, 20 L. R. A. (N. S.) 976; *Bartlett v. Harmon*, 107 Me. 451, 78 Atl. 842; *White v. Moore*, 123 N. Y. S. 1012, 139 App. Div. 269; *Morrow v. Highland Grove Trac-tion Co.*, 219 Pa. 619, 69 Atl. 41; *Lueders v. Tenino*, 49 Wash. 521, 95 Pac. 1089.

4. *Sherer v. Jasper*, 93 Ala. 530, 9 So. 584; *Trustees of M. E. Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *Bailliere v.*

Atlantic Shingle Cooperage & Veneer Co., 150 N. C. 627, 64 S. E. 754.

§ 1556 *ante*.

Map same as plat. *Pullman v. Houston* (Tex. Civ. App., 1910), 125 S. W. 69.

Adopting a town map designating land as public parks or squares, in executing partition deeds to adjoining property, constitutes a dedication. *Cassery v. Alameda County*, 153 Cal. 170, 94 Pac. 765; *People ex rel. v. Blake*, 60 Cal. 497.

5. *Harpers Ferry v. V. Kaplon & Bro.*, 58 W. Va. 482, 52 S. E. 492.

Reference in deed to alley as abandoned, held to constitute dedication of alley. *Reccius v. Weber*, 142 Ky. 157, 134 S. W. 145.

But a mere reference to a recorded map in deeds, there being a plot of ground on the map marked "park," does not constitute a dedication of such land for a park. *Adoue v. La Porte* (Tex. Civ. App. 1909), 124 S. W. 134.

In Maryland, in so far as the question of intent to dedicate as arising from a deed calling for a street as a boundary is concerned, it seems that no presump-

Fifth, the intention of the owner to dedicate may be shown by his *oral declarations*.⁶ But a single declaration by the owner of land that he intends to dedicate it is insufficient where there is no act in furtherance of the intention and especially where it is immediately followed by an act wholly inconsistent with the dedication.⁷

Sixth, the intent may be shown by *affirmative acts* of the owner in connection with his property, as by fencing a way, and the like.⁸

Seventh, it is generally held that the intent may be shown by the *acquiescence of the owner* in the use of his property by the public for a public purpose. In this case, however, the intent to be proved is not an actual intent.⁹

§ 1563. User as showing intent to dedicate.

The better rule seems to be that an intent to dedicate may be *inferred from mere user by the public*,¹⁰ pro-

tion is created in favor of an intention to dedicate where the grantor does not retain the fee in the bed of the street. *Baltimore v. Northern Cent. R. Co.*, 88 Md. 427, 41 Atl. 911.

6. *Woodburn v. Sterling*, 184 Ill. 208, 56 N. E. 378.

7. *Logansport v. Dunn*, 8 Ind. 378.

8. *Fencing. Dubois Cemetery Co. v. Griffin*, 165 Pa. St. 81, 30 Atl. 840.

"Throwing open land in a village, and fencing it on each side, and causing the way of an avenue to be designated as public on a map of the village, are acts tending strongly to show a design, presently or at some future period to dedicate and devote it to the public use." *Holdane v. Cold Spring*, 21 N. Y. 474, 478.

Laying off property as a street,

by owners, and user by public, is dedication. *New Orleans J. & G. N. R. Co. v. Moye*, 39 Miss. 374.

The mere fact that there are no fences maintained by owners of property to divide it from the street is not sufficient evidence to show an intention on the part of the owners to dedicate the land to the public use as a highway. *Watkins v. Welch Grape Juice Co.*, 89 N. Y. S. 47, 96 App. Div. 114.

9. § 1563 *post*.

10. *Hiner v. Jeanport*, 65 Ill. 428; *Mason v. Sioux Falls*, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802; *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501.

User as estoppel. An owner of land who allows it to be used by the public for a street or other public use for a number of years under a notorious claim of right

vided the user is not merely permissive.¹¹ However, a dedication by user occurs only where it clearly appears that the user is with the knowledge and consent of the owner, or without his objection, and under such circumstances as fairly to give rise to the presumption that the owner intended to dedicate to such use.¹² And mere user by the public, although long continued, should be regarded as a mere license, revocable at the pleasure of

is estopped from denying a dedication to the public. *Dodge v. Hart*, 113 Iowa 685, 83 N. W. 1063; *Riley v. Buchanan*, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 642; *Wright v. Oberlin*, 23 Ohio Cir. Ct. Rep. 509; *Schettler v. Lynch*, 23 Utah 305, 64 Pac. 955.

In *Riley v. Buchanan*, 116 Ky. 625, 76 S. W. 527, 25 Ky. L. Rep. 863, 63 L. R. A. 642, the court, in a lengthy discussion of the question of dedication and acceptance of public highways, announced the rule that, where a passway has been used by the public continuously for more than fifteen years, without let or hindrance from the owners of the land over which it runs, both a dedication by the owner of the land and an acceptance by the proper legal authority of the passway as a public highway will be conclusively presumed to have taken place.

11. § 1564 *post*.

12. *De Martini v. San Francisco*, 107 Cal. 402, 40 Pac. 496; *Elliott, Roads & Streets* (3d Ed.), § 179.

Must be with knowledge of owner. *Niles v. Los Angeles*, 125 Cal. 572, 58 Pac. 190.

Where the owner of land knew a street was proposed to be located through his land, and he

was taken over its proposed line, but raised no objection, there is a dedication where there has been a continued use of the street for a considerable time. *Gillman v. Bloomfield*, 78 N. J. L. 67, 73 Atl. 604.

"While mere use is not in itself ordinarily sufficient to establish a public way by prescription, it is, when long continued with knowledge of the owner of the property, a fact of much importance, as bearing upon the dedication, express or implied, to the public." *Foulke v. Agency City*, 145 Iowa 471, 122 N. W. 823.

Knowledge not inferred. Knowledge of the owner of the public use will not be inferred from the public use alone. *Davis v. Bonaparte*, 137 Iowa 196, 114 N. W. 896.

Way to depot. Use of a way as a means of access to a depot for a full generation and as a continuous street for travel and traffic between the two sides of a railroad, shows a dedication, where the municipality graded and worked the way without objection from the railroad company which complied with municipal orders as to the repair of the walks, etc. *Foulke v. Agency City*, 145 Iowa 471, 122 N. W. 823.

the owner, where it does not appear that any public or private interests have been acquired upon the faith of the supposed dedication, which would be materially impaired if the dedication were revoked.¹³

13. *President, etc. v. White's Lessee*, 6 Pet. (U. S.) 431, 439; *Niles v. Los Angeles*, 125 Cal. 572, 58 Pac. 190; *West Point v. Bland*, 106 Va. 792, 56 S. E. 802.

An intention to dedicate will be presumed where the owner acquiesces in the public use of his land for so long that the public convenience might be materially affected by an interruption of the enjoyment. *Whittaker v. Ferguson*, 16 Utah 240, 51 Pac. 980.

The doctrine of estoppel *in pais* cannot be applied in favor of the public against the property owner, unless it can be shown that he has stood by, and by his action or silence concurred in allowing the public and individuals to so use and enjoy his property and the right thus initiated, that thereafter to deprive them of it would work an injustice or fraud upon them and invade the right founded on the presumption he has thus allowed to be raised. *Hailey v. Riley*, 14 Idaho 481, 95 Pac. 686.

Before any estoppel can arise by reason of a prima facie dedication, it must be shown that the public or some member thereof acted upon such prima facie dedication in such a way as to render it unequitable and unjust for the owner to deny the dedication. *Adoue v. La Porte* (Tex. Civ. App., 1909), 124 S. W. 134.

"If, however, there is not an express dedication, but the owner

suffers the public to use the passway, knowing it is claiming it as a matter of right, the law presumes a dedication to the public, and presumes the dedicator's intention to be in accord with the public's use. This does not depend upon whether there has in fact been an actual dedication to the public, but it is founded upon the principles of *estoppel in pais*. If the real owner suffer the public generally to so use his land as a passway, under a notorious claim of right, for a great length of time, whereby others may have been induced to buy property in that vicinity relying upon the apparent right of the public to use this passway, and by which the purchase price of their lands may have been affected, it is unfair that the owner should be permitted to gainsay the truth of it. The law operates upon his conscience, and makes effectual that which he has suffered for so long to appear to be so, by raising the conclusive presumption that he has actually done what he allowed the public to believe he had done—dedicated the passway to the use of the public. *Elliott on Roads and Streets*, 132; *Jones on Easements*, 422." *Riley v. Buchanan*, 116 Ky. 625, 76 S. W. 527.

In Virginia, it is said that where no public or private interests have been acquired on the faith of the dedication long

In some states, however, it seems that an intent to dedicate will not be presumed merely from acquiescence in public use unless for a period sufficient to obtain title by prescription.¹⁴

§ 1564. Same—permissive user.

Mere permissive use of land as a street or the like, where the user is consistent with the assertion of ownership by the alleged dedicator, does not of itself constitute a dedication.¹⁵ In other words, the mere fact that

continued, user by the public should be regarded as a mere license. *Harris v. Commonwealth*, 20 Grat. (Va.) 833.

14. In Georgia it is held that in every case of an implied dedication it must appear that the property has been in the exclusive control of the public for a period long enough to raise the presumption of a gift. *Healey v. Atlanta*, 125 Ga. 737, 54 S. E. 749; *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 265.

Missouri. A mere continuous use is not sufficient to make a road a public highway by user, but there must be an adverse use for the statutory period and this must be continuous and exclusive, and acquiesced in by the owner. *State v. Hood*, 143 Mo. App. 313, 126 S. W. 992. But see §§ 1582, 1583 *post*.

15. *Niles v. Los Angeles*, 125 Cal. 572, 58 Pac. 190; *German Bank of Evansville v. Brose*, 32 Ind. App. 77, 69 N. E. 300.

The use must be inconsistent with a permissive use or a mere license. *Halley v. Riley*, 14 Idaho 481, 95 Pac. 686.

The mere use of a road, without proof tending to show the ad-

verse user under claim of right, does not raise the presumption of dedication. *Merchant v. Markham*, 170 Ala. 278, 54 So. 236.

"Indeed when there are certain statutory requirements for establishing public roads, and when the overseers of roads may be required to work all public roads, it would seem that, in the absence of any recognition by the public authorities, it would take very clear proof to rebut the presumption that a user is merely permissive in this country where it is common knowledge that roads are frequently used, merely as a matter of convenience, and with no intention of their being dedicated to the public, not only through open, unimproved lands, but also through large farms and plantations." *Merchant v. Markham*, 170 Ala. 278, 54 So. 236.

"And even in civil cases more must be shown than a mere neighborly license, and that measure of proof must be furnished which is required to divest the title out of the real owner and vest it in that intangible entity, the public." *State v. Hood*, 143 Mo. App. 313, 126 S. W. 992.

private property is used by the public is not necessarily inconsistent with the absence of an intent to dedicate it to the public;¹⁶ and mere knowledge and non-action or failure to assert one's rights, where one's property is being used by the public, are not conclusive, but may be rebutted by showing facts and circumstances to overcome the presumption.¹⁷

Mere acquiescence of the owner in the use of unenclosed land by the public of a road or way over it, does not constitute a dedication. *International & G. N. R. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714.

The owner of an unenclosed and an unimproved lot in a municipality who knows of, and passively acquiesces in, the use by the public of such lot, or part thereof, for street or highway purposes until such time as he may be able and willing to enclose and improve it, does not thereby indicate his intention to dedicate. *Tucker v. Conrad*, 103 Ind. 349, 2 N. E. 803.

Mere fact that the owner of land has permitted a way to remain open for a considerable time without maintaining a fence across it, does not of itself show an intention to dedicate it to the public. *Cyr v. Madore*, 73 Me. 53.

Any sign placed upon or across the way indicating that the use is merely permissive, with a right in the owner to reassert dominion at his pleasure, will prevent the presumption of dedication, no matter how long the use may continue. *Elliott, Roads and Streets* (3d Ed.), § 184.

Stairway of public building is not dedicated because of public use by permission of municipal

authorities. *McNeill v. Boston*, 178 Mass. 326, 59 N. E. 810.

Docks. Acquiescence by owners of docks in regulation by municipal authorities of repair thereof does not show dedication where use by owner for private purposes wholly interrupted any public right of way. *Buffalo v. Delaware, L. & W. R. Co.*, 178 N. Y. 561, 70 N. E. 1097, aff'g 74 N. Y. S. 343, 68 App. Div. 488.

Sidewalk. Act of abutter in putting down a sidewalk does not show an intent to dedicate property to public. *Webber v. Toledo*, 23 Ohio Cir. Ct. Rep. 237.

16. *Healey v. Atlanta*, 125 Ga. 736, 54 S. E. 749.

Long continued user by the public, without objection by the owner, is entirely consistent with the license to the public to use the land; therefore evidence of long continued user alone will not support a conclusion that there was a dedication where there is no other evidence of intent. *Hartley v. Vermillion* (Cal., 1902), 70 Pac. 273.

17. *Coburn v. San Mateo County*, 75 Fed. 520.

Presumption from user may be contradicted by evidence showing the owner never intended a dedication. *Mauck v. State*, 66 Ind. 177.

If the user by the public does not exclude the owner's private rights, such user will ordinarily be regarded as merely permissive,¹⁸ and a mere permissive use of property by third persons in connection with a *private use of the property for the same purpose* does not usually show an intent to dedicate.¹⁹ Thus, an intent to dedicate is not shown by the act of the owner of land in establishing a private way for his own convenience or for the convenience of his customers, notwithstanding such way is

18. Attorney General v. Lake View Land Co., 143 Ala. 291, 39 So. 303.

19. Cherry v. Howe, 17 Ohio Cir. Ct. Rep. 246.

"If an owner opens a private way for his own use, his permission to the public to travel over it for many years, as if a highway, is not sufficient proof of an intention to dedicate. Speir v. Town of Utrecht, 121 N. Y. 420, 430, 24 N. E. 692." New York Cent. & H. R. R. Co. v. Ossining, 126 N. Y. S. 517.

If leaving land open to the public may be referred to the owner's private convenience, it will not be construed as a dedication. Biddle v. Ash, 2 Ashm. (Pa.) 211.

"The owner of a large tract of land may establish a factory in the interior of it, and open a lane from a public highway leading to that factory. He may erect dwellings thereon for and rent them to the operatives. That may lead to a trade between the operatives and the outside world, bringing visitors, tradesmen, and peddlers there, so that a considerable travel would occur over the lane; but all that would not make it a public highway, unless the

owner solicited the public authorities to accept it as a highway and assume the burden of its repair and they did so, or unless it extended entirely across the owner's land from one public highway to another, and he permitted its use by the general public. In the case just supposed, whenever the owner chose to abandon his factory and eject the tenants from his dwellings and stop business, the public would have no right to come upon his premises, and he might close the lane entirely, or open another one in some other place to suit his own convenience." Morris & E. R. Co. v. Jersey City, 63 N. J. Eq. 45, 51 Atl. 387, 395, aff'd without opinion in 71 N. J. Eq. 308, 71 Atl. 1135.

Where the findings of fact show a long continued use, with the knowledge of the owner, of water upon streets and alleys of a municipality, such findings are not inconsistent with a permissive use and a license to use the same, and do not show an intention to perpetually dedicate the same to a public use. Hailey v. Riley, 14 Idaho 481, 95 Pac. 686.

also used by the public generally without objection by the owner.²⁰ So an intention of a railroad company to dedicate land will not be inferred from its use by the public where consistent with the public use for which the railroad company holds the property.²¹

§ 1565. Same—time of user.

The length of user sufficient to constitute an *acceptance* of a dedication is considered hereafter.²² In this relation the question is what length of user by the public will constitute sufficient evidence to show an implied

20. *Loomis v. Connecticut R. & L. Co.*, 78 Conn. 156, 61 Atl. 539; *Pennsylvania Company v. Plotz*, 125 Ind. 26, 24 N. E. 343; *Wilson v. Acree*, 97 Tenn. 378, 37 S. W. 90.

21. *Loomis v. Connecticut R. & L. Co.*, 78 Conn. 156, 61 Atl. 539; *Bacon v. Boston & M. R. R.*, 83 Vt. 421, 76 Atl. 128.

Railroad held not to have dedicated highway. *William v. New York R. Co.*, 39 Conn. 509; *Lake Erie, etc. R. Co. v. Boswell*, 137 Ind. 336, 36 N. E. 1103; *Louisville & N. R. Co. v. Sonne*, 21 Ky. L. Rep. 848, 53 S. W. 274.

Where the use of a crossing over a railroad track by the public was merely permissive for a long period of time, during which the way was maintained by the railroad company and was used by its patrons, an intention to dedicate has been held not shown. *Cincinnati & M. V. R. Co. v. Roseville*, 76 Ohio St. 108, 81 N. E. 178.

Use by public of approach to stations or depots of railroad company is not inconsistent with the retention of private ownership by

the company. *Georgia R. & B. Co. v. Atlanta*, 118 Ga. 486, 45 S. E. 256; *Columbia & P. S. R. Co. v. Seattle*, 33 Wash. 513, 74 Pac. 670.

Dedication of railroad lands around station for highway purposes. "To make out a dedication by the plaintiff railroad company, it must appear that its intention was deliberate and unequivocal to make the lands in question village streets, and to permanently surrender and abandon its property to the public use. The fact that the public used the lands in question for street purposes with the consent of the railroad company does not in my opinion establish an unequivocal and unmistakable intention to dedicate for street purposes, in view of the fact that during all the time in question said lands were used by the railroad company in the operation of its business, and for the use and convenience of its patrons." *New York Cent. & H. R. Co. v. Ryan*, 129 N. Y. S. 55, 71 Misc. Rep. 241.

22. § 1582 *post*.

intention on the part of the owner to dedicate the property. Of course, if the intention to dedicate is otherwise sufficiently manifested, then the length of user is important only in connection with the question of acceptance of the dedication. Undoubtedly it is impossible to fix any specific length of time as necessary to show a dedication, although proof of user by the public for a period much shorter than that required to show title by prescription may be sufficient to prove the intent to dedicate.²³

Where dedication is sought to be established by proof of user by the public, and the intent to dedicate is not otherwise manifested, the better rule is that the user need not be for any particular period.²⁴ But in some jurisdictions it is held that the user, where it is the only thing relied on, must continue the length of time necessary to bar an action to recover possession of the land and must be adverse.²⁵

§ 1566. Blanks on plat or map as showing intent to dedicate.

In some jurisdictions it seems to be held that a space left blank on a plat, with no designation of its purpose, does not show an intention to dedicate such space to public use.²⁶

23. *Mason v. Sioux Falls*, 2 S. D. 652, 51 N. W. 774.

In Utah, statute provides that a highway shall be deemed and taken as dedicated and abandoned to the use of the public when it has continuously and uninterruptedly been used as a public thoroughfare for ten years. *Culmer v. Salt Lake City*, 27 Utah 252, 75 Pac. 620.

24. *Schettler v. Lynch*, 23 Utah 305, 64 Pac. 955.

25. *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004.

26. *Coe College v. Cedar Rapids*,

120 Iowa 541, 95 N. W. 267; *Brown v. Dickey*, 106 Me. 97, 75 Atl. 382.

The mere fact that a passageway was shown on the map recorded by the owner does not of itself constitute a dedication, where there is nothing appearing upon the face of the map to indicate that the space was dedicated for public use. *Weidemeyer v. Reitch*, 49 Tex. Civ. App. 166, 108 S. W. 167.

Vacant lots marked on a plan "15x60," where not adapted to any public purpose, are not dedicated to public use, in the absence of

Under some circumstances, however, dedication may be accomplished without the designation *eo nomine* of a space as a street, highway, alley, or other public place; in other words, though a map or plat does not designate *eo nomine* the street, highway or alley space in the area platted, such designation may as certainly appear from the situation created by the relative location of blank

any clear evidence to show an intention so to do. *Brown v. Dickey*, 106 Me. 97, 75 Atl. 382.

In Illinois, the mere leaving of a blank upon a plat without any designation of its purpose is not sufficient proof of an intention of the owner to dedicate the premises represented by such blank or undesignated space to public use. *Poole v. Lake Forest*, 238 Ill. 305, 87 N. E. 320; *Birge v. Centralia*, 218 Ill. 503, 75 N. E. 1035; *Mason v. Chicago*, 163 Ill. 351, 45 N. E. 567; *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774.

Where a blank space appears upon the face of a plat, and there is nothing to show that the land covered by said blank space has been devoted to a public use, it cannot be held, from the face of the plat alone, that the owner intended, by the making and recording of the plat, to devote the premises represented by the blank space upon the plat to a public use. *Birge v. Centralia*, 218 Ill. 503, 75 N. E. 1035; *Princeville v. Auten*, 77 Ill. 325.

But, in Illinois, where a plat showed a strip extending across an entire subdivision, not named as a street but marked with the figures "138," and the surveyor, in his certificate attached to the plat, certified that, "all measure-

ments are taken in feet and parts of a foot, and the several sizes of the lots and blocks and widths of streets and alleys are marked on their margins, as shown upon the plat," it was held that it was the intention to dedicate a strip 138 feet wide for a public street, it not being necessary, in order to show the intention, that the strip be named as a street in the plat. *Ingraham v. Brown*, 231 Ill. 255, 83 N. E. 156.

And it is held in Illinois that where it is clear from a plat that a strip, although not marked or designated upon the plat as an alley, was intended by the platlor to be dedicated to the city as an alley, the intent to dedicate is sufficiently shown. *Kimball v. Chicago* (Ill., 1912), 97 N. E. 257.

Marking name of railroad track. Where a plat of land into lots and blocks shows a strip unplatted, with a railroad track running through it, marked only with the name of the railroad, it will not be presumed that the land between the track and the platted portion is dedicated to the use of the railroad company, there being no words upon the plat to indicate what the strip was for. *Chicago, R. I. & P. Ry. Co. v. Hayes* (Col., 1911), 113 Pac. 315.

spaces and lots or blocks, and from the purpose to which the lots or blocks are expected to be devoted, and from the lines and courses indicated by the map as they relate to lines of the subdivisions made.²⁷

27. *East Birmingham Realty Co. v. Birmingham Machine & F. Co.*, 160 Ala. 461, 49 So. 448, followed in *Moragne v. Gadsden*, 170 Ala. 124, 54 So. 518; *Oregon City v. Oregon & C. R. Co.*, 44 Ore. 165, 74 Pac. 924; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318, 45 Atl. 129; *Martinez v. Dallas* (Tex. Civ. App.), 109 S. W. 287, aff'd in 113 S. W. 1167; *Brown v. Baraboo*, 98 Wis. 273, 74 N. W. 223.

Compare *Columbia & P. S. R. Co. v. Seattle*, 33 Wash. 513, 74 Pac. 670.

Blanks. The omission to denominate an area a park or common is not controlling as to whether the plat constituted a dedication thereof. *Moragne v. Gadsden*, 170 Ala. 124, 54 So. 518.

The fact that on the face of the map certain land is not described or named as a street does not overcome the inference that it was intended to mark a street where it is not numbered as a lot nor cut off by lines from the adjoining streets and bounded as are the lots shown on the plat, and where it furnishes the only means of access to another street and through it to the numbered lots of the subdivision. *Los Angeles v. McCollum*, 156 Cal. 148, 103 Pac. 914.

So in one case it was contended that where an owner plainly marked on a map a street for several blocks and did not mark it out any further, that he should

not be held to have given the right any further than he marked it, but it was held that the law was well settled "that where a person makes or adopts a plat, and records it, and there is any space upon it that does not constitute any part of the platted blocks, he necessarily dedicates such space to a public use." *London & San Francisco Bank v. Oakland*, 90 Fed. 691, 698.

"We do not understand any of the cases as requiring that words shall be upon the map or plan of a town, expressing the objects and purposes of the different spaces and divisions appearing on its face. * * * When, from the position and relations of any open space in the town, it is apparent that it was intended to be public property, or for the public use, the dedication of such space to the public is as perfect as if the name or purpose were indicated by a written word." *Rowan's Executors v. Portland*, 8 B. Mon. (Ky.) 232, 246.

Square. Where a block is left blank in the center of a village plat, it may be inferred that the intention was to dedicate it as a public square. *People ex rel. v. Willison*, 237 Ill. 584, 86 N. E. 1094.

In a statutory plat, the absence of a name is not of itself conclusive of an intention not to dedicate the same as a street; and where a plat as filed shows lots

§ 1567. Showing absence of intent to dedicate.

On the contrary, the intent not to dedicate may be evidenced in many ways, such as express statements, objections to public use of the property, the fencing or enclosing the property, payment of taxes, etc.—the intent to be gathered from a consideration of all the facts *pro* and *con*.²⁸

On an issue as to whether the owner of land intended to dedicate it for public use, any act or declaration on his part tending to show that he did not intend to dedicate the property is admissible,²⁹ except that the intent

and blocks which are numbered, with spaces marked as streets and avenues, and with other spaces fairly indicating that alleys were left twenty feet wide in certain blocks, although not named as such, and there was a strip in question between certain numbered blocks and a railroad, not numbered as a lot nor mentioned as an outlot, and which was practically opposite as a continuation of a certain street, the plat is sufficient as a dedication of such strip as a street although not in words stated to be such on the plat. *Atlas Lumber Co. v. Quirk* (S. D., 1912), 135 N. W. 172, reviewing at some length decisions as to blanks in plats.

28. Enclosure and occupancy of land claimed to have been dedicated, by the owner thereof and those holding under him, is inconsistent with an intent to dedicate. *McGourin v. De Funiak Springs*, 51 Fla. 502, 41 So. 541.

"The fact that the defendant may have at one time allowed a public road to be across his land does not show an intent on his part to dedicate it to public use

if, at other times he built wire fences across the road and performed other acts of ownership." *State v. Hood*, 143 Mo. App. 313, 126 S. W. 992.

29. Repeated declarations and acts of ownership by one of the owners of land precludes a dedication. *Spurrer v. Bland*, 20 Ky. L. Rep. 1340, 49 S. W. 467.

Telling purchasers that a street was a private way and maintaining visible obstructions across one end of it shows intent not to dedicate. *People ex rel. v. Sperry*, 116 Cal. 593, 48 Pac. 723.

Marking space on a plat "closed" and assertion of ownership over it by the owner whenever occasion required, shows no dedication. *Pitcairn v. Chester*, 135 Fed. 587.

Continued assertion of ownership. The intention not to dedicate land to the public may be shown by a continued assertion of ownership of the property by improving it, renting it, and paying the taxes thereon. *Adoue v. La Porte* (Tex. Civ. App., 1909), 124 S. W. 134.

to dedicate cannot be rebutted if the dedication is express.³⁰ For example, if the owner announces his right to the land in controversy and declares his intention to exclude the public from it and prevents further public work on it, an intention not to dedicate is shown.³¹

On the other hand, if an intention to dedicate is clearly shown and rights have been acquired by third persons and the public, on the faith of the dedication, interference by the owner with the use by the public will not defeat the dedication.³²

Payment of taxes assessed by the municipality, while evidence tending to defeat the presumption of a dedication, is under most circumstances, a matter of but small probative force.³³

§ 1568. Intent must be clearly indicated.

If the intent is to be gathered from writings, they must clearly manifest the intent to dedicate.³⁴ If the intent is to be ascertained from the acts and declarations of the owner, they must be "deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to abandon permanently his property to the specified public use."³⁵ An intent can be inferred

Word "reserved" on map shows intent not to dedicate strip to which the word applies. *Cleveland v. Bergen Bldg. & Imp. Co.* (N. J. Ch.), 55 Atl. 117.

30. *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

31. *Gate City v. Richmond*, 97 Va. 337, 33 S. E. 615.

32. *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

33. *Sanborn v. Amarillo*, 42 Tex. Civ. App. 115, 93 S. W. 473; *Seattle v. Hinckley* (Wash., 1912), 121 Pac. 444.

Taxation of property by a municipal officer does not show that there was no dedication. *Boise*

City v. Hon, 14 Idaho 272, 94 Pac. 167; *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *Myers v. Oceanside*, 7 Cal. App. 87, 93 Pac. 686.

The payment of taxes "is competent evidence tending to defeat presumption of dedication," but "the mere payment of taxes will not rebut the clear intent to dedicate." *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. 687.

34. *Alexandria v. Thigpen*, 120 La. 293, 45 So. 253.

35. *Holdane v. Cold Spring*, 21 N. Y. 474; *New York Central & Hudson River R. Co. v. Ossining*, 126 N. Y. S. 517, 141 App. Div.

only from some unequivocal act or an unequivocal assent to the use, by the public, accompanied by actual use.³⁶

A single act may be sufficient to show an intention to dedicate,³⁷ but if a single act is shown, to establish a dedication, such act must be of such an unequivocal character that lapse of time or user are not necessary to aid the presumption of dedication.³⁸

765; *Harris v. Commonwealth*, 20 Grat. (Va.) 833.

If the intention to dedicate is to be shown by words, the words must be unequivocal and without ambiguity. If it is to be shown by acts, they must be such acts as are inconsistent with any construction, except the assent to such dedication. *Cole v. Minnesota Loan & Trust Co.*, 17 N. D., 409, 117 N. W. 354.

No presumption of intent to dedicate arises unless the owner's acts, declaration or conduct, are such that the only reasonable explanation is that a dedication was intended. *International & G. N. R. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714.

"To secure and make certain the title to real estate has been among the chief objects of the laws of all civilized communities. Generally the law has surrounded the transfer of title to, or interest in, land with certain solemnities and formalities; and, while in the case of public highways and streets, from the nature of the case, a dedication may be shown by acts or declarations, they must be of such a public and deliberate character as makes them generally known, and not of doubtful intention. Ownership of land once had is not to be presumed

to have been parted with; but the acts and declarations relied on to show a dedication should be unequivocal and decisive, manifesting a positive and unmistakable intention on the part of the owner to abandon permanently his property to the specific public use. If they are equivocal, or do not clearly and plainly indicate an intention to abandon permanently the property to the public, they are not sufficient to establish a case of dedication." *West Point v. Bland*, 106 Va. 792, 56 S. E. 802.

Before property of a citizen can be taken for public use without compensation upon the claim of a dedication, the facts and circumstances relied upon to show such dedication must be of an unequivocal character, or at least prima facie of such character as reasonably to induce the public or some member thereof to believe that such dedication had been made. *Adoue v. La Porte* (Tex. Civ. App., 1909), 124 S. W. 134.

36. *Simmons v. Mumford*, 2 R. I. 172; *Walker v. Summers*, 9 W. Va. 533.

37. *Ward v. Davis*, 3 Sandf. (N. Y. Super. Ct.) 502.

38. *Logansport v. Dunn*, 8 Ind. 378.

§ 1569. Presumption as to intention.

No presumption of an intent to dedicate arises unless it is clearly shown by the owner's acts and declarations, or by a line of conduct the only reasonable explanation of which is that a dedication was intended.³⁹

It is sometimes said that the intent to dedicate will be presumed in certain circumstances but what is meant by this is that the existence of certain facts, where proven, are sufficient *prima facie* evidence to show an intention to dedicate, since it is well settled that dedication "is never to be presumed without evidence of an unequivocal intention on the part of the owner."⁴⁰ It will be presumed, however, that the owner of land intended what his acts indicated, in so far as dedication is concerned, but such presumption is rebuttable except in cases in which its overthrow would operate as a fraud upon innocent parties who have acted on the faith of the conduct.⁴¹

§ 1570. Sufficiency of evidence to prove intent.

The evidence must preponderate in favor of an intention to dedicate but need not be conclusive, although the intention to dedicate must be clear and unequivocal; however, some of the cases do not distinguish between the *character of the evidence* required to establish the

39. *International & G. N. R. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714.

It will not be presumed that it was the intent of a person to dedicate for public use a mere *cul de sac*. *Eureka v. Armstrong*, 83 Cal. 623, 625, 22 Pac. 928, 23 Pac. 1085; *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501.

40. *Quinn v. Anderson*, 70 Cal. 454, 11 Pac. 746.

41. *Kuck v. Wakefield*, 58 Ore. 549, 115 Pac. 428.

Where the conduct of the al-

leged dedicator is relied on to show a dedication, evidence is admissible to rebut the presumption that he intended the reasonable and necessary consequences of his acts, unless to overthrow such presumption would operate as a fraud upon innocent third persons who have parted with value in good faith without notice on the faith of the conduct which created the presumption. *Faust v. Huntington*, 91 Ind. 493, 495; *Elliott, Roads & Streets* (3d Ed.), § 175

intention and the *character of the intention* essential to create a dedication.⁴²

If the proceeding is a *criminal* one, then of course the dedication must be *proved beyond a reasonable doubt*.⁴³

42. "The character of the intention to dedicate and the evidence of it are different things. The proof of the intent does not depend on the class of the evidence. No particular class of evidence is required. It is enough if the intention be proved by evidence that is of a satisfactory character. It may be proved by express contract or language of the owner, or be gathered from conduct of the owner in connection with the surrounding circumstances. Elliott on R. & S. 173. It is said at section 175 of Elliott that there is no reason why the ordinary rules of presumptive evidence should not apply to cases of dedication, as well as other cases where the title to real property is in controversy; and it follows that the person against whom the dedication is asserted should be held to intend the reasonable and necessary consequences of his acts." Kuck v. Wakefield, 58 Ore. 549, 115 Pac. 428, 431.

Preponderance of evidence. In a civil case, preponderance of evidence is sufficient to show dedication. Spencer v. Peterson, 41 Ore. 257, 68 Pac. 519.

Intention to dedicate need not be equivocally and satisfactorily proven but preponderance of evidence is sufficient. Shugart v. Halliday, 2 Ill. App. 45.

"When it is said that the inten-

tion to dedicate must be clearly proven, it is not meant that the testimony must be direct and positive upon this point, and that no inference of facts can be drawn therefrom. Every case depends upon its own peculiar facts and circumstances, and must, of course, be determined upon its own conditions and surroundings." London & San Francisco Bank v. Oakland, 90 Fed. 691, 698, 33 C. C. A. 237, aff'g 86 Fed. 30.

Contrary statements. Proof must be clear and conclusive. Spurrier v. Bland, 20 Ky. L. Rep. 1340, 49 S. W. 467. Proof of the intent must be clear and unequivocal. Chicago v. Wildman, 240 Ill. 215, 88 N. E. 559; O'Malley v. Dillenbeck Lumber Co., 141 Iowa 186, 119 N. W. 601. Evidence to prove intent to dedicate must be positive. Vance v. Pewamo, 161 Mich. 528, 126 N. W. 978.

"In cases where it is sought to establish a dedication by user—it being an exceptional and peculiar mode of passing title to interests in land—the proof must usually be strict, cogent, and convincing, and the acts proved must not be consistent with any construction other than that of a dedication." State v. Hood, 143 Mo. App. 313, 126 S. W. 992.

43. Intent to dedicate must be proven beyond a reasonable

§ 1571. Evidence admissible to show intent.

To show the intention of the owner, the evidence may consist of (a) a *writing*, (b) *oral words* of the owner, or (c) his *conduct*.⁴⁴

Affirmative and direct evidence is not necessary, but it may be shown by the conduct and acts of the owner, and the circumstances from which it is claimed the dedication springs.⁴⁵

Declarations of the owner at the time of the alleged dedication are undoubtedly admissible both for and against him.⁴⁶

On the other hand, the opposing party may show any facts tending to explain the owner's conduct or to rebut the presumption of an intent to dedicate.⁴⁷

doubt in a prosecution for obstructing a highway. *Mauck v. State*, 66 Ind. 177.

"In criminal prosecutions for obstructing public highways in which dedication is sought to be proved, such dedication must be established beyond a reasonable doubt. 13 Cyc. 476." *State v. Hood*, 143 Mo. App. 313, 126 S. W. 992.

44. Parol evidence is admissible to show that a block in a recorded plat of a village designated as "reserved public square" was intended to be dedicated to one particular public use. *Daniels v. Wilson*, 27 Wis. 492.

45. *International & G. N. R. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714.

46. Declarations of the owner, in connection with acts relied upon, are a part of the *res gestae*, and may be shown by either party. *Denver v. Jacobson*, 17 Colo. 497, 30 Pac. 246.

"Verbal declarations of the

dedicator, made contemporaneously with the dedication, are admissible in evidence to show the scope and purpose of the dedication. Such declarations are against interest and are part of the *res gestae*. *Ogle v. P., B. & W. R. R. Co.*, 3 Houst. 267, 272; *Village of Princeville v. Auten*, 77 Ill. 325; *Smith v. Flora*, 64 Ill. 93; *Columbus v. Dahn*, 36 Ind. 330; *Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185; *Simmons v. Mumford*, 2 R. I. 172; *Attorney General v. Abbott*, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251. Other cases might have been cited, but the principle is so frequently stated in text-books, as well as by courts, that further citation need not be made." *Poole v. Rehoboth* (Del. Ch., 1911), 80 Atl. 683.

47. *Lewis, Eminent Domain* (3d Ed.), § 494.

§ 1567 *ante*.

§ 1572. Same—testimony of dedicator as to his intent.

Some decisions hold that evidence of the alleged dedicator as to his intent is not admissible.⁴⁸ In other jurisdictions, the evidence is admissible, it seems, only to a limited extent.⁴⁹ In still other jurisdictions, it seems that testimony of the alleged dedicator as to his intent is admissible in all cases,⁵⁰ but that it cannot prevail

48. *Wayzata v. Great Northern R. Co.*, 46 Minn. 505, 49 N. W. 205; *Perkins v. Fielding*, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100.

Deed or other instrument cannot be contradicted by oral evidence as to intention. *Clark v. Elizabeth*, 37 N. J. L. 120; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 73 Ky. (10 Bush.) 382, 19 Am. Rep. 67.

Recorded plat cannot be contradicted by parol evidence as to intention. *Brown v. Manning*, 6 Ohio 298, 27 Am. Dec. 255.

49. "The rule that the party may give testimony of his actual intent must, we think, be limited to cases where the acts done by him do not manifestly indicate an intent to dedicate. Where they are inconsistent with anything but such intent, he cannot destroy the effect of his own conduct by subsequent declarations that he did not mean to be bound by the necessary import of that conduct. No weight should be given to declarations of an intent contrary to that plainly shown by acts done and acted on long before." *Los Angeles v. McCollum*, 156 Cal. 148, 103 Pac. 914.

Evidence of the unexpressed intention of the land owner,

where his acts and deeds plainly indicate that he intended to dedicate, and did dedicate, a street to public use, is properly excluded. *Brown v. Stark*, 83 Cal. 636, 24 Pac. 162.

Evidence of the alleged dedicator that he had had no intention to dedicate was held "relevant, but not conclusive evidence of his actual purpose." *Helm v. McClure*, 107 Cal. 199, 40 Pac. 437.

In *Indiana*, the person claiming to have dedicated property may testify as to the intention with which he did any act when such intention is material but cannot testify as to his intention disconnected from any act; and hence one cannot testify that he never intended to dedicate certain real estate as a street (*Columbus v. Dahn*, 36 Ind. 330), but he may testify that the removal of a fence was not with the intention to make the land a street (*Pittsburg, C., C. & St. L. Ry. Co. v. Nofsger*, 148 Ind. 101, 47 N. E. 332).

Iowa. May testify as to intention in doing particular act. *Goodfellow v. Riggs*, 88 Iowa 540, 55 N. W. 319.

50. *Lovington Tp. v. Adkins*, 232 Ill. 510, 83 N. E. 1043; *Seidschlag v. Antioch*, 207 Ill.

against unequivocal acts and conduct inconsistent with his intent as testified to, if it appears that the public relied on and proceeded in accordance therewith.⁵¹

§ 1573. Intent as question of fact.

If the evidence is conflicting, the question of intent is one of fact for the consideration of the jury,⁵² but the construction of a plat is one of law for the court;⁵³ and if the facts are undisputed the question is also one of law for the court.⁵⁴

5. ACCEPTANCE.

§ 1574. Power to accept.

Unless forbidden by statute or charter provision⁵⁵ a municipality has authority to accept a dedication of property for the public use. Whether property outside the limits of the municipality may be accepted would seem to depend on the purpose for which the property is dedicated.⁵⁶

§ 1575. Necessity for acceptance.

Unless otherwise provided by statute or charter,⁵⁷

280, 69 N. E. 949; *Bethel v. Bruett*, 215 Ill. 162, 74 N. E. 111.

51. *Seidschlag v. Antioch*, 207 Ill. 280, 69 N. E. 949.

52. *Myers v. Oceanside*, 7 Cal. App. 87, 93 Pac. 686; *Langan v. Whalen*, 67 Neb. 299, 93 N. W. 393; *Chafee v. Aiken*, 57 S. C. 507, 35 S. E. 800.

53. *Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228; *Oklahoma City & T. R. Co. v. Dunham*, 39 Tex. Civ. App. 575, 88 S. W. 849.

54. *German Bank of Evansville v. Brose*, 32 Ind. App. 77, 69 N. E. 300.

55. Under statutes existing in some states, the acceptance of the

dedication of a street less than two rods wide is expressly forbidden. *Smith v. Smythe*, 197 N. Y. 457, 90 N. E. 1121, rev'g 116 N. Y. S. 1071, 132 App. Div. 71.

56. That municipality has no power to accept the dedication of a street outside of its territorial limits, see *St. Louis v. St. Louis University*, 88 Mo. 155, 159.

Power to acquire real property beyond corporate limits, see § 1108 *ante*, vol. 3.

57. The provision of the charter of the city of Louisville, declaring public all streets laid out or extended by any person or persons, amounts to an acceptance

it is elementary that an acceptance is necessary.⁵⁸ There are certain exceptions to the rule, however, in some jurisdictions, which will be hereafter noticed. This rule that an acceptance is necessary to complete a dedication applies as well where the dedicator is a municipal corporation;⁵⁹ but when the dedication is made by the municipality to itself, such acceptance is necessarily implied from the act of dedication.⁶⁰

§ 1576. Same—statutory dedication.

There are some exceptions, however, to the rule that there must be an acceptance of a dedication. In the

of the dedication of all streets without any affirmative act on the part of the city. *Louisville v. Snow's Adm'rs*, 107 Ky. 536, 54 S. W. 860.

58. **Necessity for acceptance of dedication.** "The status of land over which its owner has dedicated a street is that, while the owner may be estopped from retracting his dedication, yet until there is an acceptance of the street by some municipal act, or by public usage, the public acquires no rights therein, and is subject to no duties by reason of the dedication." *Atlantic & S. Ry. Co. v. State Board of Assessors*, 80 N. J. L. 83, 77 Atl. 609.

Reason for requiring acceptance. A dedication sometimes imposes burdens upon the public as well as grants privileges, and it would not do to allow one of his own volition merely thus to impose an onerous burden upon an unwilling public and it is therefore necessary that there should be an acceptance by the public. *Riley v. Buchanan*, 116 Ky. 625, 76 S. W. 527.

Where a deed reserves a strip of land of a certain width "which is dedicated for a public roadway," it amounts only to an offer on the part of the grantor to dedicate the roadway to public uses, and there can be no dedication under such circumstances until it is accepted by the municipality. *Moore v. Fowler*, 58 Ore. 292, 114 Pac. 472.

Mere recording of a map of a town is merely an offer to dedicate, which does not become effectual so as to be irrevocable until its acceptance by the public. *Hayward v. Manzer*, 70 Cal. 476, 13 Pac. 141.

Burden of proving acceptance is on municipality alleging it. *Darling v. Jersey City*, 73 N. J. Eq. 318, 67 Atl. 709.

59. *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542.

60. *Attorney General ex rel. v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

first place, in some states, where the statute provides that upon making and filing a plat the title to the land shall vest immediately in the public for the uses specified, it is held that no acceptance is necessary,⁶¹ although the contrary is held in other states.⁶²

The rule supported by the better reason, however,

61. *Osage City v. Larkins*, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56; *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637; *Reid v. Edina Board of Education*, 73 Mo. 295; *Hill v. Hopson*, 150 Mo. App. 611, 131 S. W. 357.

Contra, *Granite Bituminous Paving Co. v. McManus*, 144 Mo. App. 593, 129 S. W. 448.

See also *Weeping Water v. Reed*, 21 Neb. 261, 31 N. W. 797; *Sowadzki v. Salt Lake County*, 36 Utah, 127, 104 Pac. 111.

In Missouri, "a valid statutory dedication operates to vest the fee, and dispenses with the necessity of an acceptance on the part of the public." *Brown v. Carthage*, 128 Mo. 10, 30 S. W. 312; *Otterville v. Bente* (Mo., 1912), 144 S. W. 822.

In Washington, under the law in force in 1869, no acceptance of a plat by a municipality was necessary. *Mechem v. Seattle*, 45 Wash. 380, 88 Pac. 628.

"That the legislature may prescribe the conditions under which lands may be platted and provide for the dedication of streets, alleys, and public places, and, when the statute declares that upon the filing of the plat the streets therein dedicated shall be deemed dedicated as streets or highways,

the mere filing of such a plat, if the statute is substantially complied with, constitutes such streets public highways." *Sowadzki v. Salt Lake County*, 36 Utah 127, 104 Pac. 111.

62. *Stephenson v. Lewis*, 244 Ill. 147, 91 N. E. 56; *Iglehart v. Chicago & A. R. Co.*, 241 Ill. 268, 89 N. E. 431; *Hamilton v. Chicago, B. & Q. R. Co.*, 124 Ill. 235, 15 N. E. 854; *Edwardsville v. Barnsbat*, 66 Ill. App. 381; *Wayne County v. Miller*, 31 Mich. 447, 449.

In Iowa, the statute makes the filing of a plat equivalent to a deed in fee simple to the streets and alleys, "but, like other deeds, requires acceptance, before it can be effective in conveying the title and casting the burden upon the municipality for the care and safety of the ways proposed." *Burroughs v. Cherokee*, 134 Iowa 429, 109 N. W. 876.

In Wisconsin, a statutory dedication may be accepted at any time before it is withdrawn. *Ashland v. Chicago & N. W. R. Co.*, 105 Wis. 398, 402, 80 N. W. 1101.

In Illinois, there is no implied acceptance by the municipality of streets on a statutory plat merely because the land shown by the plat is within the corporate limits. *Reichert Milling Co. v. Freeburg*, 217 Ill. 384, 75 N. E. 544.

would seem to be that even in the case of a statutory dedication an acceptance should be necessary in order to make the municipality liable to maintain the streets or alleys and for injuries resulting from defects therein.

§ 1577. Same—Necessity for acceptance where sale of lots with reference to plat.

It is well settled, and beyond dispute, that if the owner of land sells a lot or lots with reference to a plat or map made by him or by others, which shows on its face certain parts thereof marked as streets, alleys, parks, or other public places, the owner is estopped, as against the grantee or grantees, to assert title to such public places, and that the grantee or grantees have a right to require the grantor to keep such public places open for the use designated.⁶³

This settles the rights as between the grantor and the grantee, the grantor being estopped to deny the dedication as against his grantee. However, there is a further question of considerable importance as to which the decisions, for the most part, are neither clear nor harmonious. That question is whether the mere sale of

63. *Alabama*. Gadsden v. Strother (Ala., 1911), 55 So. 189.

Arkansas. Brewer v. Pine Bluff, 80 Ark. 489, 97 S. W. 1034; Frauenthal v. Slaten, 91 Ark. 350, 121 S. W. 395; Stuttgart v. John, 85 Ark. 520, 109 S. W. 541.

Maryland. Bloede v. Baltimore, 115 Md. 594, 81 Atl. 67.

Minnesota. Poudler v. Minneapolis, 103 Minn. 479, 115 N. W. 274.

New York. Chism v. Smith, 123 N. Y. S. 691, 138 App. Div. 715.

Oregon. Oliver v. Synhorst, 58 Ore. 582, 115 Pac. 594; Christian v. Eugene, 49 Ore. 170, 89 Pac.

419; Oliver v. Newberg, 50 Ore. 92, 91 Pac. 470.

Pennsylvania. Jessop v. Kittanning Borough, 225 Pa. 583, 74 Atl. 553.

Texas. San Antonio v. Rowley, 48 Tex. Civ. App. 376, 106 S. W. 753; Tyler v. Boyette, 43 Tex. Civ. App. 573, 96 S. W. 935.

§ 1556 *ante*.

Plaza. Where property is sold by reference to a map, which has been filed and on which is a block marked, "Plaza," the owner is precluded from recalling the dedication, notwithstanding there is no formal acceptance. Grogan v. Hayward, 4 Fed. 161.

lots with reference to such a plat constitutes a completed dedication so that there need be no acceptance of it by the municipality, or whether, so far as the municipality is concerned, there is a mere offer to dedicate which is not complete as to the public until there has been an acceptance by the municipality in some way or other. In some jurisdictions the precise question does not seem to have been presented although there is more or less *dicta* in the decisions which tends to support the rule that there need not be an acceptance in such a case.⁶⁴ And in a few states the courts have expressly and without qualification held that the dedication is complete in such a case, as to the public, without any acceptance by the municipality or by the public.⁶⁵

64. *Arizona*. Thorpe v. Clanton, 10 Ariz. 94, 85 Pac. 1061.

Florida. See McGourin v. De Funiak Springs, 51 Fla. 502, 41 So. 541; Florida East Coast R. Co. v. Worley, 49 Fla. 297, 38 So. 618.

Indiana. See Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883; Rhodes v. Brightwood, 145 Ind. 21, 43 N. E. 942; Miller v. Indianapolis, 123 Ind. 196, 24 N. E. 228; Logansport v. Dunn, 8 Ind. 378; Bennett v. Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071.

Maryland. In this state, the decisions seem to lean in favor of the rule that there need be no acceptance. Richardson v. Davis, 91 Md. 390, 46 Atl. 964; Broumel v. White, 87 Md. 521, 39 Atl. 1047; White v. Flannagan, 1 Md. 525.

Minnesota. Poudler v. Minneapolis, 103 Minn. 479, 115 N. W. 274.

North Carolina. See Milliken v. Denny, 141 N. C. 224, 53 S. E. 867; Conrad v. West End Hotel & Land Co., 126 N. C. 776, 36 S. E.

282, holding acceptance by public not necessary as between grantor and grantee.

Rhode Island. Baker v. Barry, 22 R. I. 471, 48 Atl. 795.

Washington. See Lueders v. Tenino, 49 Wash. 521, 95 Pac. 1089; La Bounty v. Seattle, 46 Wash. 141, 89 Pac. 480.

65. In Alabama, it is said: "It cannot be questioned, that when a landowner lays out his land into lots, setting apart certain portions as streets, with a view of establishing a town, a sale of the lots, with reference to a map defining and delineating the streets, is a complete dedication to the use of the purchasers and the public. Such dedication, when complete, is irrevocable, and divests the owner of the right to pervert the street from its original purposes, or to impose an additional, inconsistent servitude. But the mere laying out the lots, and making a map showing streets, do not of themselves de-

The general rule, however, seems to be that the platting of land and the sale of lots pursuant thereto con-

prive the owner of the right to use the property as his own. There must be an acceptance of the dedication, of which the sale and purchase of lots is sufficient proof. The sale and conveyance of lots, describing the streets as boundaries, constitute covenants with the purchasers, that the streets are dedicated to their use and the use of the public." *Smith v. Opelika*, 165 Ala. 630, 51 So. 821. To same effect, see *Roberts v. Matthews*, 137 Ala. 523, 34 So. 624, 97 Am. St. Rep. 56; *East Birmingham Realty Co. v. Birmingham M. & F. Co.*, 160 Ala. 461, 49 So. 448; *Gadsen v. Strother* (Ala., 1911), 55 So. 189.

In Oregon, there need be no acceptance by the public. *Schooling v. Harrisburg*, 42 Ore. 494, 71 Pac. 605; *Oliver v. Synhorst*, 58 Ore. 582, 115 Pac. 594. Acceptance is at once presumed when the owner makes sales of his property with reference to such a map. *Moore v. Fowler*, 58 Ore. 292, 114 Pac. 472. A sale of lots with reference to a plat gives the corporate authorities the right to use streets laid out in such plat as public ways, without formal acceptance, where the limits of the city are extended so as to include the land platted. *Meier v. Portland Cable R. Co.*, 16 Ore. 500, 19 Pac. 610, 1 L. R. A. 586. "When the proprietor of lands lays out a town thereon in the manner provided by the statute, platting the same into

blocks, streets, and alleys, and the plat is duly executed, acknowledged, and recorded, and he sells lots therein with reference thereto, he thereby dedicates said streets and alleys to the public, and the same is irrevocable, and the purchase of lots with reference to such plat constitutes a sufficient acceptance by the public of such dedication. It was held in *Spencer v. Peterson*, 41 Ore. 257, 68 Pac. 519, 1108, that, if lots are sold with reference to such plat, no acceptance or user by the public is required." *Christian v. Eugene*, 49 Ore. 170, 89 Pac. 419.

In Texas, in *Corsicana v. Zorn*, 97 Texas 317, 78 S. W. 924, it was held that where land is platted and lots are sold there is no necessity for acceptance on the part of the public to complete the dedication, and this rule was reiterated in *Pullman v. Houston* (Tex. Civ. App., 1910), 125 S. W. 69. However, in *Krause v. El Paso* (Tex. Civ. App.), 101 S. W. 828, it was said that, in such a case, in order to charge a city with a duty to repair, or make it liable for damages sustained by defect, there must be an acceptance by the proper authorities, but that it seemed that where the municipality was acting for the public in the preservation of their rights no evidence of acceptance was required. Where a plat is made and lots sold by reference thereto, the

stitute a dedication, if it may be so called, of the public places delineated upon the plat only as between the grantor and purchaser, and that, so far as the municipality is concerned, such acts amount to a mere offer of dedication, and there is no complete dedication without an acceptance of some kind by the municipality.⁶⁶

public places indicated in such plat vest "in the public and in the city the right to use it as a street, and the city had the right to take possession of and use said street whenever the progress of the town should make it necessary, the right to the use of this strip for a street having vested in the purchasers, and through them in the public; it was irrevocable, and there was no necessity for a formal acceptance." *Martinez v. Dallas*, 102 Texas 54, 109 S. W. 287, *aff'd* in 113 S. W. 1167.

66. *Colorado*. *John Mouat Lum-ber Co. v. Denver*, 21 Colo. 1, 40 Pac. 237.

Georgia. *Parsons v. Atlanta University*, 44 Ga. 529.

Idaho. *Boise City v. Hon*, 14 Idaho 272, 94 Pac. 167, holding that the offer of dedication is sufficiently accepted by the public when some of its members act upon the offer and purchase lots with reference to the plat filed.

Illinois. *Russell v. Chicago & M. E. R. Co.*, 205 Ill. 155, 165, 68 N. E. 727.

Maine. *Bartlett v. Bangor*, 67 Me. 460, 465. See *Danforth v. Bangor*, 85 Me. 423, 27 Atl. 268.

Michigan. *Grandville v. Jeni-son*, 84 Mich. 54, 47 N. W. 600; *Field v. Manchester*, 32 Mich. 279.

Mississippi. *Sanford v. Meridian*, 52 Miss. 383.

Missouri. *Kemper v. Collins*, 97 Mo. 644, 11 S. W. 245; *Becker v. St. Charles*, 37 Mo. 13; *Baker v. Vanderburg*, 99 Mo. 378, 12 S. W. 462.

New York. *Fonda v. Borst*, 2 Keyes (N. Y.) 48, 2 Abb. Dec. 155; *Wohler v. Buffalo & S. L. R. Co.*, 46 N. Y. 686; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261. But see *Re Hunter*, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616.

Ohio. *Lockland v. Smiley*, 26 Ohio St. 94; *Lunkenheimer v. Cincinnati*, 23 Ohio Cir. Ct. Rep. 617.

Pennsylvania. *Scott v. Donora Southern R. Co.*, 222 Pa. 634, 72 Atl. 282.

Tennessee. *State ex rel. v. Hamilton*, 109 Tenn. 276, 70 S. W. 619.

Wisconsin. *Smith v. Beloit*, 122 Wis. 396, 100 N. W. 877.

Where there is a sale by plat, there must be an acceptance in order to bind the municipality to maintain the streets. *Kruger v. Constable*, 116 Fed. 722.

In California, a sale of lots with reference to a plat which has been filed does not constitute an acceptance by the public of public places indicated on the plat.

In still other jurisdictions, it seems to be held that no

Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; *People v. Reed*, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22, and cases cited; *Myers v. Oceanside*, 7 Cal. App. 87, 93 Pac. 686. The filing of a map showing a subdivision of land into lots and blocks, followed by a sale of lots as designated on the map, *constitutes an offer* to dedicate for public use the spaces marked thereon as streets. *Logan v. Rose*, 88 Cal. 263, 26 Pac. 106; *Los Angeles v. McCollum*, 156 Cal. 148, 103 Pac. 914. No formal acceptance is necessary. *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405.

In Colorado, the sale of lots by reference to a recorded map or plat, upon which are shown public places, is an offer to dedicate, which may not be withdrawn at the pleasure of the grantor, but there must be an acceptance, express or implied, of such offer by the public authorities within a reasonable time, and unless the offer is accepted within a reasonable time, the public may lose its right to accept, and the question as to whether there has been an acceptance within a reasonable time depends on the facts and circumstances of the particular case. *Manitou v. International Trust Co.*, 30 Colo. 467, 70 Pac. 757, rev'g original opinion on this point on rehearing.

In Illinois, it is held that "decisions that a sale of lots with reference to a plat, whether a

statutory plat or not, estops the grantor, as against his grantee, to deny the existence of streets and other passageways, go only to the extent of establishing the private right of the property holder, as contradistinguished from the right of the public to have such designated streets remain open for their access, and the access of those who may have occasion to travel such streets in connection with the property thus conveyed. They do not go to the extent of declaring streets and passageways thus established as public highways, because, after all, until some affirmative act which makes certain the purpose of the municipal authorities to accept such offer of the streets as public highways, they still stand as mere offers of dedication. It does not lie within the power of the individual who may elect to plat and sell his property with reference to such plat to impose upon the public authorities, merely by his own act, the burden of the care and responsibility of such dedicated streets and passageways as public highways, until those authorities representing the public have seen fit, by some unequivocal declaration or act, to accept and assume such burden and liability. * * * And until the proper municipal authorities do accept the streets thus dedicated, and public highways, the fee of the streets does not vest in the municipality. *Hewes v. Crete*,

acceptance is necessary, so far as the *right* of the municipality in and to the public places is concerned.⁶⁷

175 Ill. 348, 51 N. E. 696; *Hamilton v. Chicago, Burlington & Quincy Railroad Co.*, 124 Ill. 235, 15 N. E. 854." *Russell v. Chicago & M. Electric Ry. Co.*, 205 Ill. 155, 68 N. E. 727, 730. "It is familiar law that a municipality acquires no right on the streets, alleys, or public grounds, shown on a plat, unless it has accepted the dedication." *Venice v. Madison County Ferry Co.*, 216 Ill. 345, 75 N. E. 105. Municipality cannot enforce private right of lot owners to have street remain open where municipality has not accepted the dedication. *Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378.

In Iowa, acceptance by ordinance or resolution is required by statute.

§ 1584 *post*.

In Michigan, where a dedication is by the sale of lands with reference to a plat the owner is not concluded, as to the public, unless the dedication is accepted by the public, and such an acceptance must be within a reasonable time. *Granville v. Jenison*, 84 Mich. 54, 47 N. W. 600.

In New Jersey, dedication by sale of lots with reference to a plat is not complete without an express or implied acceptance by the municipality. *New York & L. B. R. R. Co. v. South Amboy*, 57 N. J. L. 252, 258, 30 Atl. 628, approved in *Keyport v. Freehold & A. H. R. Co.*, 74 N. J. L. 480, 65 Atl. 1035. Compare *Pope v.*

Union, 18 N. J. Eq. 282; *Point Pleasant Land Co. v. Cranmer*, 40 N. J. Eq. 81.

Acceptance by the proper public authority necessary in order to make the public liable for maintaining the streets in good order. *Kruger v. Constable*, 116 Fed. 722, 725, citing New Jersey cases. The public right to appropriate the streets thus dedicated at any time when the wants or convenience of the public require it cannot be defeated or impaired by any subsequent act of the dedicator or those claiming under him, and the land can only be released from the public servitude by the state itself. *McAndrews & Forbes Co. v. Camden*, 78 N. J. Eq. 244, 78 Atl. 232. Where a plat is made and lots sold pursuant thereto, the dedication may be accepted by the municipality at any time, but until accepted the fee simple title and the control of the property remain in the dedicator, so that he may use it as he likes, provided he does not in any way interfere with the right of the public to accept the dedication whenever he sees fit to do so. *Darling v. Jersey City*, 73 N. J. Eq. 318, 67 Atl. 709.

67. In Arkansas, where a plat was made and filed, and lots were sold, and the municipality had never exercised any control over a particular street in question nor worked it, it was held that the dedication made was "complete and irrevocable." *Para-*

It should be kept in mind, however, in this connection, that in some jurisdictions the question whether the plat is a statutory or a common-law one, is important because of the rule existing in such jurisdictions that there need not be any acceptance of a statutory plat.⁶⁸

On a review of the authorities, the more prevalent and better rule would seem to be that there must be an acceptance, either express or implied, on the part of the municipality, in order to render it liable for repairs or for injuries resulting from a defect in the street or other public place; that the right to accept exists at least for a reasonable time unless the plat is legally vacated before acceptance, or the municipality is estopped from interfering because of acquiescence in the possession of the public places as private property, by the grantor or his grantees or third persons; that until acceptance the municipality should have no right to enforce the dedication by an action to enjoin the obstruction of the public place or the like, unless such an action of itself be considered an acceptance.

The reason in support of requiring an acceptance is that the place offered to be dedicated may be one, be-

gould v. Lawson, 88 Ark. 478, 115 S. W. 379. "No formal acceptance by the city or town is necessary, as by that act the dedication becomes irrevocable, and the municipality may accept it at any time and assume control over the streets and alleys." *Stuttgart v. John*, 85 Ark. 520, 109 S. W. 541. Where lots are sold with reference to a plat, but the municipality has not accepted the dedication, the public has the right in the meanwhile to use the property dedicated, and the dedicator has no right to obstruct it, and although the city has not accepted the dedication, yet the dedicator cannot enjoin the city

from entering upon and removing a fence across a street dedicated by the plat. *Brewer v. Pine Bluff*, 80 Ark. 489, 97 S. W. 1034.

In Mississippi, if the owner has sold lots with reference to the plat, he cannot afterwards prevent the public from using the land offered to be dedicated, or demand compensation therefor, notwithstanding there has been no formal acceptance by the municipal authorities. *Harrison v. Seal*, 66 Miss. 129, 5 So. 622, 3 L. R. A. 659.

68. § 1576 *ante*.

See *Becker v. St. Charles*, 37 Mo. 13, 18.

cause of its location or for other reasons, which would be a burden rather than a benefit to the municipality, or else the benefits would be slight in comparison to the burden, and in such a case the imposition of liability on the municipality without its consent is apparently unjust. On the other hand it would seem that the municipality, where it does not accept the offer to dedicate, should not be entitled to the benefit of the dedication unless it is also burdened with the liabilities connected therewith.

§ 1578. Same—when acceptance will be presumed.

A further exception is apparently declared by some authorities by holding that where the dedication confers a benefit on the public without imposing any burden, as when land is donated for a public park or square, or school site, an acceptance will be presumed, and the dedication become complete, as soon as the owner has manifested his intent by appropriate acts or declarations.⁶⁹

On the other hand, it is held that there is no conclusive presumption that a grant of land or a public way

69. *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; *Guthrie v. New Haven*, 31 Conn. 308; *Lewis, Eminent Domain* (3d Ed.), § 495.

Presumptions as to acceptance. "We have said that where the proffered way is shown to be one of common convenience and necessity, and therefore beneficial to the public, acceptance will be presumed, that for the purpose of showing that it is beneficial, a variety of acts and conduct on the part of the municipality, or of individual members of the public, indicating a recognition of its usefulness and tending to show an approval of the gift by the

members of the community immediately cognizant of it, are of importance, and that of all the things thus important as evidence of the beneficial character of the dedication, the actual use of the way as a highway by those who have occasion to use it holds the highest place." *Phillips v. Stamford*, 81 Conn. 408, 71 Atl. 361.

The acceptance by the public of land between a street and the ocean dedicated to public use will be presumed within the rule that such a presumption exists where the dedication is beneficial to the public and imposes no burden. *Poole v. Rehoboth* (Del. Ch., 1911), 80 Atl. 683.

is beneficial so as to raise the presumption of an acceptance, since the grant may be a burden rather than a benefit.⁷⁰

§ 1579. Mode and sufficiency of acceptance in general.

Acceptance of a dedication may be in any one of three ways, viz.: (1) by express act; (2) by implication arising from the acts of municipal officers; and (3) by implication arising from user by the public for the purposes for which the property was dedicated.⁷¹

The acceptance may be by the legislature,⁷² officers of the municipality, or, according to the prevailing view, by the public at large. Unless otherwise provided by

70. *Wayne County v. Miller*, 31 Mich. 447.

If width of street exceeds statutory limit, no acceptance can be presumed. *Holmes v. Jersey City*, 12 N. J. Eq. 299.

71. Acceptance may be (1) *express* or (2) *implied*. *Benton v. St. Louis*, 217 Mo. 687, 118 S. W. 418.

Acceptance may be by (1) an express memorial of record or (2) by any act implying an acceptance. *Hall v. Leeper* (Ky., 1909), 121 S. W. 683.

Acceptance may be by formal action of the municipal authorities. *Mobile v. Fowler*, 147 Ala. 403, 41 So. 468.

A formal order upon the records of the proper official body would, of course, be the most satisfactory manner of acceptance, but much less may be equally effective. *Riley v. Buchanan*, 116 Ky. 625, 76 S. W. 527.

Park. Acts of municipal offi-

cers held to show acceptance of park. *Riverside v. Maclean*, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164; *Conkling v. Mackinaw City*, 120 Mich. 67, 79 N. W. 6; *Bates v. Beloit*, 103 Wis. 90, 78 N. W. 1102; *Gillean v. Frost*, 25 Tex. Civ. App. 371, 61 S. W. 345.

Alley. Acts of municipal officers held to show acceptance of alleys. *Keokuk v. Cosgrove*, 116 Iowa 189, 89 N. W. 983; *Fairbury Union Agricultural Board v. Holly*, 169 Ill. 9, 48 N. E. 149.

Street. Acts of municipal officers held not to show acceptance of street. *People v. Underhill*, 144 N. Y. 316, 39 N. E. 333, rev'g 69 Hun 86, 23 N. Y. S. 388; *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. 309.

72. Act of state in making a city plat of its own land is itself an acceptance by the public. *Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417.

statute or charter, there is no necessity for any *formal* acceptance of the dedication.⁷³

Acceptance may be shown in a great many ways,⁷⁴ by any act with respect to the property claimed to be dedicated that clearly indicates an assumption of jurisdiction and dominion over it.⁷⁵ There need be but little affirmative action to indicate an intention to accept a dedication.⁷⁶ So there need not be any affirmative action on the part of the municipal authorities.⁷⁷ To constitute an acceptance the property dedicated need not be in the actual use or occupation of the public.⁷⁸

In considering what constitutes an acceptance of a dedication, it seems to be unnecessary to draw any distinction between statutory and common-law dedications where it is necessary to accept a statutory dedication, but that acts or conduct, which will amount to an acceptance of the latter will constitute an acceptance of the former, and *vice versa*, although if user by the public is relied on as an acceptance, it would seem that user for a less time should be considered an acceptance in case of a statutory dedication than where the dedication is a common-law one and implied from the acts of the owner.

§ 1580. Same—by acts of municipal officers.

The acceptance of a dedication may be evidenced by

73. *Stone v. Brooks*, 35 Cal. E. 419; *Owen v. Brookport*, 208 489; *Rose v. St. Charles*, 49 Mo. Ill. 35, 69 N. E. 952; *Houston v. Finnigan* (Tex. Civ. App., 1905), 509; *Clements v. West Troy*, 10 85 S. W. 470. How. Pr. (N. Y.) 199; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700, 709.

74. Evidence held sufficient to show acceptance of dedication of a street. *Rock Island v. Starkey*, 91 Ill. App. 592, reversed on other grounds in 189 Ill. 515, 59 N. E. 971; *W. N. Eisendrath & Co. v. Chicago*, 192 Ill. 320, 61 N.

75. *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883.

76. *Spring Lake Borough v. Polak*, 77 N. J. Eq. 557, 75 Atl. 753.

77. *Albert v. Gulf, C. & S. F. Ry. Co.*, 2 Tex. Civ. App. 664, 21 S. W. 779.

78. *Dummer v. Jersey City*, 20 N. J. L. 86, 40 Am. Dec. 213.

acts of municipal officers,⁷⁹ such as exercising authority over the property dedicated, to improve or regulate.⁸⁰ For example an ordinance or resolution authorizing a public service corporation to construct its works through land dedicated to the municipality as a street constitutes an acceptance of the offer to dedicate such street.⁸¹ So an acceptance may be shown by ordinances

79. *Illinois*. Rees v. Chicago, 38 Ill. 322.

Maine. Cole v. Sprowl, 35 Me. 161, 56 Am. Dec. 696.

Missouri. Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260.

New York. Uhlefelder v. Mt. Vernon, 78 N. Y. S. 500, 76 App. Div. 349.

Texas. Heffron v. Galveston, 33 Tex. Civ. App. 52, 75 S. W. 370; Corsicana v. Anderson, 33 Tex. Civ. App. 596, 73 S. W. 261.

Building pest house on land platted as a public square does not show an acceptance of the dedication. Venice v. Madison County Ferry Co., 216 Ill. 345, 75 N. E. 105.

Approval of a plat by municipal officers has been held not to constitute an acceptance. Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170, holding that charter provision and statute requiring plats of additions to the city to conform to existing streets and be approved by the council did not make such approval an acceptance although it vested the fee of the street in the city. Brown v. Scruggs, 141 Mo. App. 632, 125 S. W. 537.

In Connecticut, however, it seems that a way does not be-

come a street by dedication, although accepted by the municipality, unless the street is a convenience and necessity and is *used by the public*. New York, N. H. & H. R. Co. v. New Haven, 46 Conn. 257, 262.

80. People v. Jones, 6 Mich. 176.

81. *Illinois*. Kimball v. Chicago, 253 Ill. 105, 97 N. E. 257.

Iowa. Baker v. Chicago, R. I. & P. R. Co. (Iowa, 1912), 134 N. W. 587.

Michigan. Michigan Central R. Co. v. Bay City, 129 Mich. 264, 88 N. W. 638.

New Jersey. People's Traction Co. v. Atlantic City, 71 N. J. L. 134, 57 Atl. 972.

Oregon. Oregon City v. Oregon & C. R. Co., 44 Ore. 165, 74 Pac. 924.

So an acceptance of a street may be shown by a contract between the common council and a railroad company as to the terms on which the company might use such street for its road. Cincinnati & S. R. Co. v. Carthage, 36 Ohio St. 631.

If ordinance is *ultra vires*, there is no acceptance. Thompson v. Ocean City R. Co. (N. J. Ch.), 37 Atl. 129.

or resolutions adopting, or referring to and recognizing as corporate property, lands designated in a plat as public places or otherwise offered to be dedicated for public use;⁸² or by making a *survey* in which the strip

Water pipes. Granting of permission to lay water pipes, through certain streets for a valuable money consideration shows an acceptance of the dedication of such streets. *Arnold v. Orange*, 73 N. J. Eq. 280, 66 Atl. 1052.

Gas. The granting permission by a municipality to a public service company to lay mains in streets is an acceptance of such streets just as much as though the city laid the mains itself. *Palmer v. East River Gas Co.*, 101 N. Y. S. 347, 115 App. Div. 677, per Justice Gaynor.

82. *California. Eureka v. Gates*, 137 Cal. 89, 69 Pac. 850; *People v. Beaudry*, 91 Cal. 213, 27 Pac. 610, holding ordinance adopting official map of city, in which certain street is clearly marked out, is evidence of acceptance.

Kentucky. Schaefer v. Selvage, 19 Ky. L. Rep. 797, 41 S. W. 569.

Michigan. White v. Smith, 37 Mich. 291.

New Jersey. Central R. Co. v. Elizabeth, 35 N. J. L. 359, holding notice of acceptance need not be given. *State v. Bayonne*, 52 N. J. L. 503, 20 Atl. 69.

West Virginia. Jarvis v. Graf-ton, 44 W. Va. 453, 30 S. E. 178.

United States. London & San Francisco Bank v. Oakland, 90 Fed. 691, 33 C. C. A. 237, aff'g 86 Fed. 30.

Ordinance declaring land "dedi-

cated and set apart to public use as a public street" held not an acceptance because not referring to the owner or his alleged dedication. *People v. Reed*, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22.

Express vote may show acceptance. *State v. Atherton*, 16 N. H. 203.

Sidewalk ordinance. The act of an abutting owner in moving his fence back from the street for the avowed purpose of a sidewalk, together with an ordinance directing the construction of a sidewalk on such property, shows an acceptance of the dedication. *Harrison v. Greenville*, 146 Ky. 96, 142 S. W. 219.

Ordinance directing property owners along a way which has been used by the public to construct brick pavements shows an acceptance of the dedication of the way by the municipality. *Bloomfield v. Allen*, 146 Ky. 34, 141 S. W. 400.

Resolution requiring laying of sidewalks along a street, claimed to have been dedicated, held acceptance of only so much of a street as actually opened and used. *Commonwealth v. Royce*, 152 Pa. St. 88, 25 Atl. 162.

Ordinance accepting street and providing that it "shall be established as an eighty foot street" is void where the offer to dedicate is of a sixty foot street. *Sanford v. Meridian*, 52 Miss. 333.

dedicated appears as a street, and the adoption of such survey as the official survey for the municipality.⁸³

Acceptance of a street may also be shown by proof of its recognition in official maps,⁸⁴ acceptance may also be shown by the act of the municipality in *improving the land* offered for dedication,⁸⁵ as by *grading* the street

Shot gun ordinance accepting all streets and alleys theretofore dedicated by the owners thereof is sufficient as an acceptance of a particular offer to dedicate land for a street. *Los Angeles v. McCollum*, 156 Cal. 148, 103 Pac. 914; *Eureka v. Gates*, 137 Cal. 89, 69 Pac. 850; *Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. 928, aff'd in 23 Pac. 1085.

83. *Palmer v. Clinton*, 52 Ill. App. 67.

84. *Steele v. Sullivan*, 70 Ala. 589; *Re Public Park Com'rs*, 53 Hun (N. Y.) 556, 6 N. Y. S. 779; *Smith v. Buffalo*, 90 Hun (N. Y.) 118, 35 N. Y. S. 635; *Smith v. Navasota*, 72 Tex. 422, 10 S. W. 414.

Marking alley on map of city engineer, but not on official map of city, held not an acceptance. *Stallard v. Cushing*, 76 Cal. 472, 18 Pac. 427.

Map made by individual for himself but kept by city council in its chambers is admissible to prove acceptance. *Macon v. Franklin*, 12 Ga. 239.

Assent to correctness of map held only evidence of acceptance and not an act of acceptance. *Wilder v. St. Paul*, 12 Minn. 192.

85. *Colorado. Durango v. Davis*, 13 Colo. App. 285, 57 Pac. 733.

Illinois. Fairbury Union Agri-

cultural Board v. Holly, 169 Ill. 9, 48 N. E. 149.

Kentucky. Steinbacker v. Gast, 28 Ky. L. Rep. 573, 89 S. W. 481.

Michigan. Conkling v. Mackinaw City, 120 Mich. 67, 79 N. W. 6; *People v. Wolverine Mfg. Co.*, 141 Mich. 455, 104 N. W. 725, 113 Am. St. Rep. 544; *Nichols v. New England Furniture Co.*, 100 Mich. 230, 59 N. W. 155.

Wisconsin. Bates v. Beloit, 103 Wis. 90, 78 N. W. 1102; *Milwaukee v. Davis*, 6 Wis. 377.

"Where the owner of land makes a survey and map of his land and plats it, and later sells blocks and lots with reference to the streets and avenues laid off therein, and thereafter the corporate limits of a city are extended so as to include the property, and the city assesses the blocks and lots of the addition for taxation, but not the streets and avenues, and the latter have been worked and kept in repair by the municipal authorities, and used by the public, it is sufficient to show an acceptance of the dedication, although some of the streets have not been graded and kept in repair." *Jackson v. Laird* (Miss., 1911), 55 So. 41.

The act of a municipality in improving streets by grading and paving, and by using them for

claimed to have been dedicated,⁸⁶ or making re-

water and sewer pipes, constitutes a sufficient acceptance. *Gable v. Cedar Rapids*, 150 Iowa 108, 129 N. W. 737.

Constructing roadway and issuing bonds to pay therefor held an acceptance. *Lowery v. Pekin*, 210 Ill. 575, 71 N. E. 626.

Park. Where land was dedicated for a park the act of the city in ordering the "plaza" cleared up shows acceptance. *Evans v. Blankenship*, 4 Ariz. 307, 39 Pac. 812.

Building retaining wall partially across a strip of ground does not show acceptance of it as a street. *Exterkamp v. Covington Harbor Co.*, 104 Ky. 796, 47 S. W. 1086.

Where land is dedicated as a street, acceptance of the dedication may be shown by proof that the municipal authorities assumed control over the street by working it or otherwise exercising control. *Wade v. Cornelia*, 136 Ga. 89, 70 S. E. 880; *Jeffress v. Greenville*, 154 N. C. 490, 70 S. E. 919

An ordinance directing the public improvement of a street, such as will put it in proper condition for use by the public, is an acceptance. *Cohons v. Delaware*, etc. Canal Co., 134 N. Y. 397, 402, 31 N. E. 887.

Acceptance may be indicated in any unequivocal manner, such as the improvement of the streets or by notice to the proprietor that it will open and improve them. *Parriott v. Hampton*, 134 Iowa 157, 111 N. W. 440.

Ordinance providing for paving of a dedicated street has been held to be an acceptance. *People's Traction Co. v. Atlantic City*, 71 N. J. L. 134, 57 Atl. 972.

Working or repairs merely evidence. "That a traveled way has or has not been wrought by the local municipality, that repairs have or have not been made at the public charge, or otherwise for the accommodation of travel, are facts which naturally possess significance, and oftentimes great significance, as evidence tending to show acceptance by the public of a dedicated way, but the only importance to be attached to such facts is that which bears upon their evidential value for the purpose indicated. Neither original working nor subsequent reparation possess binding force as creating an acceptance, and acceptance may be shown in other ways." *Phillips v. Stamford*, 81 Conn. 408, 71 Atl. 361.

Removal of filth from alley as a sanitary precaution is not an acceptance of such alley. *Dodge v. Stacy*, 39 Vt. 558.

86. *Brakken v. Minneapolis & St. Louis R. Co.*, 29 Minn. 41, 11 N. W. 124; *Kaime v. Harty*, 73 Mo. 316; *Scheffer v. Hardin*, 140 Mo. App. 13, 124 S. W. 569; *Niagara Falls Suspension Bridge Co. v. Bachman*, 4 Lans. (N. Y.) 523; *Orrick v. Ft. Worth* (Tex. Civ. App.), 32 S. W. 443.

In Missouri however, it was held in 1908 that adoption of ordinance establishing the grade of a dedicated street does not show

pairs,⁸⁷ or by constructing a *sewer* through it.⁸⁸ So the digging a public *well* in a street has been held evidence of acceptance.⁸⁹ And the maintenance of *gas lamps* in streets and the lighting of them constitutes an acceptance of a dedication of such street.⁹⁰

an acceptance so as to make municipality liable for defects therein (*Atkinson v. Nevada*, 133 Mo. App. 1, 112 S. W. 1022), but it would seem that a contrary rule now prevails since the decision in the *Benton* case.

Changing grade. A resolution of a municipal body changing the grade of streets is admissible to show an acceptance of the dedication of such streets. *Palmer v. East River Gas Co.*, 101 N. Y. S. 347, 115 App. Div. 677.

87. *Alabama.* *Steele v. Sullivan*, 70 Ala. 589.

Illinois. *Alvord v. Ashley*, 17 Ill. 363.

Indiana. *Fowler v. Linquist*, 138 Ind. 566, 37 N. E. 133.

Maryland. *McMurray v. Baltimore*, 54 Md. 103.

Massachusetts. *Wright v. Tukey*, 3 Cush. (Mass.) 290.

Minnesota. *Shartle v. Minneapolis*, 17 Minn. 308; *Brakken v. Minneapolis & St. Louis R. Co.*, 29 Minn. 41.

New Hampshire. *State v. Atherton*, 16 N. H. 203.

Pennsylvania. *Du Bois Cemetery Co. v. Griffin*, 165 Pa. 81, 30 Atl. 840.

Repair of street does not constitute an implied acceptance which may be given a retrospective effect. *Kennedy v. Cumberland*, 65 Md. 514, 9 Atl. 234.

Unauthorized repairs does not of itself prove acceptance. *White v. Bradley*, 66 Me. 254.

Repair of other streets in the vicinity does not show an acceptance. *Kennedy v. Cumberland*, 65 Md. 514, 9 Atl. 234.

88. *Arnold v. Orange*, 73 N. J. Eq. 280, 66 Atl. 1052; *Re Hunter*, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616; *Philadelphia v. Thomas' Heirs*, 152 Pa. St. 494, 25 Atl. 873.

Ordinance establishing system of sewers through streets and alleys as shown in a recorded plat was held equivalent to an acceptance of such streets and alleys. *Burroughs v. Cherokee*, 134 Iowa 429, 109 N. W. 876.

"So important a municipal act as the construction of a public sewer by proper municipal authority at the expense of the municipality, in a dedicated street connected with the municipality's general system of sewers, must be held to be an acceptance of the dedication of the street through which it is constructed." *Arnold v. Orange*, 73 N. J. Eq. 280, 66 Atl. 1052.

89. *Aiken v. Lythgoe*, 7 Rich. Law (S. C.) 435.

90. *Palmer v. East River Gas Co.*, 101 N. Y. S. 347, 115 App. Div. 677, per Justice Gaynor.

So an attempt to open a street embraced in a dedication is an acceptance,⁹¹ although failure to open a street at once does not show that there was no acceptance;⁹² and the failure of a municipality to improve or properly care for land dedicated does not show a failure to accept the dedication where it had exercised control thereover and the land had actually been used by the public.⁹³

The act of the municipal authorities in taking possession is an acceptance,⁹⁴ as is, it seems, the inclusion of a street within the beat of a police officer.⁹⁵ So it

Street lights. But the fact that a private corporation erects a street light within the limits of a street, the maintenance of which was paid for by the village, does not show an acceptance by the village of the street dedicated. *Arnold v. Orange*, 73 N. J. Eq. 280, 66 Atl. 1052.

91. *Russell v. Lincoln*, 200 Ill. 511, 65 N. E. 1088; *Thonney v. Rice*, 43 Wash. 708, 86 Pac. 713.

Extension of corporate limits and construction of street at expense of abutters show acceptance of street. *South Covington & C. Street Ry. Co. v. Newport L. & A. Turnpike Co.*, 110 Ky. 691, 62 S. W. 687.

Laying out extension of street is not acceptance where way dedicated is not identical with that laid out. *Chapin v. Maine Central R. Co.*, 97 Me. 151, 53 Atl. 1105.

92. *Meridian v. Poole*, 88 Miss. 108, 40 So. 548.

§ 1610 *post*.

93. *Oregon City v. Oregon & C. R. Co.*, 44 Ore. 165, 74 Pac. 924.

94. *Manitou v. International Trust Co.*, 30 Colo. 467, 70 Pac. 757.

The act of city in taking possession of pipes, hydrants, etc. in the streets of an annexed subdivision and connecting them with its general water system is an acceptance of such streets. *Smith v. Chicago*, 107 Ill. App. 270, *aff'd* in 204 Ill. 356, 68 N. E. 395.

Where city has used and drained an extension of a street to tide water for some twenty years, the person who opened such extension and paved it cannot close the way since it has been dedicated to public use. *Canton Co. v. Baltimore*, 104 Md. 582, 65 Atl. 324.

But acts of municipal officers in taking sand from street shown on a plat, to build up streets in the village, does not show an acceptance of the streets from which the sand was removed, where the sand was taken at random without regard to street lines and either paid for by the municipality or taken with the consent of the dedicator. *Venice v. Madison County Ferry Co.*, 216 Ill. 345, 75 N. E. 105.

95. *Louisville v. Snow's Adm'r*, 107 Ky. 536, 54 S. W. 860.

would seem that the naming of a dedicated street by municipal ordinance is an acceptance.⁹⁶ So an acceptance of dedicated streets may be shown by their substitution for an ancient way.⁹⁷

The general rule is that where land is platted as an addition to a municipality, the mere inclusion of the territory covered thereby within the municipal limits is not of itself an acceptance of the dedication of public places designated on such plat.⁹⁸

If the acceptance is by the acts of particular municipal officers, then of course the acceptance, in order to be binding on the municipality, must be by an officer or body which has authority to accept in behalf of the municipality.⁹⁹

Contra. "The evidence that police officers patrolled the street is no evidence that it was a public highway, for such officers might well in the performance of their duties patrol a private street." *Re Starr Street in Borough of Queens*, 131 N. Y. S. 71, 80.

96. *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. 130.

97. *State v. Atherton*, 16 N. H. 203.

98. *Venice v. Madison County Ferry Co.*, 216 Ill. 345, 75 N. E. 105; *Russell v. Chicago & M. Electric Ry. Co.*, 205 Ill. 155, 68 N. E. 727; *Cochran v. Shepherds-ville*, 19 Ky. L. Rep. 1192, 43 S. W. 250; *Baltimore v. Broumel*, 86 Md. 153, 37 Atl. 648.

Extension of corporate limits, in connection with other acts, held to show acceptance of dedication of addition. *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883.

Acceptance of new charter extending territorial limits and providing that the land with the ter-

ritory annexed should not be taxed for municipal purposes until a street should be opened through the property, does not show an acceptance of streets dedicated before the enactment of the charter by the owner of land annexed by the new charter. *Valentine v. Hagerstown*, 86 Md. 486, 38 Atl. 931.

In *Arkansas*, however, where platted land was annexed to a city by a statute providing that platted land should "be subject to all the power, authority and jurisdiction of the city," it was held that such act accepted the dedication of streets for the city. *Little Rock v. Wright*, 58 Ark. 142, 28 S. W. 876.

99. *Remington v. Millerd*, 1 R. I. 93.

Repairs on highway by overseer of highways, held not a valid acceptance because of want of authority in him to bind the town. *Jordan v. Otis*, 37 Barb. (N. Y.) 50.

See § 383 *ante*, vol. 1.

If the acceptance is by a board, as representing the municipality, there must be a concurrence of a majority of the board at a regular meeting.¹

§ 1581. Same—bringing action relating to land dedicated.

Instituting action by a municipality to recover land, as to which there has been an offer to dedicate, is generally considered an acceptance of the dedication.² So the bringing of a suit to enjoin the obstruction of a way constitutes an acceptance of the dedication of such way.³

§ 1582. Same—user by public.

In most jurisdictions the rule is that an offer to dedicate may be impliedly accepted by a user of the property by the public for the purpose for which dedicated for a considerable length of time.⁴

1. *State v. Atherton*, 16 N. H. 203.

See § 595 *ante*, vol. 2.

2. *Spring Lake Borough v. Polak* (N. J., 1909), 75 Atl. 753; *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353, 47 Atl. 566; *Atlantic City v. Groff*, 64 N. J. L. 527, 45 Atl. 916.

Contra, *Cass County v. Banks*, 44 Mich. 467, 7 N. W. 49.

Bringing ejectment is evidence of acceptance of dedicated street. *Atlantic City v. Snee*, 68 N. J. L. 39, 52 Atl. 372.

Suit to enforce title, brought by municipality, is acceptance. *Des Moines v. Hall*, 24 Ia. 234.

Indictment against proprietor for obstructing highway is not acceptance of dedication thereof. *People v. Beaubien*, 2 Doug. (Mich.) 256.

3. *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501.

On the other hand, it has been held that an *answer* in an injunction suit to prevent the municipality from interfering with land, which alleges a dedication of the streets and acceptance by the municipality, does not of itself operate as an acceptance of the dedication. *Darling v. Jersey City*, 73 N. J. Eq. 318, 67 Atl. 709.

4. *Alabama*. *Mobile v. Fowler*, 147 Ala. 403, 41 So. 468.

Arkansas. *Fitzgerald v. Saxton*, 58 Ark. 494, 25 S. W. 499.

California. *Los Angeles Cemetery Association v. Los Angeles*, 97 Cal. XVII, 32 Pac. 240; *Hall v. Kauffman*, 106 Cal. 451, 39 Pac. 756; *People v. Davidson*, 79 Cal. 166, 21 Pac. 538.

Connecticut. *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149.

Illinois. *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866; *Rees v. Chicago*, 38 Ill. 322.

The theory for holding that an acceptance may be implied from public user is that the inhabitants are the

Indiana. Green v. Elliott, 86 Ind. 53; Pittsburgh, C. C. & St. L. R. Co. v. Warrum, 42 Ind. App. 179, 82 N. E. 934; Hammond v. Maher, 30 Ind. App. 286, 65 N. E. 1055; Clarke v. Evansville Boat Club, 44 Ind. App. 426, 81 N. E. 100.

Iowa. Waterloo v. Union Mill Co., 72 Iowa 437, 34 N. W. 197.

Louisiana. Municipality No. 3 v. Levee Steam Cotton-Press Co., 7 La. Ann. 270.

Michigan. Wayne County v. Miller, 31 Mich. 447.

Missouri. Meiners v. St. Louis, 130 Mo. 274, 32 S. W. 637.

Nebraska. Cassidy v. Sullivan, 75 Neb. 847, 106 N. W. 1027.

New York. Cook v. Harris, 61 N. Y. 448; People v. Loehfeld, 102 N. Y. 1, 5 N. E. 783.

Ohio. Fulton v. Mehrenfield, 2 Handy (Ohio) 176, 12 Ohio Dec. 389.

Pennsylvania. Pittsburg v. Epping-Carpenter Co., 194 Pa. St. 318, 45 Atl. 129; Commonwealth v. Moorehead, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 599.

Utah. Schettler v. Lynch, 23 Utah 305, 64 Pac. 955.

Washington. Seattle v. Hinckley (Wash., 1912), 121 Pac. 444; Spencer v. Arlington, 49 Wash. 121, 94 Pac. 904.

West Virginia. Harpers Ferry v. V. Kaplon & Bro., 58 W. Va. 482, 52 S. E. 492.

Wisconsin. Smith v. Beloit, 122 Wis. 396, 100 N. W. 877; Barteau v. West, 23 Wis. 416.

Weight of authority. "It is 4 McQ.—18

true the decisions of the courts are not uniform on this proposition, there being states where, even without any statute, it is held that there cannot be acceptance by mere user; but the great weight of authority is to the contrary. The authorities on this question will be found collected in the notes to Riley v. Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 642, 3 Am. & Eng. Ann. Cas. 789; and in the notes to State v. Trask, 6 Vt. 355, 27 Am. Dec. 554." *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501.

In *Manderschid v. City of Dubuque*, 29 Iowa 73, 4 Am. Rep. 196, the Supreme Court of Iowa, said: "It is probably the settled doctrine in England that no formal acceptance, other than public use, is necessary in order to make the dedication of a highway effectual. See *Angell on Highw.*, § 158. While this rule is not uniformly recognized in this country, yet it is believed that the weight and prevailing current of authorities support it."

"In *Cemetery Association v. Meninger*, 14 Kan. 312, 316, *Brewer, J.*, speaking for the court, said: 'No formal acceptance by any particular authorities is essential. The mere user by the public may be of such a character as to constitute an acceptance. Indeed, such user by the public with the knowledge of the owner may be sufficient evidence of both the dedication and acceptance. We know this doctrine is denied by

principal and the corporate officials are merely agents, and that the principal may himself do what he might have

some courts, but it seems to us to rest upon the soundest principles.' The appropriation of the highway by persons traveling over it was evidence of a dedication, whether the users resided in or out of the city. Proof of the use of the way by inhabitants of Missouri, Arkansas, or Texas would have been competent in support of a common-law dedication by the owner of the soil." *Raymond v. Wichita*, 70 Kan. 523, 79 Pac. 323.

If the way is used by the public, and worked, or treated by the public authorities as a part of a system of public highways in the place where the way is claimed, and this is continued for such a length of time that the public accommodation and private rights might be materially affected by the interruption of the enjoyment, the dedication to the public use is complete as against the owner of the fee. *Healey v. Atlanta*, 125 Ga. 736, 737, 54 S. E. 749.

The fact that the charter of a city gives its council power to lay out streets and alleys does not preclude an acceptance of a dedication of land for an alley by mere user. *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501.

User for a long time is sufficient though the highway has not been worked by public authorities. *Gillespie v. Duling*, 40 Ind. App. 217, 83 N. E. 728.

The acts of the municipal officers do not, as a whole or singly, alone constitute the municipality or the public, but the users

of the property, the inhabitants at large, must be considered in determining whether there has been an acceptance. *Re Town of Rutland*, 128 N. Y. S. 94, 70 Misc. Rep. 82. But see *Re Starr Street in Borough of Queens*, 131 N. Y. S. 71, 79.

User as evidence. User of a street as a highway by the public is evidence tending to show acceptance. *Boyer v. State*, 16 Ind. 451.

User by the public is but evidence tending to prove acceptance and does not of itself constitute acceptance. *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173.

In Kentucky, in 1903, Justice O'Rear of the Court of Appeals, in *Riley v. Buchanan*, 116 Ky. 625, 76 S. W. 527, reviews, at considerable length, the decisions on this subject in other states and in Kentucky, and holds that public user may be sufficient of itself to show an acceptance, and expressly disapproves *Wilkins v. Barnes*, 79 Ky. 323. It is said that acceptance of a road may be "by such protracted and continued use as to clearly indicate its acceptance, when the road dedicated is a benefit to the public and not a burden. In the last named state of case, a formal acceptance by the proper legal authority will be conclusively presumed to have taken place. Should the road become a burden to the public, it may be discontinued in the method pointed out by the statutes." See also

done through the intervention of an agent. In some jurisdictions, however, it is held that an acceptance cannot be shown by proof merely of public user of a street or other public place.⁵

Hall v. Leeper (Ky., 1909), 121 S. W. 683.

In New York, however, in a recent case, it is held that "mere travel by public upon the roads, without action by the public authorities in repairing or maintaining them, is insufficient." Smith v. Smythe, 197 N. Y. 457, 90 N. E. 1121.

Acceptance of park. In Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251, the court said: "The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is use by the public. No assent of the town is necessary, because no burden is put upon the town, as in the case of a way. * * * If in a seaside summer resort no improvements at all are made, there will still be some benefit from having a space left for air, and for an open, unobstructed prospect. Whether the easement of a public park could be accepted merely by enjoying an unobstructed view over it of the ocean, need not be considered. Various other acts of use of all the parks are shown, sufficient to show an acceptance of them by the public. Such acceptance need not be very specific."

5. Bacon v. Boston & M. R. R., 83 Vt. 421, 76 Atl. 128.

See White v. Bradley, 66 Me. 254.

Contra. Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367.

In Massachusetts, since St. 1846, c. 203, "there can be no public way by dedication without an acceptance of it by the public authorities. * * * While public use may be important as evidence, it is not of itself, sufficient to show such an acceptance. Since the enactment of the statute * * *, there can be no effectual acceptance without a laying out of a way in the ordinary mode prescribed by the statutes." Moffat v. Kenney, 174 Mass. 311, 54 N. E. 850, citing Hobs v. Lowell, 19 Pick. (Mass.) 405, 31 Am. Dec. 145; Bowers v. Manufacturing Co., 4 Cush. (Mass.) 332; Morse v. Stocker, 1 Allen (Mass.) 150; Hayden v. Stone, 112 Mass. 346; Guild v. Shedd, 150 Mass. 255, 22 N. E. 896. But *parks and squares* are not within the statute of 1846, and a park or square is different from a street in that the municipality is bound to repair the latter but not the former; common user by the public is sufficient to show acceptance of a park or square, i. e., acceptance will be presumed if the gift is beneficial, and user is evidence that it is beneficial. Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Attorney General v. Abbott

In some cases it is said that an uninterrupted user by the public for at least twenty years constitutes an acceptance of the dedication,⁶ and it is further held in some of the decisions that user for less than twenty years is not sufficient of itself to show an acceptance of the dedication;⁷ but the general rule is that to show an acceptance by user, the user need not be for the period of twenty years or any other definite time.⁸ And when

154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251.

In Texas, where much of the land is vacant, even in municipalities, and where every one feels at liberty to pass at will over any unenclosed premises, the presumption of acceptance from long continued use ought not to be generally indulged in so far as a street is concerned. *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. 309. Laying sidewalk, by an individual not the owner of the land, and its use by the public, does not, in Texas, show acceptance by city of strip as part of street. *San Antonio v. Sullivan*, 4 Tex. Civ. App. 451, 23 S. W. 307. But use of park by public was held an acceptance. *Gilleen v. Frost*, 25 Tex. Civ. App. 371, 61 S. W. 345.

6. *Kennedy v. Cumberland*, 65 Md. 514, 9 Atl. 234; *Steele v. Sullivan*, 70 Ala. 589; *State v. Ather-ton*, 16 N. H. 203.

In Georgia where a dedication of land for a highway is not express but is implied from acquiescence in the public use of the land for a highway, such public use and enjoyment must exist for at least seven years before the dedication and acceptance be-

comes complete. "The title of the public, so to speak, to the use and occupation of the road in cases of this character, is based on a form of prescription, as that word is used at common law, but not as it is used in the Code of this state. Through our Code we have adopted acquisitive prescription to lands from the civil law, and in such cases adverse-ness of possession is a requisite, and permissive possession cannot be the foundation thereof; but we have still retained the common-law notion of prescription as to easements and incorporeal rights, and as to this form of prescription the implied consent of the landowner is an essential element." *Davis v. State*, 136 Ga. 798, 71 S. E. 603.

7. *Steele v. Sullivan*, 70 Ala. 589; *Bartlett v. Bangor*, 67 Me. 460.

8. *Arkansas*. *Brewer v. Pine Bluff*, 80 Ark. 489, 97 S. W. 1034.

Indiana. *Summers v. State*, 51 Ind. 201.

Maine. *Cole v. Sprowl*, 35 Me. 161, 56 Am. Dec. 696.

Missouri. *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. 207.

a street has been dedicated to public use by the owner, and used by the public, it requires a much less time to presume an acceptance by the public than where there has been an user without such dedication.⁹ On the other hand, user by the public does not constitute an acceptance where not under a claim of right but merely pursuant to a temporary license of the owner.¹⁰ So mere user by the public will not of itself constitute an acceptance, without regard to the character of the use and the circumstances and length of time under which it is claimed and enjoyed.¹¹ But it is not essential to the creation of a highway by dedication and acceptance that large numbers of the public participate in the user, or that the user be one which results in a large volume of travel, but each situation must be judged in relation to its own surroundings and conditions, and with regard for the number of persons who would have occasion to use the way.¹²

New York. Bissell v. New York Cent. R. Co., 26 Barb. N. Y.) 630.

Vermont. State v. Trask, 6 Vt. 355, 27 Am. Dec. 554.

9. Ackerman v. Williamsport, 227 Pa. 591, 76 Atl. 421; Commonwealth v. Moorehead, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 599.

10. Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Brinck v. Collier, 56 Mo. 160.

§ 1564 ante.

Use of board sidewalk by neighbors, where constructed by owner of adjoining land, does not constitute an acceptance of it. Commonwealth v. Barker, 140 Pa. St. 189, 21 Atl. 243.

11. Richmond v. Stokes, 31 Grat. (Va.) 713.

Public use of square for ball playing and agricultural fairs

held not an acceptance. Baker v. Johnston, 21 Mich. 319, 349.

Alley. Slight evidence of acceptance of alley by use sufficient where necessity for alley is small. Taraldson v. Lime Springs, 92 Iowa 187, 60 N. W. 658.

User of railroad land in front of station as a public way, in going to and from station held not an acceptance. Williams v. New York & N. H. R. Co., 39 Conn. 509.

12. Phillips v. Stamford, 81 Conn. 408, 71 Atl. 361; Guthrie v. New Haven, 31 Conn. 308, 321.

Extent of user. "In ascertaining whether or not a highway, park, or public place has been accepted by user, the purpose which the way, park, or place is fitted or intended to serve must be the standard by which to determine the extent and character of use

Whether an acceptance by public user is sufficient to impose liability on the municipality for repairs or for

which constitutes an acceptance." *Koshland v. Cherry* (Cal. App., 1910), 110 Pac. 143.

"As to how much use of a way is necessary to denote an acceptance of a public way will depend upon the facts in each case. If the way is one which, from its nature, might be extensively used, greater use will be required to show an acceptance. If the proof of intent to dedicate should rest largely upon the fact of public use, then such public use, being necessary to prove not only dedication but acceptance, must be greater than where the intent to dedicate is clearly shown by evidence other than of user by the public." *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501.

Where street was cut in two by lake or drain so as to make it almost impassable to any except persons afoot, so as to prevent it from being extensively used, yet where for over ten years the property was used by the public, and the municipality took steps to prevent its use as a dumping ground and to remove a fence therefrom, there was a sufficient acceptance by the municipality. *Brewer v. Pine Bluff*, 80 Ark. 489, 97 S. W. 1034.

The use of land as a highway and as a camping place by strangers does not show an acceptance of a dedication for park purposes. *Myers v. Oceanside*, 7 Cal. App. 87, 93 Pac. 686.

User as footway and in summer only. The acceptance of a high-

way leading to a beach may be shown as effective by foot travel, if that is the kind which would naturally be chiefly accommodated, as by any other; and a user limited to the summer season, if that was the user to be anticipated, and for the accommodation of which the way was under the circumstances constituted, would be as significant as any could reasonably be expected to be. *Phillips v. Stamford*, 81 Conn. 408, 71 Atl. 361.

User of alley. "It is also claimed that, even though there was a dedication of the alley by the recording of the plat, there is nothing to show an acceptance on the part of the public. The evidence shows that for some years the alley was used to some extent, as much as it naturally would be with the then settlement of the town. There was at that time, and has been since, but little, if any, use for the alley; but we are not to forget that there are prospective as well as present considerations in such enterprises. The record shows that this alley had for a time such recognition by the public as is general in such cases, considering the surroundings. The necessity for its use then was slight, and hence the evidence of acceptance slight, but it was sufficient. There should be reasonable presumptions in favor of the preservation of such public interests, and the acts to constitute an acceptance on the part of the pub-

injuries received through neglect to repair, is the subject of some conflict in the authorities, it being held in some jurisdictions, or there being *dicta*, to such effect, that such acceptance is not sufficient for that purpose,¹³ while in other jurisdictions the contrary is held.¹⁴

lic 'need be such only as the public wants demanded.' *City of Waterloo v. Union Mill Co.*, 72 Iowa 437, 34 N. W. 197." *Taraldson v. Lime Springs*, 92 Iowa 187, 60 N. W. 658.

13. *Georgia*. See *Georgia R. & B. Co. v. Atlanta*, 118 Ga. 486, 489, 45 S. E. 600; *Parsons v. Atlanta University*, 44 Ga. 529, 539.

Illinois. *People ex rel. v. Worth Township*, 52 Ill. 498; *Richmond v. Marseilles*, 154 Ill. App. 345.

Maine. *State v. Wilson*, 42 Me. 9.

Maryland. *Kennedy v. Cumberland*, 65 Md. 514, 521, 9 Atl. 234, holding user for less than twenty years insufficient.

Michigan. *Chapman v. Sault Ste. Marie*, 146 Mich. 23, 109 N. W. 53.

Virginia. See *Winchester v. Carroll*, 99 Va. 727, 739, 40 S. E. 37; where user apparently limited to user for twenty years.

West Virginia. *Pence v. Bryant*, 54 W. Va. 263, 267, 46 S. E. 275; *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 399, 44 S. E. 155.

See chapter on Torts, *post*.

A way dedicated as a street can be a public highway, in the sense that the public have exercised the right of travel over it, without official acceptance; such acceptance being unnecessary to make it

a public highway, and unimportant except that it imposes a duty on the body politic to keep the street in repair, for breach of which it may be liable in damages. *Palmer v. East River Gas Co.*, 101 N. Y. S. 347, 115 App. Div. 677, per Justice Gaynor.

In Ohio, "local subdivision, such as counties and towns, are themselves merely agencies of the state, possessing only delegated powers, and the prescribed mode or manner of exercising them is the measure of the power. They can act only by their officers, and the duty to care for the roads and streets and the liability for damages for neglecting to perform the duty cannot be imposed upon them by proof of user by the public, but only by an acceptance by the authorities whose duty it would be to care for the road or the street if it should be established." *Cincinnati & M. V. R. Co. v. Roseville*, 76 Ohio St. 108, 81 N. E. 178.

14. *Connecticut*. *Makepeace v. Waterbury*, 74 Conn. 360, 50 Atl. 876; *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360.

Iowa. See *Dunn v. Oelwein*, 140 Iowa 423, 426, 118 N. W. 764.

Minnesota. *Phelps v. Mankato*, 23 Minn. 276.

New Hampshire. See *Sweeney v. Newport*, 65 N. H. 86, 18 Atl. 86.

It is submitted that there is no good reason for holding that the municipality is not liable where there is an

Texas. Austin v. Ritz, 72 Tex. 391, 403, 9 S. W. 884.

Washington. Cady v. Seattle, 42 Wash. 402, 405, 85 Pac. 19.

United States. Gallagher v. St. Paul, 28 Fed. 305.

In Indiana, it is said that "later cases are all to the effect that user by the public will amount to an implied acceptance, and cast the burden of maintaining the highway upon the local government and that the acceptance of the dedication will be implied from the general use of the public as of right." Hammond v. Maher, 30 Ind. App. 286, 65 N. E. 1055.

In Missouri, in Benton v. St. Louis, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561, the earlier decisions in Missouri, holding that a municipality is not liable for negligence in the care of a street unless it has been accepted by some act of its officers or agents, are apparently overruled and especially Ruppenthal v. St. Louis, 190 Mo. 213, 88 S. W. 612, where user by public was held not to create liability for defects. The Benton case was followed by the court of appeals in Curran v. St. Joseph, 143 Mo. App. 618, 128 S. W. 203. In an earlier case, however, it was expressly held that the use of a street by public does not give it the character of a street nor throw upon the city a duty to keep it in repair, and it is not a public street so as to make the obligation to repair a duty until the city in some official

and appropriate manner has invited or sanctioned its use as a street by the public. "Neither upon precedent or principle is the contention true that mere user by the public, for any length of time, without any act of the city, of land can impress upon it the character of a street, and thereby cast upon the city the duty to keep it in repair, or make it liable for failure to do so." Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170, followed in Atkinson v. Nevada, 133 Mo. App. 1, 112 S. W. 1022. Compare Brown v. Scruggs, 141 Mo. App. 632, 125 S. W. 537.

In Pennsylvania, the latest decision holds that acceptance by user is sufficient to create liability. Ackerman v. Williamsport, 227 Pa. 591, 594, 76 Atl. 421. There is *dicta* to the contrary, however, in Pittsburg v. Epping-Carpenter Co., 194 Pa. 318, 322, 45 Atl. 318, and Downing v. Coatesville Borough, 214 Pa. 291, 63 Atl. 696, is susceptible of a contrary construction. However, in an earlier case, the following instruction given in an action to recover damages for personal injuries was held proper: "Proprietors of land lying within the territorial limits of a borough cannot lay it out in lots and streets as their personal interests may suggest, and thereby, without the assent of the borough, impose on it the duty of keeping these streets in repair, or subjecting it to damages for injuries

acceptance by public user, since the public are in reality the municipality, i. e., the principal, while the municipal officers are merely their agents.

§ 1583. Same—acceptance by user as affected by statutes.

In some jurisdictions statutes or the charter provides that all streets which are used continuously for a certain period, usually about five years, shall be deemed to be public streets.¹⁵ And where a statute or charter provi-

which persons may sustain in passing or attempting to pass over them. The borough must do something to indicate its acceptance of them as public highways, to render it liable for injuries sustained upon them. Mere silence on its part is not sufficient to do so. It may accept a part of them, and not be liable to keep in repair those not accepted. Neither will the use of those not accepted, by the owners of lots abutting on them, or by others, delivering coal, flour, hay, or produce for the occupants of the lots, or for any other purpose, render the borough liable for their proper and reasonable repair, for the reason that the borough could not prevent, and had not the right to interfere with, such use of them. It must therefore appear from the preponderance of evidence that the borough council—the only authority that had power to ordain streets within the borough—did something to indicate that it accepted them as public highways, before the borough can be held liable for injuries sustained upon them.” The supreme court said: “This acceptance

may be shown either by ordinance, or by repairs to the streets directed to be made by council when assembled. If the repairs to the street at the point in question were by the street commissioner or a street committee, or even by the chief burgess, then there is no evidence of the acceptance, unless the council subsequently ratified them. Such subsequent ratification may be shown by payment of the expenses of repairs; but the mere payment of money to the street commissioner, or person making the repairs, is not evidence of ratification, unless the council at the time was aware that it was paying for repairs to these streets, and knowingly did pay for them.” *Steel v. Huntingdon* (Pa.), 43 Atl. 398.

15. *Morse v. Troy*, 38 Hun (N. Y.) 301.

User of street by public for certain number of years as making it a highway. § 1303 *ante*, vol. 3.

Statutory user as exclusive. Statute providing that user of road and repair thereof for six years as a public highway shall be deemed a dedication does not

sion makes the use by the public of any street or alley for a certain period of years conclusive that the land is a street or alley for all purposes, such a provision in itself operates as an acceptance where there has been a public use for the time designated.¹⁶

Other statutes provide that there must be an opening or public user of a dedicated street within a fixed number of years, or else the right of the municipality to accept is lost.¹⁷

§ 1584. Statutory or charter provisions as to mode of acceptance.

In same jurisdictions the statute requires an acceptance of a dedication to be by ordinance or resolution.¹⁸

preclude acceptance of dedication by user for no particular time and without keeping in repair or working the street. *Klenk v. Walnut Lake*, 51 Minn. 381, 53 N. W. 703.

16. *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52.

17. § 1611 *post*.

18. *Burroughs v. Cherokee*, 134 Iowa 429, 109 N. W. 876; *Laughlin v. Washington*, 63 Iowa 652, 19 N. W. 819, holding acceptance of report of committee not sufficient; *Merchant v. Waterman*, 2 Ohio Dec. 429; *Arnold v. Orange*, 73 N. J. Eq. 280, 66 Atl. 1052.

In Arkansas, the statute requiring an acceptance of a dedication by an ordinance specially passed for that purpose does not apply to streets established by prescription (*Waring v. Little Rock*, 32 Ark. 408, 36 S. W. 24), nor to incorporated towns. *Stuttgart v. John*, 85 Ark. 520, 109 S. W. 541.

In Iowa, the statute provides that no street dedicated to public

use shall be deemed a public street unless the dedication is accepted by ordinance or resolution. *Backman v. Oskaloosa*, 130 Iowa 600, 104 N. W. 347, holding acceptance by resolution proper. *Keokuk v. Cosgrove*, 116 Iowa 189, 89 N. W. 983. But it is held thereunder that a municipality may waive such a statute and accept a street for the public without ordinance or resolution. *Byerly v. Anamosa*, 79 Iowa 204, 44 N. W. 359; *Keokuk v. Cosgrove*, 116 Iowa 189, 89 N. W. 983.

In Kentucky, dedication of a street must be accepted by ordinance or resolution (*Schuster v. Barber Asphalt Paving Co.*, 24 Ky. L. Rep. 2346, 74 S. W. 226), but it is held that the statute does not apply where the dedication was made before the annexation of the territory in which the street is situated (*Louisville v. Hall*, 28 Ky. L. Rep. 1064, 91 S. W. 1133).

But an *ordinance* requiring that the acceptance of a dedication shall be only by ordinance may be waived by the municipality, and a dedication accepted by resolution.¹⁹

§ 1585. Acts showing intention not to accept.

It has been seen that the intention of a municipality to accept an offer to dedicate may be evidenced in a great variety of ways. Likewise the existence of a contrary intent may be shown in many ways by the acts and the conduct of municipal officers and of the inhabitants of the municipality.²⁰ For instance, the *assessment of property* for a public improvement is evidence of a purpose to reject an offer to dedicate such property.²¹

On the other hand, the mere omission of municipal authorities to assess land dedicated for a street for a public improvement is not evidence of such an acceptance as will make the property a public street.²² The fact that land is *taxed* by the municipality does not of itself negative an acceptance of an offer to dedicate such land for public purposes;²³ but it is generally held that

19. *Hunter v. Des Moines*, 144 Iowa 541, 123 N. W. 215.

See 633-636 *ante*, vol. 2, as to action by ordinance or resolution.

20. Payment of large sums for privilege of going on land and erecting levees thereon held to show there was no acceptance of dedication. *Sacramento v. Clunie*, 120 Cal. 29, 52 Pac. 44.

21. *Lunkenheimer Co. v. Cincinnati*, 23 Ohio Cir. Ct. Rep. 617; *Toledo v. Converse*, 21 Ohio Cir. Ct. Rep. 239.

22. *Fuller v. Belleville Tp.*, 67 N. J. Eq. 468, 58 Atl. 176.

§ 1567 *ante*.

Failure to tax land as private property is not evidence of acceptance. *Arnold v. Orange*, 73 N. J. Eq. 280, 66 Atl. 1052,

23. *Illinois*. *Chicago v. Wright*, 69 Ill. 318, 319; *Lake View v. LeBahn*, 120 Ill. 92, 9 N. E. 269.

Iowa. *Getchell v. Benedict*, 57 Iowa 121, 10 N. W. 321.

Minnesota. *Winona v. Huff*, 11 Minn. 119.

Ohio. *Daiber v. Scott*, 3 Ohio Cir. Ct. Rep. 313, 2 O. C. D. 179.

Wisconsin. *Lemon v. Hayden*, 13 Wis. 159.

In Iowa, however, it is held that a city "will be estopped to set up any claim to land to which the right of public use has been abandoned by subjecting it to taxes as private property." *Smith v. Osage*, 80 Iowa 84, 45 N. W. 404, 8 L. R. A. 633,

evidence that the municipality taxed the property as private property is admissible on the question of acceptance, although not conclusive.²⁴ Assessment or non-assessment, taxation or failure to tax, is not of itself conclusive on the question of acceptance of a dedication.²⁵

If an offer is made to dedicate a way and thereafter the municipality lays out a way not identical with the one offered, and substantial damages are awarded to the abutting owners, it is evidence of a refusal to accept the offer to dedicate.²⁶

On the other hand, a municipality is not precluded from claiming land for a public place by virtue of a dedication because of the fact that the municipality has instituted proceedings to *condemn* the land, where such proceedings were never consummated.²⁷

Acquiescence in the possession of the grantor or of a third person for a long period of years, of land offered for dedication, generally precludes the municipi-

24. *Wilder v. St. Paul*, 12 Minn. 192; *Trerice v. Barteau*, 54 Wis. 99, 11 N. W. 244.

However, if the one offering to dedicate is in possession and claims ownership of the property, receipts for taxes paid by him are not admissible to disprove acceptance since under such circumstances it is proper to tax him for such property. *Mankato v. Meagher*, 17 Minn. 265.

25. See *Hamilton v. Chicago, B. & Q. R. Co.*, 124 Ill. 235, 15 N. E. 854.

The fact that the municipality has not taxed certain property alleged to have been dedicated is an evidentiary fact tending to prove that the premises were regarded as public property, but while entitled to consideration

and due weight is not conclusive on the owner. *Poole v. Lake Forest*, 238 Ill. 305, 87 N. E. 320.

26. *Chapin v. Maine Central R. Co.*, 97 Me. 151, 53 Atl. 1105.

27. *Chicago v. Wright*, 69 Ill. 318.

That condemnation proceedings show intent not to accept dedication, see *Princeton v. Templeton*, 71 Ill. 68.

If there has been an acceptance a subsequent taking of the premises through the condemnation proceedings is not a waiver of the dedication. *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242, holding that ejectment does not lie to recover the property although the condemnation proceedings were invalid.

§ 1594 *post*.

pality from insisting that the offer to dedicate was accepted.²⁸

§ 1586. Sufficiency of evidence to show acceptance.

It is held that the same unequivocal and convincing proof necessary to prove an intent to dedicate is required to establish the acceptance of the dedication.²⁹ This statement, however, should be limited, as already pointed out in regard to the sufficiency of the evidence to show an intent to dedicate.³⁰

§ 1587. Time for acceptance.

An offer to dedicate need not be immediately accepted,³¹ but if accepted at once no period of user is necessary.³²

28. *Cambridge v. Cook*, 97 Iowa 599, 66 N. W. 884.

Evidence of continued possession by the alleged dedicator and his vendees of the land claimed to have been dedicated rebuts the presumption of an acceptance, notwithstanding the dedication was by recording a plat and a sale of lots thereunder. *Lagrange v. Bain*, 4 Ky. L. Rep. 256.

29. *Vance v. Pewamo*, 161 Mich. 528, 126 N. W. 978.

Proof of acceptance must be unequivocal, clear and satisfactory. *People v. Johnson*, 237 Ill. 237, 86 N. E. 676.

Evidence held sufficient to show absence of intent to accept dedication. *John Mouat Lumber Co. v. Denver*, 21 Colo. 1, 40 Pac. 237.

30. § 1570 *ante*.

31. *Denver v. Clements*, 3 Colo. 472; *Shea v. Ottumwa*, 67 Iowa 39, 24 N. W. 582; *Clements v. West Troy*, 10 How. Pr. (N. Y.) 199; *Oswald v. Grenet*, 22 Tex. 94.

The offer to dedicate land for a street need not be accepted immediately but if the offer has not been withdrawn it may be accepted within such reasonable time as the public necessity may require. *People v. Johnson*, 237 Ill. 237, 86 N. E. 676; *Krause v. El Paso (Tex.)*, 101 S. W. 828, *rev'd* on other grounds in 101 Tex. 211, 106 S. W. 121.

32. If there is a dedication by the owner, completed by acceptance on the part of the public, or by persons in a position to act for them, the right to a public way at once arises, and the time of user is no longer material. *Tise v. Whittaker-Harvey Co.*, 146 N. C. 374, 59 S. E. 1012.

If there is clear proof of an unequivocal act of dedication, the dedication becomes effectual at once upon acceptance by the public, and no definite period of use is required. *Palmer v. Chicago*, 248 Ill. 201, 93 N. E. 765.

Some decisions hold that an acceptance of an offer to dedicate is effective if given, at any time, before a dedication is withdrawn,³³ while other cases hold that the acceptance must take place within a reasonable time.³⁴

33. *Missouri*. Price v. Breckenridge, 92 Mo. 378, 5 S. W. 20.

New Jersey. Jersey City v. Morris Canal & Banking Co., 12 N. J. Eq. 547.

New York. Baldwin v. Buffalo, 35 N. Y. 375.

Rhode Island. Simmons v. Cornell, 1 R. I. 519.

Wisconsin. Ashland v. Chicago, & N. W. R. Co., 105 Wis. 398, 80 N. W. 1101.

Acceptance may be at any time. Niagara Falls v. New York Cent. & H. R. R. Co., 58 N. Y. S. 619, 41 App. Div. 93.

If land is dedicated for a street it may be accepted by the municipality at any time thereafter. Smith v. Opelika, 165 Ala. 630, 51 So. 821.

Acceptance is in time if evinced at any time before the owner takes any step to withdraw his offer. White v. Smith, 37 Mich. 291.

Land dedicated as a street cannot be accepted after the state has gone into possession and constructed a canal thereon. Huntington v. Townsend, 29 Ind. App. 269, 63 N. E. 36.

34. *California*. Wolfskill v. Los Angeles County, 86 Cal. 405, 24 Pac. 1094.

Colorado. Manitou v. International Trust Co., 30 Colo. 467, 70 Pac. 757.

Illinois. Venice v. Madison County Ferry Co., 216 Ill. 345, 75 N. E. 105.

Michigan. Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Baker v. Johnston, 21 Mich. 319.

Pennsylvania. Rung v. Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95.

"Whether there is any rule requiring an offer of dedication to be accepted in a reasonable time may be doubted. At all events, there are authorities to the effect that an acceptance may be made at any time before the offer is withdrawn, by some affirmative act of the dedicator, and acceptances after the lapse of more than twenty-five years have been consistent." Lewis, Eminent Domain (3d Ed.), § 495.

Ordinarily tracts which are platted are at some distance from the populous portions of the town or city and the proprietor, in offering to change his property from rural to urban, must be presumed to anticipate some delay in the acceptance and improvement of the streets and alleys separating the lots and blocks. When sparsely settled, years may elapse before the necessity will arise for grading or otherwise improving the streets, and until then the public ought not to be deprived of the right to accept them. However, delay may be for so long a time and under such circumstances as to indicate the abandonment of any intention to accept, and so it is quite generally held that acceptance must be

Cases holding that a municipality may accept an offer to dedicate within a reasonable time merely mean that it may do so provided the offer to dedicate is not withdrawn in the meantime, since there is no good reason for refusing to permit a revocation of an offer to dedicate at any time after it is made, provided that in the meantime there has been no acceptance, and no rights of third persons have intervened so as to make it inequitable to revoke.

What is a reasonable time is a question of fact for the jury³⁵ who may take into consideration not only the time that has elapsed but also all the other facts and circumstances in the case.³⁶

within a reasonable time. *Burroughs v. Cherokee*, 134 Iowa 429, 109 N. W. 876.

Fifty-five years. Acceptance fifty-five years after execution of plat and twenty-three years after incorporation of municipality held too late. *Venice v. Madison County Ferry Co.*, 216 Ill. 345, 75 N. E. 105.

Fifty years. Where offer to dedicate has not been accepted for nearly fifty years, it cannot then be accepted. *Cass County v. Banks*, 44 Mich. 467, 7 N. W. 49.

Twelve years. Acceptance of streets twelve years after the dedication has been held effectual. *Bailliere v. Atlantic Shingle Co.*, 150 N. C. 627, 64 S. E. 754.

In Texas, delay in acceptance of street does not revoke right to use it as a public street where occupants have not acquired title by limitation prior to the 1887 statute abolishing limitations in favor of persons in possession of municipal property. *Williams v.*

Galveston (Tex. Civ. App.), 58 S. W. 551.

35. *Chafee v. Aiken*, 57 S. C. 507, 35 S. E. 800.

What is a reasonable time is ordinarily a question of fact, when the question arises in connection with other branches of the law, and there seems to be no reason why the same rule should not apply when the question arises as to what is a reasonable time to accept a dedication.

36. *Chafee v. Aiken*, 57 S. C. 507, 35 S. E. 800.

What constitutes a reasonable time for acceptance depends largely on the situation and circumstances. *Borroughs v. Cherokee*, 134 Iowa 429, 109 N. W. 876; *Sarvis v. Caster*, 116 Iowa 707, 89 N. W. 84.

Where a street is dedicated, a reasonable time is the time required for the settlement and occupation of adjoining lands. *Guthrie v. New Haven*, 31 Conn. 308.

In determining whether lapse of time precludes a municipality from accepting an offer to dedicate made by a plat, statutory or otherwise, something more than the mere lapse of time should be taken into consideration, in some cases. For instance, if the proprietor occupies the public places designated in the plat and expends considerable sums in erecting buildings thereon, with the acquiescence of the municipality, it would seem that the municipality would be equitably estopped to open the public place, after many years, notwithstanding the lapse of time might not be so great as to otherwise preclude an acceptance of the dedication.³⁷

The lapse of thirty-four years,³⁸ and of twenty years,³⁹ has been held to preclude an acceptance, while on the other hand the lapse of such periods in particular cases as fifty years,⁴⁰ thirty years,⁴¹ twenty-seven years,⁴² twenty-five years,⁴³ twenty-three years,⁴⁵ and ten years,⁴⁵ has been held not to preclude an acceptance thereafter.

37. See *Reichert Milling Co. v. Freeburg*, 217 Ill. 384, 75 N. E. 544, where, however, fifty years had elapsed.

38. *Grandville v. Jenison*, 84 Mich. 54, 47 N. W. 600.

39. *People v. Reed*, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22; *John Mouat Lumber Co. v. Denver*, 21 Colo. 1, 40 Pac. 237; *Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975; *Wayne County v. Miller*, 31 Mich. 447.

40. Where certain land is offered as a highway by the owners and the offer has never been revoked, it may be accepted by the taking of formal action by the municipality to open the street, although over fifty years have

elapsed. *Stillman v. Olean*, 129 N. Y. S. 515.

41. *Shea v. Ottumwa*, 67 Iowa 39, 24 N. W. 582.

42. *Elliott v. Louisville*, 28 Ky. L. Rep. 967, 90 S. W. 990.

43. The fact that a street dedicated by a recorded plat has not been formally accepted by the municipality, notwithstanding the lapse of over twenty-five years, does not preclude a subsequent acceptance of the dedication so as to make it binding. *Gainesville v. Thomas*, 61 Fla. 538, 54 So. 780.

44. *Baltimore v. Frick*, 82 Md. 77, 33 Atl. 435.

45. *Backman v. Oskaloosa*, 130 Iowa 600, 104 N. W. 347.

There cannot be an acceptance in advance of the offer to dedicate.⁴⁶

§ 1588. Estoppel to accept or enforce dedication.

In a preceding chapter in this work,⁴⁷ the rule generally adopted in this country that a municipality may be estopped by its conduct to assert its title to property, such as streets and the like, which have been treated by the municipality, as the private property of individuals for a considerable period of time, without objection by the municipality, with knowledge of the facts, has been considered. This rule applies equally well to estop a municipality to open a dedicated street where the dedication has not been accepted, and the dedicator has erected buildings on the street and maintained them for many years, or has otherwise exercised exclusive control.⁴⁸

Technically speaking there can be no abandonment of a street which has never been accepted, but the right or privilege to accept the dedication may be precluded by estoppel whenever there has been occupancy of portions of the plat set apart for public purposes by the proprietor or his grantees in a manner inconsistent with future use for such purpose, and for such length of time as to show acquiescence by the municipal officers in the permanent appropriation of the grounds for other purposes.⁴⁹

46. *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542.

47. §§ 1159, 1398 *ante*, vol. 3.

48. *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108. §§ 1594, 1595 *post*.

49. *Burroughs v. Cherokee*, 134 Iowa 429, 109 N. W. 876.

Where land is dedicated as a street a municipality may be estopped to open up the street where it has permitted an individual for

many years to build thereon and use it as his property. *Von Tobel v. Lewistown*, 41 Mont. 226, 108 Pac. 910.

Enclosure by an ordinary fence does not estop a municipality from accepting streets as indicated in the plat, when ready to improve them, since such use is not inconsistent with the purpose to dedicate, and the owner is entitled before acceptance to the beneficial use of the property.

§ 1589. Acceptance of part as acceptance of all.

The question whether there has been an acceptance depends primarily on the further *question whether there has been an intent to accept* the offer to dedicate, and this applies equally well in connection with determining whether an acceptance by the municipality of a part of a street, which has been dedicated, or a part of any other place dedicated for other public purposes, is an acceptance of the entire street or of all public places so dedicated, and also in determining the question whether,

Parriott v. Hampton, 134 Iowa 157, 111 N. W. 440; McClenahan v. Jesup (Iowa, 1909), 120 N. W. 74.

"Most town plats, especially those laid out upon the vacant prairie of our state, were dedicated with no serious thought of the immediate use and improvement of all their streets and alleys. If the hopes of the dedicator were realized, and a village, town, or city slowly developed upon the selected site, the opening and improvement of the public ways would not ordinarily progress faster than was required to meet the demands of the growing population. In the smaller and less fortunate towns, where the rate of growth is quite slow, it might be many years before the public convenience would necessitate the improvement of every street and alley to its full extent, and, if meanwhile a lot owner has extended his fence to include a plat-
ted public way for which there was at the time no immediate need, the possession thus taken, in the absence of other circumstances, is in no sense adverse to the public, and acquiescence in such use by the public or munic-

ipality until the time arrives when in the opinion of the proper authorities the way should be opened up will not work an estoppel in favor of the lot owner. In other words, the acceptance of the dedication of the plat by the public is sufficiently evidenced by the fact that the town has been built thereon, and its streets and alleys have been used and treated as public highways to the extent of the reasonable needs of the population and by extending the opening and improvement of the streets to the limits of the plat as the growth of population called for such improvement. This is not to say that the public may not be estopped by notorious and long-continued abandonment, or by acts inconsistent with such assertion, to insist upon the existence of a given street or alley; but to create such estoppel something more must be shown than a failure to demand the opening of the public way before the growth or expansion of the town has made such demand reasonably necessary." McClenahan v. Jesup (Iowa, 1909), 120 N. W. 74.

where a plat is made and two or more streets are shown thereon, the acceptance of one of the streets is an acceptance of all the streets shown on the plat.

Some decisions have held that the acceptance of a part will be construed as an acceptance of the whole,⁵⁰ while in other cases the acceptance of one street in an addition has been held not to constitute an implied acceptance of another street in such addition.⁵¹

The better rule would seem to be that if the acts of the municipal officers or of the public are such as to show an *intention to accept all rather than a part* they will be construed as having that effect, and *vice versa*;⁵²

50. *Derby v. Alling*, 40 Conn. 410; *Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735; *London & San Francisco Bank v. Oakland*, 90 Fed. 691, 700, 33 C. C. A. 237.

See *Otterville v. Bente* (Mo., 1912), 144 S. W. 822.

Acceptance of part of street by opening and working it shows intent to accept all of street. *Ashland v. Chicago & N. W. R. Co.*, 105 Wis. 398, 80 N. W. 1101.

Entire width of way dedicated need not be traveled to make valid acceptance by user of the whole way. *Simmons v. Cornell*, 1 R. I. 519; *Vorhes v. Ackley*, 127 Iowa 658, 103 N. W. 998. But it is also said that actual use of portion only of an entire street as a constructive acceptance of a street can exist only in a peculiar case. *Hall v. Meriden*, 48 Conn. 416.

Where a paper city "is laid out as an entire thing, the dedication of all the streets to the public is entire; and, when the public act upon such dedication, the acceptance of part may, and in general

will be construed as an acceptance of the whole as an entirety. The public enter upon a part in the name of the whole, to enjoy the parts as from time to time such enjoyment of them becomes necessary." *Derby v. Alling*, 40 Conn. 410, 432.

If the dedication of a street is accepted, the fact that only a narrow portion of it is in fact traveled does not preclude the right to use the entire width. *Brunner Fire Co. v. Payne*, 54 Tex. Civ. App. 501, 118 S. W. 602.

51. *Kennedy v. Cumberland*, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346, holding that repair of certain streets does not constitute implied acceptance of another street.

In California, acceptance by user or otherwise of one or more particular streets shown upon a recorded map does not operate as an acceptance of all or any other of the streets delineated thereon. *Wolfskill v. Los Angeles County*, 86 Cal. 405, 24 Pac. 1094.

52. In Illinois, "where it clearly appears that the principal streets and alleys of a subdivision have

but that acceptance of a part is not *necessarily* an acceptance of all.⁵³

been accepted by the municipality, the presumption then obtains that all the streets and alleys of the subdivision have been accepted, unless there is something which shows the acceptance to have been limited." *Kimball v. Chicago*, 253 Ill. 105, 97 N. E. 257.

While "it is true that a street may be accepted in part and the remainder rejected, if it is proved that such was the intention of the public authorities," and "an acceptance of some of the streets named in a plat will not constitute an acceptance of the whole, if it is shown that there was an intention to limit the acceptance" (*Augusta v. Tyner*, 197 Ill. 242, 246, 64 N. E. 378), yet, "an acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing unless the intention to limit the acceptance is shown." *Lee v. Harris*, 206 Ill. 428, 69 N. E. 230, 232, 99 Am. St. Rep. 176.

It is held, however, in a later case that taking possession of part of a street is not necessarily an acceptance of the entire street (*Reichert Milling Co. v. Freeburg*, 217 Ill. 384, 75 N. E. 544), and the decision in *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774, that the authorities may accept streets in whole or in part and that an acceptance of a part is no acceptance of the whole, is relied on. It was also held in *Jordan v. Chenoa*, 166 Ill. 530, 47 N. E. 191, that a municipality, by taking con-

trol of certain streets and alleys shown on a recorded plat, does not accept the others. However, in *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37, and *Sullivan v. Tichenor*, 179 Ill. 97, 53 N. E. 561, it was held that the use of and working a part of the width of a street constituted an acceptance of the street in its entire width.

In *Lake View v. LeBahn*, 120 Ill. 92, 9 N. E. 269, it was held not necessary, in order to constitute acceptance of the dedication of a street, that the user and maintenance by public officers should extend over the entire street. See also *Shirk v. Chicago*, 195 Ill. 298, 63 N. E. 193.

In *Indiana*, the failure of a municipality to open and improve part of a new street is not a rejection of the part not opened or improved. *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883.

In *Iowa*, where a municipality has used or improved a part of a street, it will be presumed that it has accepted the entire street. *Gable v. Cedar Rapids*, 150 Iowa 108, 129 N. W. 737; *Vorhes v. Ackley*, 127 Iowa 658, 103 N. W. 998.

In *South Carolina*, it is held that "when the municipality shows acceptance by the use of a part, the burden of proof is on the opposite party to show that it did not extend to the entire street." *Chafee v. Aiken*, 57 S. C. 507, 35 S. E. 800.

53. See *Kelso v. Oglethorpe*, 120 Ga. 951, 954, 48 S. E. 366; *Attorney*

Some cases have held that there may be an acceptance of a part of the property dedicated as distinguished from all of it.⁵⁴ It is suggested, however, that an acceptance of a part only should not be permitted in case the dedicator objects, since he may impose conditions, and if he may do so it would seem that there is an implied condition that the municipality accept *in toto* if at all, unless the dedicator assents to an acceptance of a part.

§ 1590. Acceptance as subject to conditions.

Where an offer to dedicate is on a condition, or there are reservations therein, the acceptance is construed as subject to such conditions or reservations, and the dedication does not take effect if the conditions are broken.⁵⁵

General v. Old Colony & N. R. Co., 12 Allen (Mass.) 404.

Acceptance of part of road by public does not necessarily constitute acceptance of all of road. *Fulton v. Mehrenfeld*, 8 Ohio St. 440.

Partial acceptance of a street by public use establishes the street to the extent of public occupation but no further. *Wayne County v. Miller*, 31 Mich. 447.

In Georgia, acceptance of a part of a street was held not an acceptance of another part over which the municipality did not undertake to exercise any control. *Kelsoe v. Oglethorpe*, 120 Ga. 951, 48 S. E. 366, 102 Am. St. Rep. 138.

54. *Logan v. Rose*, 88 Cal. 263, 26 Pac. 106; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554; *Yates v. Judd*, 18 Wis. 118.

Dedication of ninety feet strip for a street, user of only sixty feet, and occupancy of other thirty feet by abutters for many years, precludes municipality from claim-

ing thirty feet strip. *Bell v. Burlington*, 68 Iowa 296, 27 N. W. 245, and see, to same effect, *Indianapolis v. Board of Church Extension*, 28 Ind. App. 319, 62 N. E. 715.

Appropriation of part of a dedicated street by a private person for his own use does not of itself necessarily show that the dedication was not accepted in all its parts. *Boyer v. State*, 16 Ind. 451.

55. *California*. *Los Angeles Cemetery Association v. Los Angeles*, 95 Cal. 420, 30 Pac. 523.

Illinois. *Conkling v. Springfield*, 39 Ill. 98; *Princeton v. Templeton*, 71 Ill. 68.

Massachusetts. *Hemphill v. Boston*, 8 Cush. (Mass.) 195, 54 Am. Dec. 749.

Missouri. *St. Louis v. Meier*, 77 Mo. 13; *Kemper v. Collins*, 97 Mo. 644, 11 S. W. 245.

New Jersey. *New York & L. B. R. Co. v. Drummond*, 46 N. J. L. 644.

§ 1591. Acceptance as question of fact.

The question of acceptance is one of mixed law and fact. It is one of law in so far as it involves questions as to the nature of the acceptance, the source from which it must come, and the acts and things which may be indicative of it. It is one of fact in so far as it involves inquiries as to whether or not the requisite acts and things have been done so that legal requirements have been met.⁵⁶

6. REVOCATION.

§ 1592. Right to revoke.

In those cases where an acceptance is not necessary to complete a dedication,⁵⁷ the dedicator cannot revoke the acceptance. Thus, if it is held that the sale of lots by reference to a recorded map or plat, upon which is shown public places, constitutes a complete dedication without an acceptance by the public, the dedicator cannot withdraw or revoke the dedication,⁵⁸ notwithstanding

Oregon. *Lownsdale v. Portland*, 1 Ore. 381, Fed. Cas. 8578, Deady 1.

West Virginia. *Boughner v. Clarksburg*, 15 W. Va. 394.

United States. *Lownsdale v. Portland*, Fed. Cas. 8578, 1 Or. 381, Deady 1.

§ 1545 *ante*.

Acceptance of dedication of boulevard includes acceptance of building restriction appurtenant thereon. *Simpson v. Mikkelsen*, 196 Ill. 575, 63 N. E. 1036.

Where there is a dedication by platting and a sale of lots as bounded by certain streets, the municipality can only accept the street as it was dedicated and cannot fix arbitrarily the boundaries thereof. *Allinder v. Bessemer Coal, Iron & Land Co.*, 164 Ala. 275, 51 So. 234.

On the other hand, it has been held that one who opened a street which the municipal authorities have accepted and improved, cannot shut it up again after the lapse of considerable time because the authorities failed to perform an oral condition made with them at the time the street was opened. *Port Huron v. Chadwick*, 52 Mich. 320, 17 N. W. 929.

56. See *German Bank of Evansville v. Brose*, 32 Ind. App. 77, 69 N. E. 300; *Agne v. Seitsinger*, 104 Iowa 482, 73 N. W. 1048.

57. §§ 1576-1578 *ante*.

58. *Manitou v. International Trust Co.*, 30 Colo. 467, 70 Pac. 757; *Hughes v. Clark*, 134 N. C. 457, 46 S. E. 956, 47 S. E. 462.

ing the municipality itself has not accepted the dedication,⁵⁹ but in those jurisdictions where the dedication in such a case is complete only as between the grantor and the grantee of lots in the plat, because it is held that an acceptance of the dedication is necessary and there has been no acceptance by the public, the dedication may be revoked, so far as the municipality is concerned, where it has not accepted the dedication within a reasonable time.⁶⁰

So, after the dedication is accepted by or on behalf of the municipality, it cannot be revoked.⁶¹ And this

59. See *Russell v. Lincoln*, 200 Ill. 511, 65 N. E. 1088.

60. Where there is a statutory dedication of open prairie land, but at the time there was no municipality in existence to accept the dedication, and before the premises had become a part of the territory of any municipality, the original dedicator conveyed all the lots abutting on both sides of a certain portion of a street by a deed conveying the lots to the center of the street, the execution of the conveyance vests the fee in the grantee to the center of the street, since until acceptance of the dedication the fee remained in the original proprietor. *Iglehart v. Chicago & A. R. Co.*, 241 Ill. 268, 89 N. E. 431.

61. *Alabama*. *West End v. Eaves*, 152 Ala. 334, 44 So. 588; *Douglas v. Montgomery*, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; *Stewart v. Conley (Ala.)*, 27 So. 303.

California. *Brown v. Stark*, 83 Cal. 636, 24 Pac. 162.

Connecticut. *Chapin v. State*, 24 Conn. 236.

District of Columbia. *Oettinger*

v. District of Columbia, 18 App. D. C. 375.

Illinois. *Warren v. Jackson*, 15 Ill. 236; *Proctor v. Lewiston*, 25 Ill. 153.

Indiana. *Michigan Cent. R. Co. v. Hammond, W. & E. C. Electric R. Co.*, 42 Ind. App. 66, 83 N. E. 650; *Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55; *Redwood Cemetery Ass'n v. Bandy*, 93 Ind. 246.

Kansas. *Franklin County v. Lathrop*, 9 Kan. 453.

Louisiana. *New Orleans & C. R. Co. v. Carrollton*, 3 La. Ann. 282.

Maine. *State v. Wilson*, 42 Me. 9.

Mississippi. *Briel v. Natchez*, 48 Miss. 423.

Missouri. *Regan v. McCoy*, 29 Mo. 356.

New Jersey. *Gloucester Land Co. v. Gloucester City*, 43 N. J. L. 544.

New York. *Re Hunter*, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616; *Adams v. Saratoga & W. R. Co.*, 11 Barb. (N. Y.) 414.

Pennsylvania. *Richardson v. McKeesport*, 18 Pa. Super. Ct.

applies as well to a dedication by a nation, state, or municipality as to a dedication by others.⁶² But where an acceptance is necessary and there has been no acceptance, the general rule is that the dedicator can revoke the dedication,⁶³ provided no public or

199; *Commonwealth v. Alburger*, 1 Whart. (Pa.), 469.

Texas. *Bellar v. Beaumont* (Tex. Civ. App.), 55 S. W. 410.

Virginia. *Bellenot v. Richmond*, 108 Va. 314, 61 S. E. 785; *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830; *Benn v. Hatcher*, 81 Va. 25, 59 Am. Rep. 645.

Washington. *La Bounty v. Seattle*, 46 Wash. 141, 89 Pac. 480.

United States. *London & San Francisco Bank v. Oakland*, 90 Fed. 691, 33 C. C. A. 237; *Ruch v. Rock Island*, Fed. Cas. 12105.

Fact that one reserves the right to dig canals within the limits of the highway dedicated by him, does not give him the power to revoke such dedication. *Cohoes v. Delaware & H. Canal Co.*, 134 N. Y. 397, 31 N. E. 887.

Erection of fence across street is not a revocation where the dedication has been accepted by the municipality. *Re Hunter*, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616.

Conveyance of land is not a revocation after acceptance of dedication. *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446.

62. *Davenport v. Buffington*, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377.

63. *California.* *Los Angeles v. McCollum*, 156 Cal. 148, 103

Pac. 914; *Prescott v. Edwards*, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186.

Illinois. *Stevenson v. Lewis*, 244 Ill. 147, 91 N. E. 56; *Iglehart v. Chicago & A. R. Co.*, 241 Ill. 268, 89 N. E. 431.

Indiana. *Steinauer v. Tell City*, 146 Ind. 490, 45 N. E. 1056.

Michigan. *Le Roy v. Collins*, 154 Mich. 77, 117 N. W. 579; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173.

New York. *Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84, 82 N. E. 513; *Re Hunter*, 62 N. Y. S. 169, 47 App. Div. 102, rev'd on other grounds in 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616; *Lee v. Sandy Hill*, 40 N. Y. 442.

North Carolina. *State v. Fisher*, 117 N. C. 733, 23 S. E. 158.

Ohio. *Fulton v. Mehrenfeld*, 2 Handy (Ohio), 176, 12 Ohio Dec. 389.

Texas. *Houston v. Finnigan* (Tex. Civ. App.), 85 S. W. 470.

Wisconsin. *Mahler v. Brumder*, 92 Wis. 477, 66 N. W. 502.

State which has dedicated to a city a portion of the navigable waters of the harbor to deepen and improve the harbor may withdraw the offer before acceptance by the city. *People v. Williams*, 64 Cal. 498, 2 Pac. 393.

After platting, if public do not accept offer to dedicate, owner

private rights have intervened which would be impaired by the revocation,⁶⁴ or, if private rights have intervened, if the persons having such rights consent to the revocation, there having been no acceptance by the municipality.⁶⁵

To illustrate, where a lot is sold with reference to a plat showing a street the grantor may revoke the dedication, if it has not been accepted by the municipality, provided he obtains the consent of his grantee, but if there are several grantees he cannot revoke the dedication without the consent of all the grantees.⁶⁶

A mistake does not give a right to revoke where otherwise the right does not exist,⁶⁷ nor does a partial

may revoke his offer. *Field v. Manchester*, 32 Mich. 279.

If a plat is made and the public places marked thereon are not accepted by the municipality within a reasonable time, the owner may revoke the dedication. *Venice v. Madison County Ferry Co.*, 216 Ill. 345, 75 N. E. 105.

Presumptions. Offer to dedicate not accepted within reasonable time will be presumed to be withdrawn unless circumstances make it continuous. *Wayne County v. Miller*, 31 Mich. 447.

64. *Rhodes v. Brightwood*, 145 Ind. 21, 43 N. E. 942; *Getchell v. Benedict*, 57 Iowa 121, 10 N. W. 321; *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 8 Law Ed. 452; *Grogan v. Hayward*, 4 Fed. 161, 6 Sawy. 498.

Dedication may be revoked before acceptance or before others have acted upon the faith of it so as to render revocation unjust. *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444.

Alley. Dedication of alley cannot be revoked as to those purchasing and making improvements with reference to the dedication. *Keokuk v. Cosgrove*, 116 Iowa 189, 89 N. W. 983.

65. **Purchasers of lots**, who have thereby acquired an easement in adjoining streets, may surrender it to the owner before the public has acquired any rights therein. *Attorney General v. Morris & E. R. Co.*, 19 N. J. Eq. 386.

In New York, a sale of lots pursuant to a plat does not preclude a revocation of the dedication, where the claims of the grantees of the lots are extinguished, and the public has not accepted the dedication. *Bissell v. New York Cent. R. Co.*, 26 Barb. (N. Y.) 630.

66. *Niagara Falls v. New York Central & H. R. R. Co.*, 58 N. Y. S. 619, 41 App. Div. 93.

67. See *State v. Waterman*, 79 Iowa 360, 366, 44 N. W. 677; *Marratt v. Diehl*, 37 Iowa 250; *Christian v. Eugene*, 49 Ore. 170, 89 Pac. 419.

failure of consideration agreed upon by a third person,⁶⁸ nor does mere non-user by the municipality.⁶⁹

Revocation may be evidenced by various acts inconsistent with the use for which it has claimed the land was dedicated. What constitutes a revocation of an offer to dedicate depends largely upon the circumstances of the particular case, and is generally a question of fact.⁷⁰ If a plat is a statutory one, and an acceptance is necessary, the offer can only be withdrawn before acceptance by a vacation of the plat under the statute, but if it is a common-law plat the offer of dedication may be withdrawn in other ways.⁷¹

The offer is revoked by the death of the dedicator before acceptance,⁷² or by his conveyance of the property dedicated before acceptance,⁷³ or by enclosing the land

68. One who has dedicated land cannot revoke the dedication by showing that the inducement to dedicate was the promise of a neighbor to give him the use of other lands and that he had ceased to use such lands. *McKenzie v. Gilmore*, 98 Cal. xviii, 33 Pac. 262.

69. § 1612 *post*.

70. A revocation may be accomplished either by an affirmative act in recalling it or by an abandonment of the scheme. *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

Intention. "It is equally true that the fact of revocation by abandonment depends upon the intent, as manifested by open and visible acts, to abandon the purpose in furtherance of which the dedication was designed." *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

Withdrawal of plat held revocation. *Gregory v. Ann Arbor*, 127 Mich. 454, 86 N. W. 1013.

Permitting railroad tracks to be laid on alleged street held a revocation. *Cohoes v. Delaware & H. Canal Co.*, 54 Hun (N. Y.) 558, 7 N. Y. S. 885, *rev'd* on other grounds, 134 N. Y. 397, 31 N. E. 887.

71. *Kimball v. Chicago*, 253 Ill. 105, 97 N. E. 257.

72. *People v. Johnson*, 237 Ill. 237, 86 N. E. 676; *People v. Kellogg*, 67 Hun (N. Y.) 546, 22 N. Y. S. 490.

73. *California.* *Myers v. Oceanside*, 7 Cal. App. 87, 93 Pac. 686; *Hayward v. Manzer*, 70 Cal. 476, 13 Pac. 141; *Eureka v. Croghan*, 81 Cal. 524, 22 Pac. 693; *Schmitt v. San Francisco*, 100 Cal. 302, 34 Pac. 961.

Illinois. *Hewes v. Crete*, 68 Ill. App. 305, *rev'd* on other grounds in 168 Ill. 330, 48 N. E.

dedicated, before acceptance, so as to exclude the public use,⁷⁴ or by the filing of a new map before the accept-

36; *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774.

New York. Buffalo v. Delaware, L. & W. R. Co., 74 N. Y. S. 343, 68 App. Div. 488, aff'd without opinion in 178 N. Y. 561, 70 N. E. 1097.

Ohio. Lockland v. Smiley, 26 Ohio St. 94.

Texas. Uvalde County v. Uvalde (Tex. Civ. App., 1895), 32 S. W. 368.

Conveyance held to revoke dedication. *Lightcap v. Held*, 154 Ind. 43, 55 N. E. 952; *Birge v. Centralia*, 218 Ill. 503, 75 N. E. 1035.

Conveyance to a railroad company for parks and depot grounds held a revocation. *Minneapolis & St. Louis R. Co. v. Britt*, 105 Iowa 198, 74 N. W. 933.

Conveyance of bed of street to owner of abutting land, before street is accepted by public, held a revocation. *Clendenin v. Maryland Const. Co.*, 86 Md. 80, 37 Atl. 709.

Deed held not to constitute revocation, see *People v. Hibernia Savings and Loan Society*, 84 Cal. 634, 24 Pac. 295; *Michigan Central R. Co. v. Bay City*, 129 Mich. 264, 88 N. W. 638.

Where a plat is laid out but no lots facing certain streets and alleys were sold, and the lots were subsequently sold, together with the streets and alleys, for farming purposes, and the streets were vacated by the municipality, the purchaser will not be compelled to open the streets and

alleys on the land sold to him. *State Co. v. Finley*, 150 N. C. 726, 64 S. E. 772.

74. *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, 40 N. W. 448.

Where the whole scheme for making additions to a municipality has failed and has been abandoned as shown by the fact that for more than twenty years since the making of the plat, no efforts have been made to bring the land within the limits of the municipality, but on the contrary the land has been continuously fenced and cultivated as a farm, the dedication as shown by the making of a plat will be held to have been revoked. *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

Erection of fence, including portion of street claimed to have been dedicated, held not a revocation under particular circumstances. *Bridges v. Wyckoff*, 67 N. Y. 130.

A statutory dedication never acted upon by opening the streets and alleys designated thereon for the public use is inchoate, merely so far as the unopened streets are concerned, and is abrogated by fencing it the entire width for several years. *Chambers v. Roanoke Industrial & Agricultural Ass'n*, 111 Va. 254, 68 S. E. 980.

However, enclosing is not necessarily a revocation in case of a dedication by plat.

ance of the first map or the sale of lots thereunder.⁷⁵ So the closing of a street by fences and opening another street on a different place on the property, before the acceptance of the first street, constitutes a revocation of the dedication of the first street.⁷⁶ Likewise, the act of the owner in erecting and maintaining buildings on land designated as a street on the plat constitutes a revocation where the buildings remain on the street for many years.⁷⁷ And a revocation of an offer to dedicate may be shown by a refusal of the owner to grant the municipality a right of way over the alleged street, and the action of the latter in then instituting condemnation proceedings.⁷⁸

A revocation can only be made by the one creating the dedication, i. e., the original grantor.⁷⁹ However, where lands are held by a city, board, commission, or other entity, in trust for the state, the legislature may revoke the dedication.⁸⁰ It seems that the revocation may be of a part only of the property dedicated.⁸¹

On the other hand, if one attempts by deed to revoke the dedication of certain land but he does not own all the property referred to in the deed, the deed is invalid.⁸²

§ 1593. Rededication.

After an offer to dedicate has been revoked, or after lapse of time or other circumstances have precluded the

75. *Myers v. Oceanside*, 7 Cal. App. 87, 93 Pac. 686; *Sanford v. Meridian*, 52 Miss. 383.

76. *Re Hunter*, 62 N. Y. S. 169, 47 App. Div. 102.

77. *People v. Reed* (Cal. 1888), 20 Pac. 708.

78. *State v. Fisher*, 117 N. C. 733, 23 S. E. 158.

79. *Stillman v. Olean*, 129 N. Y. S. 515.

80. *Mahoney v. Board of Edu-*

cation, 12 Cal. App. 293, 107 Pac. 584.

Revocation by legislature. Land dedicated for street purposes can be revoked by an act of the legislature. *Polack v. San Francisco Orphan Asylum*, 48 Cal. 492.

81. *Eckerson v. Haverstraw*, 39 N. Y. S. 635, 6 App. Div. 102.

82. *Reichert Milling Co. v. Freeburg*, 217 Ill. 384, 75 N. E. 544.

right of the municipality to accept the offer, there is no reason why a new offer to dedicate cannot be made.

But where a dedication of land for a street has been revoked, there is no rededication by virtue of a deed in which there is a call for a boundary as the "old" A street, since the use of the word "old" shows there was no intent to rededicate.⁸³

7. ESTOPPEL TO ASSERT OR DENY DEDICATION.

§ 1594. Estoppel to assert dedication.

The municipality may be estopped to assert a dedication by acts and conduct which have been relied on by others to their prejudice.⁸⁴ Likewise, a private individual may be estopped in the same way,⁸⁵ as where he stands by and permits others to expend money in building on land claimed to have been dedicated.⁸⁶ However, it has been adjudged frequently that the levy and collection of taxes on the property alleged to have been

83. *Church v. Dula*, 148 N. C. 262, 61 S. E. 639.

84. *Reichert Milling Co. v. Freeburg*, 217 Ill. 384, 75 N. E. 544.

§ 1588 *ante*.

Municipality may be estopped to assert its right to open dedicated streets. *Schooling v. Harrisburg*, 42 Ore. 494, 71 Pac. 605.

"According to the clear weight of authority," payment of taxes on land claimed to have been dedicated, by the alleged dedicator, "is not sufficient to estop the city from claiming the strip in dispute as a public street." *Seattle v. Hinckley* (Wash., 1912), 121 Pac. 444.

Condemning strip in widening avenue, evidently done out of an abundance of caution, does not

estop city to claim that strip was already part of street by dedication. *Seattle v. Hinckley* (Wash., 1912), 121 Pac. 444.

Including strip alleged to have been dedicated as a street in a local assessment district and bringing an action to foreclose an assessment thereon does not estop the municipality to claim that the property was dedicated for a street. *Seattle v. Hinckley* (Wash., 1912), 121 Pac. 444.

85. **Silence.** May be estopped by silence to assert dedication. *Sutor v. International & G. N. R. Co.* (Tex. Civ. App., 1910), 125 S. W. 943.

86. *Baker v. Vanderburgh*, 99 Mo. 378, 12 S. W. 462.

dedicated does not estop the municipality from claiming a dedication.⁸⁷

§ 1595. Estoppel to deny dedication.

One claimed to have dedicated land to the public may be estopped by his acts and conduct to deny the dedication,⁸⁸ and this applies equally well to a corporation.⁸⁹ For example, acquiescence in public user may constitute an estoppel.⁹⁰ So one who makes a plat of land with streets designated thereon may be estopped from denying that such streets are for the use of the public, as

87. *Hanger v. Des Moines*, 109 Iowa 480, 80 N. W. 549; *Dalber v. Scott*, 3 Ohio Cir. Ct. Rep. 313; *Gillean v. Frost*, 25 Tex. Civ. App. 371, 61 S. W. 345.

See also *Chafee v. Aiken*, 57 S. C. 507, 35 S. E. 800.

88. *Barney v. Lincoln Park Com'rs*, 203 Ill. 397, 67 N. E. 801; *Pittsburg, C. C. & St. L. R. Co. v. Noftsgger*, 26 Ind. App. 614, 60 N. E. 372.

Estoppel extends to purchaser. *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834.

"The principle upon which the estoppel rests is that it would be dishonest, immoral, or indecent, and in some instances even sacrilegious, to reclaim at pleasure property which has been solemnly devoted to the use of the public, or in furtherance of some charitable or pious object. The law therefore will not permit any one thus to break his own plighted faith; to disappoint honest expectations thus excited, and upon which reliance has been placed. The principle is one of sound morals, and of most obvious

equity, and is in the strictest sense a part of the law of the land. It is known in all courts, and may as well be enforced at law as at equity." *Hunter v. Sandy Hill*, 6 Hill (N. Y.) 411.

Vendor may be estopped to deny dedication by vendee where he acquiesces therein. *Ft. Worth v. Cetti*, 38 Tex. Civ. App. 117, 85 S. W. 826.

Married woman may be estopped. *Dulaney v. Figg*, 29 Ky. L. Rep. 678, 94 S. W. 658; *McBeth v. Trabue*, 69 Mo. 642, holding no estoppel in particular case.

Petition to vacate street estops petitioner to claim street was never accepted. *Ashland v. Chicago & N. W. R. Co.*, 105 Wis. 398, 80 N. W. 1101.

Representations. Where one sells land with the representation that an adjacent tract would be opened as a street, he is estopped to deny that the strip was dedicated as a public street. *Morse v. Whitcomb*, 54 Ore. 412, 102 Pac. 788.

89. *Sussman v. San Luis Obispo*, 126 Cal. 536, 59 Pac. 24.

90. § 1582 *ante*.

against persons who have relied on such streets being public so that they would be injured by their obstruction or vacation.⁹¹ So offering no objection to the erection of costly buildings in reliance on a way being a public one is an estoppel.⁹² So if the dedicator had no title at the time of the dedication, a subsequently acquired title inures to the benefit of the public.⁹³

8. RIGHTS AND TITLE ACQUIRED OR AFFECTED.

§ 1596. Persons to whose benefit dedication inures.

A dedication not only inures to the benefit of those who purchase before or at the time of the dedication, but is also for the benefit of all who subsequently become citizens and members of the public.⁹⁴ It will always be intended for the public and never for a part of the public.⁹⁵

As between municipalities, public buildings designated on a map operate as a dedication only to the municipal or quasi-municipal corporation which can erect or use such buildings.⁹⁶

A dedication may be enforced by a town on annexation of the addition shown in the plat notwithstanding the plat was designated as an addition to a city of a different name.⁹⁷

§ 1597. Effect of dedication in general.

Property once acquired by a municipality by dedication differs in no way from other municipal property,

91. *Corning & Co. v. Woolner*, 206 Ill. 190, 69 N. E. 53.

92. *Ross v. Thompson*, 78 Ind. 90.

93. *Napa v. Howland*, 87 Cal. 84, 25 Pac. 247.

94. *Macon v. Franklin*, 12 Ga. 239.

95. *Penny Pot Landing v. Philadelphia*, 16 Pa. St. 79.

96. *Travis County v. Christian* (Tex. Civ. App., 1892), 21 S. W. 119, holding that designation on map of lot as "courthouse" and "jail" was dedication to county and not to city or state.

97. *Rhodes v. Brightwood*, 145 Ind. 21, 43 N. E. 942.

except that it cannot be diverted to inconsistent uses and that if it can no longer be used for the purpose for which dedicated, ordinarily it reverts.⁹⁸ Thus, a *street* dedicated to public use and accepted does not differ from a street laid out by municipal authority.⁹⁹

If there are two or more dedications at different times, those subsequently made must be used subject to the prior dedications.¹

§ 1598. Effect of dedication on rights of dedicator.

An owner of land who dedicates it to the public generally retains the ownership of the fee and grants only an easement;² and he can continue to use the property in any way he sees fit so long as the use is not inconsistent with the public use for which the property was dedicated.³

On the other hand, an owner who dedicates a way to the public neither warrants nor represents that the land is fit for the purpose, but the public takes it as it is granted, and in the condition in which it is at the time of the dedication.⁴

§ 1599. Rights acquired by citizens in general.

Some cases hold that any citizen of a municipality may sue to enjoin it from selling dedicated land.⁵ On the contrary, it has been held that one who owns property in a municipality neither contiguous to nor fronting on a lot dedicated on a plat for church pur-

98. §§ 1606-1612 *post*.

Dower. A married woman cannot claim dower in lands dedicated by her husband to the public. *Elliott Roads & Streets* (3d Ed.), § 157.

99. *Ackerman v. Williamsport*, 227 Pa. 591, 76 Atl. 421.

1. *People v. Canal Trustees*, 14 Ill. 402.

2. § 1600 *post*.

3. *Stevenson v. Chattanooga*, 20 Fed. 586.

Erection of building. Where land has been dedicated to public use, the owner cannot erect a building thereon. *Taylor v. Armstrong*, 24 Ark. 102.

4. *Elliott, Roads & Streets* (3d Ed.), § 148.

5. *Macon v. Franklin*, 12 Ga. 239; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130; *Brown v. Manning*, 6 Ohio 298, 27 Am. Dec. 255.

poses, and who does not belong to such church, cannot sue to enjoin the change of the use of such lot from pious and secular purposes.⁶

In so far as the use of the dedicated property is concerned, it would seem that citizens may use it just the same as any other like property of the municipality acquired in any other way.⁷

§ 1600. Title acquired by dedication.

Under a common-law dedication, the public does not acquire a fee in the land, but simply the right to use it for the purposes for which it was dedicated. The fee remains in the owner and he holds it subject to the easement vested in the public.⁸ Likewise, the parties to a transfer of land for a public purpose may create in the municipality a less estate than that which the statute authorizes it to acquire by condemnation proceedings or otherwise.⁹

6. *Armstrong v. Portsmouth Bldg. Co.*, 57 Kan. 62, 45 Pac. 67.

7. Where land was dedicated for an alley, the purchaser of lots on the alley held entitled to use it to lay underground sewer pipes across it. *McElhone v. McManes*, 118 Pa. St. 600, 12 Atl. 564, 4 Am. St. Rep. 616.

Where a square is dedicated to the use of the public for market purposes, it may be used for such purpose by any citizen, provided the use is not exclusive, under the control of the municipal authorities. *McReynolds v. Broussard*, 18 Tex. Civ. App. 409, 45 S. W. 760.

8. *Robbins v. White*, 52 Fla. 613, 42 So. 841; *Ryerson v. Chicago*, 247 Ill. 185, 93 N. E. 162; *Re Walton Ave.*, 116 N. Y. S. 471, 131 App. Div. 696; *Athens v. Burkett* (Tenn. Ch.), 59 S. W. 404.

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"Common-law dedications do not ordinarily convey the fee. In fact under the strict rule they never do. * * * And though it has been said that 'there may be a dedication which is essentially a grant in which the fee passes,' the cases cited in support of the proposition seem to depend upon formal conveyances or statutes." *Patrick v. Young Men's Christian Association*, 120 Mich. 185, 79 N. W. 208.

Park. A dedication of land for a public park does not deprive the dedicators of their title, but merely vests an easement in the public. *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716.

Ownership of streets. § 1305 *ante*, vol. 3.

9. *Bradley v. Crane*, 201 N. Y. 14, 94 N. E. 359, holding that a deed conveying land to a city for

§ 1601. Same—title acquired by statutory dedication.

In most jurisdictions it is expressly provided by the statute relating to the filing of plats as a statutory dedication, that on such filing the fee of the property shall vest in the municipality, and it is held thereunder that the title acquired by the municipality is a fee simple and no title remains in the dedicator,¹⁰ provided there

highway conveyed only an easement.

A deed transferring property for public use in lieu of condemnation proceedings should be construed in favor of the land owners, and no implication is permissible that it grants an estate greater than is absolutely necessary to satisfy its language and object. *Bradley v. Crane*, 201 N. Y. 14, 94 N. E. 359, holding that a deed conveying land to a city for the highway conveyed only an easement.

10. *Alabama.* *Birmingham Mineral R. Co. v. Bessemer*, 98 Ala. 274, 13 So. 487.

Illinois. *Sears v. Chicago*, 247 Ill. 204, 93 N. E. 158; *Winnetka v. Prouty*, 107 Ill. 218; *Hunter v. Middleton*, 13 Ill. 50; *Gebhardt v. Reeves*, 75 Ill. 301; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Mattheisen & Hegeler Zinc Co. v. La Salle*, 117 Ill. 411, 2 N. E. 406.

Iowa. *Lake City v. Fulkerson*, 122 Iowa 569, 98 N. W. 376; *Pella v. Scholte*, 21 Iowa 463; *Milburn v. Cedar Rapids*, 12 Iowa 246; *McClenehan v. Jesup*, 144 Iowa 352, 120 N. W. 74; *Burroughs v. Cherokee*, 134 Iowa 429, 109 N. W. 876.

Montana. *Hershfield v. Rocky*

Mt. Bell Telephone Co., 12 Mont. 102, 29 Pac. 883.

Nebraska. *Jaynes v. Omaha St. R. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751.

See *Stange v. Hill & West Dubuque St. R. Co.*, 54 Iowa 669, 7 N. W. 115.

In *Kansas*, the title to land dedicated by a statutory dedication is in the county in trust for the particular municipality. *Harden v. Metz*, 62 Kan. 867, 63 Pac. 1126; *Elder v. Franklin County*, 42 Kan. 652, 22 Pac. 1152; *Randal v. Elder*, 12 Kan. 257; *Franklin County v. Lathrop*, 9 Kan. 453.

Where a block is designated on a plat as a public square, the legal title to the public square vests, in *Kansas*, in the county. *Jefferson County Commissioners v. Oskaloosa*, 80 Kan. 587, 102 Pac. 1095.

In *Michigan*, a statutory dedication vests the fee in the county in trust for the municipality intended to be benefited. *Grandville v. Jenison*, 84 Mich. 54, 47 N. W. 600.

In *Missouri*, a statutory dedication vests a fee (*Brown v. Carthage*, 128 Mo. 10, 17, 30 S. W. 312), but such fee is not an absolute fee but merely the right of control of the streets. *Union Ele-*

has been an acceptance of the dedication if an acceptance is necessary.¹¹

If the grantee has not yet acquired a corporate existence and the plat is recorded, the fee to the property will remain in abeyance until the municipality is duly organized.¹²

However, the dedicator is not bound to vest a fee in the municipality, in the absence of a statute expressly requiring it, but may grant only an easement and reserve the fee for himself.¹³ Furthermore, the fee which passes by a statutory dedication is subject to the purpose indicated by the dedication.¹⁴

On the other hand, in some jurisdictions, a statutory dedication does not vest the fee simple in the municipality, at least in so far as streets dedicated are concerned.¹⁵

vator Co. v. Kansas City Suburban B. R. Co., 135 Mo. 353, 366, 36 S. W. 1071.

In Wisconsin, in regard to public squares created by statutory dedication, a municipality takes the fee in trust for the public so as to leave no title or interest in the dedicator by virtue of which he can claim any personal interest in the dedicated land, so that the heirs of the dedicator cannot sue to enjoin an inconsistent use of the property, although such an action might be maintained under a common-law dedication. *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 126 N. W. 881, overruling *Milwaukee v. Railway Company*, 7 Wis. 85.

Reversion on vacation of street, see § 1415 *ante*, vol. 3.

11. Necessity for acceptance of statutory dedication, see § 1576 *ante*.

In Illinois, where the lots abutting on a dedicated street are conveyed by the dedicator before the statutory plat is accepted by the municipality, the fee of the streets reverts to such grantees on its subsequent vacation. *Hamilton v. Chicago, B. & I. R. Co.*, 124 Ill. 235, 15 N. E. 854.

12. *Trustees of Illinois & M. Canal v. Haven*, 11 Ill. 554; *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. 866.

§ 1542 *ante*.

13. *Dubuque v. Benson*, 23 Iowa 248.

14. *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. (74 U. S.) 272, 19 L. Ed. 74.

15. *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178, 183; *Hamilton County v. Rape*, 101 Tenn. 222, 47 S. W. 416.

In Colorado, under a statute providing that a dedication of a

§ 1602. Rights and extent of title acquired by municipality.

Whether a dedication passes a fee or merely an ease-

town site shall vest in the city the title to all the streets therein designated in trust for the uses expressed in the plat, the title taken by the municipality is not an absolute fee notwithstanding the language of the statute. *Olin v. Denver & R. G. R. Co.*, 25 Colo. 177, 53 Pac. 454. See also *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122, 95 Pac. 343, 16 L. R. A. (N. S.) 874, 127 Am. St. Rep. 100. And under such statute a municipality has no title to minerals underneath a dedicated street. *Leadville v. Bohn Min. Co.*, 37 Colo. 248, 86 Pac. 1038.

In Idaho, title to streets is not vested in the municipality by a statutory dedication, a statute providing that abutting owners are presumed to own to the middle of the street; and it is immaterial that the plat expressly dedicates "to the use of the public forever all the streets and alleys as shown on said plat." *Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

Indiana. "It is clear that an existing or subsequently established municipal government acquires no title to streets, alleys, public squares, and grounds dedicated as such by the proprietor in laying out and platting a town or an addition thereto; but as to such property the city or town government exercises only legislative and supervisory control for the benefit of the public. The

duty imposed upon municipalities with respect to property so dedicated is, in general, to preserve, maintain, and keep the same in condition for the use intended. No authority will be implied on the part of the city to abandon, sell, or divert to other uses such trust property to the injury or prejudice of the beneficiaries." *East Chicago Co. v. East Chicago*, 171 Ind. 654, 660, 87 N. E. 17.

In Minnesota, under Rev. St. 1851, c. 31, § 5, which has been in force in the state ever since the organization of the territory of Minnesota, it has been the uniform holding that the dedication of land, pursuant to this statute, to the public for streets, alleys, and public grounds, does not pass the fee-simple title thereto, but only such an estate as the purpose of the trust requires, and that the fee, subject to the public easement, remains in the dedicant and his grantees. *Schurmeier v. Railway Co.*, 10 Minn. 82 (Gil. 59), 88 Am. Dec. 59; *Winona v. Huff*, 11 Minn. 119 (Gil. 75); *Mankato v. Williard*, 13 Minn. 1 (Gil. 1), 97 Am. Dec. 208; *Brisbane v. Railway Co.*, 23 Minn. 114; *Wait v. May*, 48 Minn. 453, 51 N. W. 471; *Betcher v. Chicago, M. & St. P. Ry. Co.*, 110 Minn. 228, 124 N. W. 1096.

In Ohio, it is expressly provided by statute that a city does not acquire a fee simple absolute in streets but only a qualified fee.

ment has already been considered.¹⁶ Without regard thereto, a dedication is always subject to pre-existing rights,¹⁷ including encumbrances, and the rights of parties in adverse possession.

If the dedication is express, the writing fixes the territorial boundaries of the dedication,¹⁸ unless prescribed by statute;¹⁹ and where there has been an express and accepted dedication of land to the public use for a highway, there is no room for the presumption, or the implication, of a dedication or donation of a wider strip of land.²⁰

Callen v. Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782.

Wisconsin. "By a long line of decisions in this state with reference to streets and roads it has become the settled law of this state that in the case of a road or street, whether acquired by condemnation, conveyance, by common-law dedication or by statutory dedication, the city, town, or village takes only an easement for highway purposes, while the fee is held by the abutting landowner. This brings all roads and streets within an uniform rule, but whether the ruling was originally correct as regards statutory dedication by plat under the statutes quoted is doubtful. However, this may be, the rule has been so often applied and is of such long standing that it has become a rule of property with reference to roads and streets, and cannot now be departed from." *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 126 N. W. 881, 886.

16. §§ 1600, 1601 *ante*.

17. Irrigating ditch. Where a municipality accepts the dedication of streets across which an irrigation canal has previously been located, the donation is taken subject to the prior right of the owners of the conduit. *Denver v. Mullen*, 7 Col. 345, 3 Pac. 693.

18. It seems that a street as fixed and determined by a deed of dedication cannot be changed by the municipality, for street improvements or otherwise. *Reh-fuss v. Hill*, 243 Ill. 140, 90 N. E. 187.

19. Width of street. Where statute provided that all public roads shall have a width of sixty-six feet, it was held that one who petitioned county commissioners for a road, although the petitioner is silent concerning its width, dedicated a way over his land for a road of uniform width. *Anderson v. Nelson*, 86 Neb. 752, 126 N. W. 314.

20. Bedard v. Simons, 160 Mich. 545, 125 N. W. 381.

Dedication of land for a street has been held not to be a dedication of a sewer or water pipes therein;²¹ and the making and filing of a plat, laying out a town site upon a desert entry, will not dedicate to the public the water used upon the streets and alleys of such town site under a water right subsequently located and acquired.²²

The extent of a dedication, when implied from an adverse public user, is measured by that user; in other words, the dedication is commensurate with the actual enjoyment of the public easement.²³

Where the dedication is of a street lying along or extending through a navigable stream or the like for the purpose of access thereto, *accretions* become part of it and the public will be entitled to the use thereof;²⁴ and

21. *Smith v. Chicago*, 107 Ill. App. 270.

22. *Hailey v. Riley*, 14 Idaho 481, 95 Pac. 686.

23. The user of a raceway, from which a dedication might be presumed, being only by row boats of various kinds, canoes, and scows—or propelled by hand,—the right of the public to use the raceway for the purpose of navigation, so far as it springs from dedication, is limited to navigating it with boats of the kind mentioned, and propelled by hand, and does not justify its use by power boats. *Trenton Water Power Co. v. Donnelly*, 77 N. J. L. 659, 73 Atl. 597.

24. See *Elliott, Roads & Streets* (3d Ed.), § 164.

Accretions. "It may be remarked at the outset that it is well settled at common law that one owning land in fee, bounded by a stream of water, is the owner of all the accretions

to such land caused by a gradual change in the channel of such stream. When such land is subject to an easement, the question as to whether such accretions become a part of the easement depends, of necessity, upon the nature of the easement, the intention, express or implied, of the party granting or dedicating the same, and the intention of those accepting and acting upon such grant or dedication. If one owning land bounded by a stream should dedicate a public highway running parallel with the stream, and extending to the water's edge, and accretions should take place beyond the highway, not necessary to its use, it could not be contended with reason that such addition to the land belonged to the public, or was subject to the easement granted. But if one owning the fee should dedicate a public highway running to a public ferry or to a pub-

if the owner fills in riparian land a dedicated street will be continued to the new water-front.²⁵

Where the only way of enjoying the benefit of land dedicated is to pass over other lands of the grantor, it would seem that there is an implied dedication of such way.

§ 1603. Right of dedicator to sue.

One who has dedicated property to public use, whether by a statutory or common-law dedication, has nevertheless such an interest as entitles him to sue to restrain the municipality from diverting it to any other use not consistent with the use for which dedicated,²⁶ and he may bring a like suit against a third person who is so using it.²⁷ So he may bring *ejectment* against a person permanently obstructing a street dedicated by him, or where the possession is otherwise wrongfully withheld.²⁸

lic dock or boat-landing, and accretions should take place after the dedication, over which it was necessary to pass in order to reach the ferry or dock, then such accretions would become subject to the easement so dedicated; otherwise the object of the donor would be defeated, and the public would suffer." *Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869.

25. "It is settled in this state that a street delineated on a dedicating map as extending to a public navigable river (and the Delaware opposite Camden is such a river) will be continued to the new water front obtained by filling in by the owner under legislative permission. *Hoboken Land & Improvement Co. v. Mayor, etc., of Hoboken*, 36 N. J. L. 540; *Seabright v. Allgor*, 69

N. J. L. 641, 56 Atl. 237." *McAndrews & Forbes Co. v. Camden*, 78 N. J. Eq. 244, 78 Atl. 232.

26. *Rowzee v. Pierce*, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402, 65 Am. St. Rep. 625.

Under a common-law dedication, the dedicator retains such an interest as to enable him to sue in equity to prevent a diversion of the property to other uses than those to which it was dedicated. *United States v. Illinois Central R. Co.*, Fed. Cas. 15437, holding rule applicable where United States is dedicator.

27. *Williams v. New York Central R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651, where, however, the dedication was a common law one.

28. *Indiana. Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869.

So a successor to the original dedicator can enforce the dedication.²⁹ However, if there has been a statutory dedication and the fee simple has passed to the municipality, it would seem that the dedicator has no such title as to authorize him to maintain ejectment. And it is held in a very recent decision in Wisconsin that if there is a statutory dedication so as to convey the fee, neither the dedicator nor his heirs can sue to restrain the misuser of the land dedicated.³⁰

It has been held that the dedicator cannot bring *trespass* for an injury to the soil or freehold,³¹ nor sue to enjoin the laying of a railroad across land dedicated by him for a public square unless the railroad would be productive of some special injury to him.³² So it has been held by the federal supreme court that one who has platted land and sold all the lots has no further interest and cannot enjoin a misuser.³³

§ 1604. Right of municipality to sue.

The municipality may maintain suits for the vindication of the public right to lands dedicated.³⁴ So a municipi-

Missouri. See *McGinnis v. St. Louis*, 157 Mo. 191, 57 S. W. 755.

New York. *Brown v. Galley, Hill & D. Supp.* (N. Y.) 308.

Vermont. *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207.

Wisconsin. *Weisbrod v. Chicago & N. W. R. Co.*, 21 Wis. 602.

29. *Island Heights Hotel & Imp. Co. v. Freeman*, 77 N. J. Eq. 569, 571, 78 Atl. 157.

30. *Thordyke v. Milwaukee Auditorium Co.*, 143 Wis. 1, 13, 126 N. W. 881.

31. *Hunter v. Middleton*, 13 Ill. 50.

32. *Anderson v. Rochester, L. & N. F. R. Co.*, 9 How. Prac. (N. Y.) 553.

33. *United States v. Illinois Cent. R. Co.*, 154 U. S. 225, 14 Sup. Ct. 1015, 38 L. Ed. 971.

34. *Trustees of Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696.

"When lands are dedicated to the use of the inhabitants of a city or incorporated village for a public square, a bill may be filed in the name of the corporation to restrain a nuisance thereon, or to protect the equitable rights of the corporation to the use of the public square or land." *White v. Moore*, 123 N. Y. S. 1012, 139 App. Div. 269.

pality may maintain *ejectment* to recover dedicated land.³⁵ Likewise, where the statute vests the fee absolutely in the municipality it may sue the original dedicator or his grantees for coal subsequently mined and taken from beneath the street, notwithstanding it in no way interferes with the public use of the land as a street.³⁶

§ 1605. Rights of purchasers and abutters in general.

Where lots are sold with reference to a plat or map showing a division of the land into lots, blocks, streets, alleys, and other public places, the grantee may enjoin the closing or obstruction of such public places.³⁷ So even where a statutory dedication vests the fee in the municipality, it has been held that a trust is created which lot owners as purchasers in reliance on the plat can enforce in equity.³⁸ So an abutting owner may generally sue to enjoin a conveyance of the property or a misuse of it by devoting it to purposes other than those contemplated by the original dedication.³⁹

35. *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353, 47 Atl. 566; *Winona v. Huff*, 11 Minn. 119; *Dummer v. Jersey City*, 20 N. J. L. 86, 40 Am. Dec. 213, holding that action will lie against legal owner of the fee.

Contra. *Racine v. Crottsenberg*, 61 Wis. 481, 21 N. W. 520, 50 Am. Rep. 149, holding that where interest of city was a mere easement it was not entitled to "possession," within the *ejectment* statute.

§ 1369 *ante*, vol. 3.

36. *La Salle v. Mattheisen & Hegeler Zinc Co.*, 16 Ill. App. 69; *Des Moines v. Hall*, 24 Iowa 234.

37. Purchasers of lands pursuant to a plat on which adjoining land is designated as public grounds acquire vested rights in

and to the use of such grounds, which cannot be divested either by the dedicator or by the municipality. *Leffler v. Burlington*, 18 Iowa 361.

38. *Franklin County Com'rs v. Lathrop*, 9 Kan. 453.

Contra, as to public square, in Wisconsin. *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 17, 126 N. W. 881.

39. *Cook v. Burlington*, 30 Iowa 94, 6 Am. Rep. 649; *Cooper v. Alden, Har.* (Mich.) 72; *Cady v. Conger*, 19 N. Y. 256.

Public square. Owners of land abutting on a public square have a private right other than that possessed by the public at large to have the square kept open. *Fessler v. Union*, 68 N. J.

On the other hand, the purchaser of a lot cannot release the dedicator from his obligation to the public in so far as the dedication is concerned, nor claim damages for its violation by an action in his own name or by way of setoff or otherwise.⁴⁰

If property is dedicated and one thereafter buys a lot bordering on such property, he takes it subject to all the annoyances incident to the use of the dedicated property.⁴¹

9. MISUSER AND ABANDONMENT.

§ 1606. Misuser or diversion of property dedicated.

"It is only where the dedication of the property as public ground is an *unrestricted* dedication to public use that the municipality or legislature may designate the uses to which it shall be put."⁴²

Eq. 657, 60 Atl. 1134, aff'g 67 N. J. Eq. 14, 56 Atl. 272.

Park. Persons who own property abutting on land dedicated for a park may enjoin the municipality from using a portion of the park for a highway notwithstanding no damage to his lot from said use is shown. *Riverside v. Mac Lain*, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164.

Abutting owners on a park may enjoin the diversion thereof to other than park purposes. *Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185.

In Ohio, however, it is held that owners of lots adjoining a square have no such interest in the square as to entitle them to sue to enjoin the lease of parts of it to individuals. *Smith v. Heuston*, 6 Ohio 101, 25 Am. Dec. 741.

Dedication after conveyance.

That a dedication was after nearby property was conveyed by the dedicator is material, in so far as the rights of the grantee are concerned. *Lennig v. Ocean City Association*, 41 N. J. Eq. 24, 2 Atl. 611; *Knott v. Jefferson Street Ferry Co.*, 9 Ore. 530; *Valley Pulp & Paper Co. v. West*, 58 Wis. 599, 17 N. W. 554.

40. *Heckerman v. Hummel*, 19 Pa. St. 64, holding that the remedy is by abatement or indictment.

41. *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77.

42. *Chicago v. Ward*, 169 Ill. 392, 412, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185; *Chicago, Rock Island & Pacific R. Co. v. Joliet*, 79 Ill. 25.

Where land was dedicated as "public ground" and there was no restriction as to its use, except that it was provided that it should

If property is dedicated to a particular purpose, it cannot be diverted therefrom by the state or municipality, except under the power of eminent domain.⁴³

continue "free for the use of the inhabitants of said town and for travelers who may erect thereon temporary yards, or may from time to time occupy the same or any part thereof for making any vessels and other conveniences for the purpose of conveying their property to and from said town," and such particular use as a matter of fact ceased, the municipality may lay it out as a park and improve and ornament it as such and may erect a public building on a small part of the land. *Commonwealth ex rel. v. Connellsville*, 201 Pa. 154, 50 Atl. 825.

Court house may be built on land dedicated as "public grounds." *Lebanon v. Warren County*, 9 Ohio 80.

43. *United States v. Illinois Central R. Co.*, Fed. Cas. 15437.

Diversion. Dedicated property cannot be diverted by municipality to another and inconsistent use. *Trustees of Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *People v. Vanderbilt*, 38 Barb. (N. Y.) 282, 24 How. Pr. 301; *Pott v. School Directors of Pottsville*, 42 Pa. St. 132; *Rees v. Exposition Society*, 2 Pa. Co. Ct. R. 385; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207.

Land dedicated for certain purposes specified in detail cannot be used in part for a street, where not enumerated in the uses contemplated. *Board of Education v. Detroit*, 30 Mich. 505.

Municipality cannot use for school purposes ground dedicated

to other public purposes. *Kansas City Board of Education v. Kansas City*, 62 Kan. 374, 63 Pac. 600.

Public library. Use of open place for public library held within purpose of dedication for meeting of literary societies or other useful associations, etc. *Riggs v. Board of Education*, 27 Mich. 262.

Camp ground. Erection of buildings which will better adapt premises to use as camp grounds cannot be enjoined by adjacent owners, where land was dedicated for camp ground. *Lennig v. Ocean City Association*, 41 N. J. Eq. 24, 2 Atl. 611.

Schools. Land conveyed to town for public school forever cannot be conveyed by town to regents of a state normal school where students therein must sign declaration of intention to teach in the public schools of the state. *Board of Regents Normal School, Dist. No. 3 v. Painter*, 102 Mo. 464, 14 S. W. 938, 10 L. R. A. 493.

Dedication of land on plat as "seminary place" is a dedication for public school purposes. *Kansas City Board of Education v. Kansas City*, 62 Kan. 374, 380, 63 Pac. 600.

Where land is dedicated for public school purposes by acquiescence, and is so used for over twenty-five years, the school house so dedicated cannot be removed and placed on other land. *Sanders v. Cauley*, 52 Tex. Civ. App. 261, 113 S. W. 560.

Thus, where the owner of land has dedicated it for a street or alley, the municipality cannot appropriate it to other uses or purposes.⁴⁴ However, the use of streets prevailing at the time of the dedication is not the limit of the user to which the public is entitled, but the use is to be enlarged to include all improved methods of attaining the same objects and enjoying the same privileges.⁴⁵

The municipality cannot obstruct a dedicated street with public or private buildings.⁴⁶ On the other hand, the land may be appropriated to any use, such as the construction of *sewers*, to which a street acquired in any other manner may be put.⁴⁷ So the use of the street by a *railroad* may be permitted,⁴⁸ as may the placing

44. *Arkansas River Packet Co. v. Sorrels*, 50 Ark. 466, 8 S. W. 683; *Flemingsburg v. Wilson*, 64 Ky. (1 Bush.) 203; *Barclay v. Howell*, Fed. Cas. 975, rev'd on other grounds in 6 Pet. (U. S.) 498, 8 L. Ed. 477.

Streets cannot be diverted to another use. *Rowan's Executors v. Portland*, 47 Ky. 232.

Where land is platted into lots and a certain space is expressly dedicated for the use of a "street, wharf, or highway," and a part of the land was used as a street and another part as a park, the latter use is not so inconsistent as to constitute an abandonment. *Clarke v. Evansville Boat Club*, 44 Ind. App. 426, 88 N. E. 100.

Square dedicated as highway. Where a public square is dedicated as a public highway, it cannot be blocked, to the prejudice of the public or an individual. *Commonwealth v. Bowman*, 3 Pa. St. 202.

45. *Magee v. Overshiner*, 150

Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

Presumptions. Where municipality uses street in a way authorized by express legislation, it will be presumed to be for the benefit of the public. *Holmes v. Cleveland, C. & C. R. Co.*, 93 Fed. 100.

46. *Lutterloh v. Cedar Keys*, 15 Fla. 306.

§ 1350 *ante*, vol. 3.

47. *Stoudinger v. Newark*, 28 N. J. Eq. 187; *Kelsey v. King*, 33 How. Pr. (N. Y.) 39.

See § 1436 *ante*.

Additional servitudes, see chapter 34, *Franchises post*.

One making a statutory dedication cannot reserve the fee simple in the soil beneath the streets so as to prevent the laying of water pipes without his consent. *Wood v. National Water Works Co.*, 33 Kan. 590, 7 Pac. 233.

48. *Williams v. New York Central R. Co.*, 18 Barb. (N. Y.) 222.

of telephone poles therein by a telephone company.⁴⁹ Land dedicated for a street cannot be used as a *public square*.⁵⁰

If land is dedicated as a public highway "and for other *public purposes*," it may be used for public uses other than highways.⁵¹ Likewise if land is dedicated as a *common* it cannot be diverted to any other use,⁵² and this rule applies equally well to a *public square*.⁵³ For instance, the municipality cannot allow a street railway

49. *Julia Building Association v. Bell Telephone Co.*, 13 Mo. App. 477, 4 Ky. L. Rep. 1014.

Additional servitude, see chapter 34, *Franchises post*.

50. *Portland v. Whittle*, 3 Ore. 126.

51. *Burlington Gas Light Co. v. Burlington, C. R. & N. R. Co.*, 91 Iowa 470, 59 N. W. 292.

52. *Price v. Thompson*, 48 Mo. 361; *Cady v. Conger*, 19 N. Y. 256.

Where land is dedicated as a common, never to be obstructed by any building, municipal authorities may enclose the land and improve it for a public park. *Langley v. Gallipolis*, 2 Ohio St. 107.

Misuser of a common is not shown by evidence of a transfer railway track on it, and the use of the ground by the public for the exchange of merchandise. *Goode v. St. Louis*, 113 Mo. 257, 20 S. W. 1048.

Laying out of a public highway through a common is not inconsistent with the dedication of land for a common to use as a training field. *Re Wellington*, 16 Pick. (Mass.) 87, 26 Am. Dec. 631.

Where a common was dedicated,

"for the common use of the inhabitants of Boston as a training field and cow pasture," it was held that the legislature had authority to authorize the construction of a railroad subway under part of the common, on the theory that the occupation above the surface for all proper purposes, will be changed hardly perceptibly, if at all, and the increase of facilities for approaching the common will be a convenience to the public in the use and enjoyment of it. *Codman v. Crocker*, 203 Mass. 146, 89 N. E. 177.

Under particular statute a municipality held not entitled to grant to a railroad company the right to occupy a public common with an elevated railroad structure. *Louisville & N. R. Co. v. Cincinnati*, 76 Ohio St. 481, 81 N. E. 983.

Wharves. On the other hand, if a common abuts on a navigable river, the municipality may build wharves thereon. *Newport v. Taylor's Ex'rs*, 55 Ky. 699.

53. *Warren v. Lyon*, 22 Iowa 351; *Campbell County Court v. Newport*, 51 Ky. 538.

Public squares. "The ordinary

to be operated over a public square,⁵⁴ although it has been held that a road may be created over property dedicated for a county seat, public square, since not inconsistent with its use as a county seat.⁵⁵ As to whether public buildings may be erected on a square, there are

and most frequent uses (of public squares), as enumerated by Justice Rogers in *Rung v. Shoneberger*, 2 Watts. 23, 26 Am. Dec. 95, are as 'sites for the erection of buildings for the use of the public, such as court houses, market houses, school houses, and churches; sometimes they are designed as ornaments, and at others for the promotion of the health of the inhabitants by admitting a free circulation of air.' To these might be added, especially in the earlier dedications, commons for pasture, public pounds for stray animals, even, under some conditions, common dumping grounds, or, as in the present case, common landing places for those using the river." *Commonwealth ex rel. v. Connellsville*, 201 Pa. 154, 50 Atl. 825.

"But the use and beneficial purposes of a public square, or common, in a village or city, where no special limitation or use is prescribed by the terms of the dedication, are entirely different from those of a public highway. Such a place, thus dedicated to the public, may be improved or ornamented for pleasure grounds and amusements for recreation and health; or it may be used for the public buildings, and place for the transaction of the public business of the people of the village or city; or it may be used for pur-

poses both of pleasure and business. Any such appropriation may be made under the direction and control of the municipal authorities; but the place must, for the purposes of the dedication remain free and common to the use of all the public; and an appropriation to the purposes of a mere public highway, or to the private and individual use and purposes of any lot owner or particular class of lot owners in the village or city, of ground dedicated as that in question, would be inconsistent with the objects of the dedication, and a plain diversion from its appropriate and legitimate uses." *Langley v. Gallipolis*, 2 Ohio St. 107.

Bridge approaches. The occupation of a public square in a city by the approach to a bridge is not consistent with the use of the property for the purposes of a public square. *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716.

Hitching posts. Where a square had always been used for county buildings and hitching posts, the municipality may be restrained from removing the latter. *Fredrick County v. Winchester*, 84 Va. 467, 4 S. E. 844.

54. *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540.

55. *Green County v. Huff*, 91 Ind. 333.

good reasons for the decisions holding in the affirmative,⁵⁶ although there is considerable authority to the contrary, depending to some extent, however, in a majority of the cases, on particular circumstances.⁵⁷

It would seem that it is not a mis-use of a dedicated

56. Public buildings on squares. "The title to spaces left open by the original plans of towns, or by subsequent general dedication for similar purposes, is in the common-wealth, for the benefit of the whole public, and the uniform course of decision has been that central squares in the laying-out of towns were meant as much, perhaps primarily more, for public buildings than to secure space, and therefore the commonwealth may authorize their occupation in that manner without altering their original use." *Mahon v. Luzerne County*, 197 Pa. 1, 46 Atl. 894.

Where land is dedicated for a public square, "for the purpose of containing the court house," but on the back of the plat the dedicator quitclaimed the property to the county for public uses, the county could erect a school house on the land. *Reid v. Board of Education*, 73 Mo. 295.

Where a square was dedicated as a public place for the enjoyment of the community in general, it has been held that a municipality may nevertheless erect a public library thereon, on the theory that it is in aid of the enjoyment of the park by the public, but such building can be used only for strictly library purposes and hence cannot provide a room for a meeting place for the board

of education. *Spires v. Los Angeles*, 150 Cal. 64, 87 Pac. 1026.

57. Fessler v. Union, 68 N. J. Eq. 657, 60 Atl. 1134, aff'g 67 N. J. Eq. 14, 56 Atl. 272.

Public buildings cannot be erected on an open square dedicated for a pleasure ground. *Fessler v. Union*, 68 N. J. Eq. 657, 60 Atl. 1134, affirming 67 N. J. Eq. 14, 56 Atl. 272.

Town hall. A municipality cannot lawfully erect a town hall on a square. *Princeville v. Auten*, 77 Ill. 325.

Jail. Where land is dedicated for a court house site, a jail can not be erected thereon. *Harris County v. Taylor*, 58 Tex. 690.

City hall. A city hall with a jail in the basement cannot be built on land dedicated for public square to be used "for ornamental purposes and not otherwise." *Church v. Portland*, 18 Ore. 73, 22 Pac. 528, 6 L. R. A. 259.

County court house. So where property is dedicated as a square and reserved by the dedicator for public buildings and park purposes, and a city accepted the dedication, a county court house cannot be erected thereon since the words "public buildings" refer to public buildings of the city rather than those of the county. *McIntyre v. El Paso County*, 15 Colo. App. 78, 61 Pac. 237.

square to enclose it, with gates at frequent intervals.⁵⁸ So where a *park* has been dedicated for a particular purpose, the municipality having it in charge cannot divert it from that purpose,⁵⁹ and a portion thereof cannot be used for a public highway.⁶⁰ So ordinarily a municipality cannot erect public buildings on land dedicated for a park.⁶¹ On the contrary a portion of a public park has been held properly used by the state as a part of its capitol grounds.⁶² And it has also been held that an area within a mile track in a park may be used for agricultural purposes.⁶²

So land dedicated solely for a *public market*, cannot be used for a public street.⁶⁴ Likewise, land dedicated for a *levee* cannot be used for inconsistent purposes,⁶⁵

58. *State v. Charleston Neck*, 3 Hill, Law (S. C.) 149.

59. *Ward v. Field Museum of Natural History*, 241 Ill. 496, 89 N. E. 731; *Riverside v. MacLain*, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164.

§ 1155 *ante*, vol. 3.

The act of an individual in fencing and planting trees on land dedicated for a park does not interfere with the purposes of the dedication. *Burnet v. Bagg*, 67 Barb. (N. Y.) 154.

60. *Riverside v. MacLain*, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164; *Price v. Thompson*, 48 Mo. 361.

61. School house cannot be erected on land dedicated for park. *Rowzee v. Pierce*, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402, 65 Am. St. Rep. 625.

County court house cannot be built in park. § 1155, note 25, *ante*, vol. 3.

62. *Hartford v. Maslen*, 76 Conn. 599, 57 Atl. 740.

63. *Huff v. Macon*, 117 Ga. 428, 43 S. E. 708.

64. *Voinche v. Marksville*, 124 La. 712, 50 So. 662.

Market. Where ground was designated "market" on a plat, erection of building thereon for market purposes was within the purpose of the dedication. *Seguin v. Ireland*, 58 Tex. 183.

65. Levee. Erecting warehouse on land dedicated as a levee is not a mis-use. *St. Paul v. Chicago, M. & St. Paul R. Co.*, 63 Minn. 330, 68 N. W. 458.

Land dedicated for a levee may be used as a street where several streets open upon it and many lots have no other means of ingress and egress. *McAlpine v. Chicago Great Western R. Co.*, 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85.

So it has been held that portions of land dedicated for a public landing may be leased to individuals for private purposes when not needed by the public.

nor can land dedicated for a *graveyard*.⁶⁶

§ 1607. Same—sale or lease of property dedicated.

The power to sell property belonging to a municipality has already been considered in its general application.⁶⁷ In so far as dedicated property is concerned, it is well settled that it cannot be sold,⁶⁸ notwithstand-

Union R. Co. v. Chickasaw Coöperage Co., 116 Tenn. 594, 95 S. W. 171.

Where land is dedicated for levee purposes only, a municipality may grant a railroad the right to use it with its tracks for the mere passage of trains over it, when all danger of interference by obstructing the passage of teams to and from the boats discharging freight and passengers is obviated by forbidding switching and blocking the landing with cars. *State ex rel. v. Dreyer*, 229 Mo. 201, 129 S. W. 904.

66. In *Campbell v. Kansas City*, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593, a square was marked "donated for graveyard" on an original plat filed with the recorder of titles by one of the proprietors of the town site, who subsequently used the plat at a public sale of lots. From this fact and the acquiescence of the other proprietors in the plat and the use of the square for interments a dedication was inferred. This dedication was held to have been abandoned by the action of the municipality in passing an ordinance vacating the land for graveyard purposes and changing it into a park with the

acquiescence of the public. It was further held that the land thereupon reverted to the donor who might recover in ejectment against the municipality.

It is immaterial that a valuable consideration was paid for the grant. *Reed v. Stouffer*, 56 Md. 236.

Opening road through burying ground and use of road for a number of years does not of itself affect the dedication, *Hunter v. Sandy Hill*, 6 Hill (N. Y.) 407.

Changing burial ground to school site, see *Pott v. School Directors*, 42 St. 132.

Ordinances prohibiting further interments does not constitute abandonment. *Kansas City v. Scarritt*, 169 Mo. 471, 69 S. W. 283.

67. § 1141 *et seq.*, *ante*, vol. 3.

68. Trustees of Methodist Episcopal Church v. Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; *Alton v. Illinois Transportation Co.*, 12 Ill. 33, 52 Am. Dec. 479; *Augusta v. Perkins*, 3 B. Mon. (42 Ky.) 437; *Covington v. McNichle*, 18 B. Mon. (57 Ky.) 262; *Commonwealth v. Rush*, 14 Pa. St. 186.

Square or plaza cannot be sold. *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130; *Sau An*

ing the proceeds are to be used for the purpose for which the dedication was made,⁶⁹ at least if not authorized by statute.⁷⁰

Furthermore if land is dedicated for a particular purpose but is subsequently rendered unsuitable for such purpose, it has been held that a municipality cannot sell the property nor can a court of equity execute the trust *cy pres* by transferring it to the proceeds of the sale.⁷¹

A municipality cannot *lease* any portion of a street or square to be used for a purpose destructive of the ends for which the property was originally dedicated.⁷²

§ 1608. Same—power of legislature to authorize diversion or sale.

The general rule undoubtedly is that the legislature itself does not possess the power to authorize property dedicated for a particular purpose to be used for a purpose inconsistent with the purpose for which it was dedicated, unless in the exercise of the power of eminent domain,⁷³ and that it has no authority, in such a case, to

tonio v. Lewis, 15 Texas 388;
Pomeroy v. Mills, 3 Vt. 279, 23
Am. Dec. 207.

Plaza designated as part of
street in statutory dedication,
right to sell. *Amador County v.*
Gilbert, 133 Cal. 51, 65 Pac. 130.

69. *Commonwealth v. Rush*,
14 Pa. St. 186.

County cannot sell land dedi-
cated for court house, notwith-
standing it is intended to use the
proceeds for the erection of a
court house. *Franklin County*
Com'rs v. Lathrop, 9 Kan. 453.

Court house square. Where a
block is dedicated for a court
house square, it cannot be sold
and the proceeds applied to the
erection of a court house. *Elder*
v. Franklin County, 42 Kan. 652,
22 Pac. 1152.

70. § 1608 *post*.

71. *Van Wert Board of Edu-*
cation v. Van Wert, 18 Ohio St.
221.

72. *Cooper v. Alden*, Har.
(Mich.) 72.

§ 1145 *ante*, vol. 3.

73. *Chicago v. Ward*, 169 Ill.
392, 48 N. E. 927, 38 L. R. A. 849,
61 Am. St. Rep. 185; *Louisville &*
N. R. Co. v. Cincinnati, 76 Ohio
St. 481, 81 N. E. 983; *St. Paul v.*
Chicago, M. & St. Paul R. Co., 63
Minn. 330, 68 N. W. 458.

Compare *New Orleans v. Hop-*
kins, 13 La. 333.

In Illinois, it is said that the
settled law of this state is that if
the owner of private property of-
fers to donate it to the public for
a specified public use, and the
offer is accepted, and the property

authorize a sale of the property.⁷⁴ And statutes authorizing a sale by a municipality of land held for public use, when not needed for such use have been held not to apply to property dedicated by the owner to the public.⁷⁵

As to the power to authorize a sale of dedicated property, however, there are some decisions at least tending to support a contrary rule.⁷⁶

devoted to such use, the state cannot change the use and apply the property to some other use inconsistent with the dedication. *South Park Commissioners v. Montgomery, Ward & Co.*, 248 Ill. 299, 93 N. E. 910, 913.

"In *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540, this court said: 'A dedication must always be construed with reference to the object with which it was made. * * * The power of the legislature to repeal the charters of municipal corporations cannot be extended to the right to divert property given to the public for one use to a wholly different and inconsistent use. The power cannot exist to divert property from the purpose for which it was donated. This plat was a solemn dedication of the ground to the corporation, to be held in trust for the use of the public. The donation was made for a certain specific and defined purpose. * * * It must be preserved, or the land must revert to the original proprietors.'" *Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185.

But if one records a plat of a town with public grounds marked thereon, but the town does not incorporate, the legislature may

direct what public use shall be made of the land marked "*public grounds*." *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25.

Public square. Dedication of public square cannot be altered or extended by legislature as against abutting owner. *Fessler v. Union*, 68 N. J. Eq. 657, 60 Atl. 1134, *aff'd* 67 N. J. Eq. 14, 56 Atl. 272.

74. *Warren v. Lyons City*, 22 Iowa 351, 356; *Franklin County Com'rs v. Lathrop*, 9 Kan. 453, 463. § 1143 *ante*, vol. 3.

75. *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130.

76. In California, it has been held that a board of education authorized by charter to lease property not required for school purposes may lease land held by them pursuant to a dedication for public school purposes, by authority of the legislature, indicated by its approval by statute of the charter provision authorizing the lease. "It is also true that when dedicated land is situated within a municipality, but is set aside and reserved by the state for certain purposes, the municipality has no authority to divert the property from such purposes. But the right of the state to do so, on the other hand is unlimited

§ 1609. Same—change of use by consent.

That the dedicator and dedicatee may change the purposes of the dedication has been recognized,⁷⁷ but it would seem that if the interests of third persons have intervened and they would be injured by the change, their consent is also necessary.⁷⁸

§ 1610. What constitutes abandonment.

Strictly speaking, there can be no abandonment of a dedication before it is completed. In other words, if acceptance is necessary to complete the dedication, and there has been no acceptance, the right to accept may be lost by long delay, connected with other circumstances, or the right to accept may be lost by a revocation of the offer to dedicate, and hence the only abandonment which may be said to exist is an abandonment of the right to accept the offer to dedicate.⁷⁹

After a dedication is complete, an abandonment does not result from mere nonuser,⁸⁰ unless a statute so pro-

unless there are contract restrictions or private rights of an abutting owner or other person involved." *Mahoney v. Board of Education*, 12 Cal. App. 293, 107 Pac. 584.

In Indiana, land was conveyed to a city for a public park, with a provision for a reversion in case the land was used for other than park purposes. Thereafter, the municipality made an exchange of the park with the successor of the dedicator, for other property for a park, and the old park was deeded to said successor. A statute, in existence at the time of the original conveyance, provided for the sale of any public square or landing, on a majority petition of the electors, the money to be expended in the purchase of other squares or landings. It

was held that the park lot was transferred to the city with knowledge of the statute, and that statute violated no constitutional rights of abutting owners. *East Chicago Co. v East Chicago*, 171 Ind. 654, 87 N. E. 17.

77. *Pott v. School Directors*, 42 Pa. St. 132, 141.

78. *Bayard v. Hargrove*, 45 Ga. 342, 351 (purchasers of lots with reference to a plat are parties to the transaction and must, it seems, consent); *Kansas City Board of Education v. Kansas City*, 62 Kan. 374, 63 Pac. 600; *Besser v. Hawthorne*, 3 Ore. 129.

79. See *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

80. *California. Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

vides,⁸¹ or from misuser,⁸² but only from the fact that "the sole uses to which the property has been dedicated become impossible of execution."⁸³

Applying these rules to streets and alleys, it is held that the municipality has a discretion as to the time for opening them and that they are not required to act forthwith.⁸⁴ On the other hand, if the nonuser is accompanied by user by the dedicator or by third persons, inconsistent with the public use, the nonuser may show

Iowa. Chicago, R. I. & P. Ry. v. Council Bluffs, 109 Iowa 425, 80 N. W. 564.

Maryland. Flershein v. Baltimore, 85 Md. 489, 36 Atl. 1098; Richardson v. Davis, 91 Md. 390, 46 Atl. 964.

Pennsylvania. Pittsburg v. Eppling-Carpenter Co., 194 Pa. St. 318, 45 Atl. 129.

Tennessee. Hardy v. Memphis, 57 Tenn. 127.

Texas. Oswald v. Grenet, 22 Tex. 94.

United States. Coffin v. Portland, 27 Fed. 412 (levee).

Nonuser of land under tide water dedicated to city for a highway is not an abandonment. *Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547.

Landings. Land dedicated for a landing cannot be built on by third persons though it was not at the time used for a landing. *Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

Square. Where a square is dedicated, the fact that it has been vacant for many years does not show an abandonment. *Wilgus v. Miami County Com'rs*, 54 Kan. 605, 38 Pac. 787.

Non-user for less than twenty years is insufficient to divest the

rights of the public. *Covington v. McNichle*, 18 B. Mon. (57 Ky.) 262; *State v. Young*, 27 Mo. 259.

Abandonment by the public will not be presumed from non-user for a less period of time than that necessary to raise a presumption of a grant. *Wilder v. St. Paul*, 12 Minn. 192; *Briel v. Natchez*, 48 Miss. 423; *Crump v. Mims*, 64 N. C. 767, holding that obstruction or non-user must continue for twenty years.

Market building. Where land was dedicated for a market, failure for seventy years to erect a market building does not deprive the municipality of the right as against abutting land owners. *Fenton v. Cheseldine*, 11 Ohio Dec. 649, 28 Wkly. Law Bul. 223.

81. § 1611 *post*.

82. *Parker v. St. Paul*, 47 Minn. 317, 50 N. W. 247.

83. *Van Wert Board of Education v. Edson*, 18 Ohio St. 221, 226.

84. *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759.

See also *Giffin v. Olathe*, 44 Kan. 342, 24 Pac. 470; *Spencer v. Peterson*, 41 Ore. 257, 68 Pac. 519.

After acceptance of dedication,

an abandonment.⁸⁵ So if there is not only nonuser but also a showing that the property cannot be used for the

lapse of time in opening street does not constitute abandonment. *Paragould v. Lawson*, 88 Ark. 478, 115 S. W. 379; *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883; *Downend v. Kansas City*, 71 Mo. App. 529; *South Amboy v. N. Y. & L. B. R. Co.*, 66 N. J. L. 623, 50 Atl. 368; *Dallas v. Gibbs*, 27 Tex. Civ. App. 275, 65 S. W. 81; *Sowadzki v. Salt Lake County*, 36 Utah 127, 104 Pac. 111.

Mere nonuser of street for any length of time does not constitute an abandonment, at least not until it is required for actual public use. *Parker v. St. Paul*, 47 Minn. 317, 50 N. W. 247; *Lins v. Swefeld*, 126 Wis. 610, 105 N. W. 917.

Failure to open street for twenty three years held not to show an abandonment. *Thonney v. Rice*, 43 Wash. 708, 86 Pac. 713.

Question of fact. Whether delay in opening dedicated street operates as an abandonment by non-user is question of fact. *Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417.

Temporary interruption of use of street by outside cause such as washing away of a portion is not an abandonment. *Holmes v. Cleveland, C. & C. R. Co.*, 93 Fed. 100.

Length of non-user. Where a street is dedicated to the public, public right is not lost, in Rhode Island, by non-user, however long continued. *Horgan v. Jamestown*, 32 R. I. 528, 80 Atl. 271.

85. See *Kelsoe v. Oglethorpe*, 120 Ga. 951, 954, 48 S. E. 366, 102 Am. St. Rep. 138.

The conduct of a municipality in sanctioning the permanent occupation of land dedicated for a public square by the approach to a bridge constitutes an abandonment of the easement vested in the municipality by reason of the dedication. *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716.

Where land is dedicated for a street but remains in the possession of the dedicator who thereafter occupies it adversely through the municipality for more than twenty years, without objection from the municipality, there is such an abandonment or non-user of the land as to bar a recovery thereof by the municipality notwithstanding the dedication was accepted. *Carlinville v. Castle*, 177 Ill. 105, 52 N. E. 383, 69 Am. St. Rep. 212; *Peoria v. Johnston*, 56 Ill. 45.

"Mere non-user of an easement, for twenty years, will afford a presumption of a release or extinguishment, but not a very strong one, in a case unaided by circumstances; but if there has been, in the meantime, some act done by the owner of the land charged with the easement inconsistent with or adverse to the existence of the right, a release or extinguishment of the right will be presumed." 3 Kent, Comm. 448, quoted with approval in *Auburn*

purposes for which dedicated, an abandonment results.⁸⁶

And a municipality may relinquish its control over property dedicated to it for public use by an abandonment thereof, and this is so notwithstanding prescription does not run against a municipality as to land granted to it for the use of the public.⁸⁷

v. Goodwin, 128 Ill. 57, 21 N. E. 212.

86. The question of abandonment "is one of fact, and may be said to occur where the object of the use for which the property is dedicated wholly fails." *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

"The right of the public being a mere easement, the owner of the fee may resume possession whenever there has been a full and lawful abandonment of the use for which the dedication was made. The estoppel ceases to operate when the use ceases. 'The dedication,' as forcibly put by the circuit judge, 'has spent its force' whenever the use becomes impossible. This is the well settled rule concerning public roads, streets, and alleys, when the fee remains in the owner of land over which a public road has been established. *Barclay v. Howell's Lessee*, 6 Pet. 498, 18 L. Ed. 477." *Mahoning County v. Young*, 59 Fed. 96, 8 C. C. A. 27.

Where a landing on a river was dedicated for the loading of flat boats, but after use for a number of years the landing was washed away by a change in the river, and thereafter the landing was restored by the river again changing, but the commerce on the river

had in the meantime ceased, there was such an abandonment as would work a reversion. *Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869.

Where a company caused a map to be made of their land subsequently embraced within the corporate limits of a town and designated certain streets and alleys thereon, but the municipality did not open and maintain the streets, and both the company and the municipality rented streets for agricultural and other purposes, there is an abandonment of the dedication. *Glasgow v. Mathews*, 106 Va. 14, 54 S. E. 991.

Reclamation of submerged land. Where land dedicated for a public place was submerged by the waters of a lake after its dedication, its subsequent reclamation by the municipality completely reasserts the title of the municipality. *Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185.

87. *Kelsoe v. Ogleshorpe*, 120 Ga. 951, 48 S. E. 366, 102 Am. St. Rep. 138.

In Ohio, abandonment of land dedicated as a burying ground restores the dedicator to his right of possession without regard to whether the dedication is a common-law or statutory one. *Ma-*

What constitutes an abandonment is generally a question of fact,⁸⁸ but abandonment of part of a street is not an abandonment of the whole.⁸⁹ However, where the officers of a municipality deeded the fee in a street, in which the municipality only had an easement, the conveyance was held an abandonment so as to cause a reversion of the land, notwithstanding the conveyance passed no title.⁹⁰

A change in the form of the corporate government or in the boundaries of the municipality does not affect a dedication, either statutory or common-law.⁹¹

honing County v. Young, 59 Fed. 96, 8 C. C. A. 27.

88. Adopting a map on which a dedicated street is not shown is not an abandonment thereof. *Eureka v. Gates*, 137 Cal. 89, 69 Pac. 850.

Acts of individuals. Property dedicated for a street does not become private property because an individual expends money in beautifying the premises. *Gainesville v. Thomas*, 61 Fla. 538, 54 So. 780.

Abandonment of wharf. Ordinance providing for a wharf master and fixing charges for discharging or taking on cargo at the wharf held not an abandonment of the public user of the wharf. *Palen v. Ocean City*, 72 N. J. L. 15, 62 Atl. 947.

Enclosure of part of highway dedicated to public use and its occupancy under claim of right will not bar rights acquired by dedication. *Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547.

The fact that an owner built fences across a highway and maintained them, and a stable in the enclosed part, for many years,

does not show an abandonment by the public of the right to use the way, where it had continued during all such time to use the way as such. *Nelson v. Randolph*, 222 Ill. 531, 78 N. E. 914.

Burden of proving abandonment is on person asserting it. *Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700, 709.

89. Using only portion of street is not abandonment of balance. *Indianola Light, Ice & Coal Co. v. Montgomery*, 85 Miss. 304, 37 So. 958.

Opening only part of street is not abandonment of the rest of the street. *London & San Francisco Bank v. Oakland*, 90 Fed. 691, 33 C. C. A. 237, aff'g 86 Fed. 30.

Ordinance adopting a part of a public street to be used at once is not abandonment of the rest of the street. *Hoboken Land & Improvement Co. v. Hoboken*, 36 N. J. L. 540.

90. *State v. Taylor*, 107 Tenn. 455, 464, 64 S. W. 766.

91. *Jordan v. Chenoa*, 166 Ill. 530, 47 N. E. 191; *Elliott, Roads and Streets* (3d Ed.), § 127.

See chapters 7 and 8 *ante*, vol. I.

§ 1611. Same—statutory provisions as to failure to open or work streets within specified time.

In many states, statutes provide for a loss of the rights acquired in land for a highway, by failure of the municipality to open or work the highway within a specified number of years.⁹² Some of these statutes are

92. In New York, statute governing cities of the second class and providing that every street not travelled or used as a street for six years, shall cease to be a street, the question as to what constitutes substantial use depends largely upon the location of the street in question, and on the surroundings and necessities of the case. *Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700, 709.

Statutory provision that every dedicated highway which has not been opened and worked, and laid out, within six years of the time of its dedication, shall cease to be a highway, refers only to dedicated highways which do not become actually travelled highways by the general user of the public, and does not refer to dedicated highways which have become such actually traveled highways, and they cannot be made to lose their character of highways by any official neglect of them. *Palmer v. East River Gas. Co.*, 101 N. Y. S. 347, 115 App. Div. 677.

Under a statute providing that a highway shall cease to be such unless "opened and worked" within a certain number of years from the time dedicated, where it is shown that the street has been opened within

such time and used as a street, the burden of proof that it was not "worked" within such time is on the party so claiming. *Mc-Vee v. Watertown*, 92 Hun (N. Y.) 306, 36 N. Y. S. 870.

In Pennsylvania, the statute of 1889 provides that "any street, lane or alley laid out by any person or persons in any village or town plot or plan of lots, on lands owned by such person or persons, in case the same has not been opened to, or used by, the public for twenty-one years next after the laying out of the same shall be and have no force and effect and shall not be opened, without the consent of the owner or owners of the land on which the same has been, or shall be, laid out." The purpose of the act is to relieve land upon which streets have been laid out by the owners, but not opened or used for twenty-one years, from the servitude imposed. *Quicksall v. Philadelphia*, 177 Pa. 301, 35 Atl. 609; *Woodward v. Pittsburg*, 194 Pa. 193, 45 Atl. 91. Furthermore a conveyance of lots by the owner with reference to the plat does not give rise to an implication of a new dedication of the land for streets so as to set running a new limitation of twenty-one years. *Scott v. Donora Southern R. Co.*, 222 Pa. 634, 72

held applicable only to county roads as distinguished from streets,⁹³ while others apply as well to streets. So the provisions in some states are held not applicable to land *dedicated* for a highway,⁹⁴ while the contrary is held in other jurisdictions.⁹⁵

§ 1612. Effect of abandonment or misuser.

The general rule is that lands dedicated to public use do not *revert* to the dedicator because of misuse or non-

Atl. 282; *Cotter v. Philadelphia*, 194 Pa. 496, 45 Atl. 336.

Under statute providing that no street or alley on a plat not opened for twenty-one years after its laying out, shall be opened without the consent of the owner of the land, the twenty-one years begin to run from the time the plat was laid out rather than from the time of its acknowledgment or recordation or sale of lots. See *C. L. Flaccus Glass Co. v. Brackenridge Borough*, 226 Pa. 89, 75 Atl. 36.

The twenty-one year statute in Pennsylvania passed in 1889, is not retroactive. *Osterheldt v. Philadelphia*, 195 Pa. St. 355, 45 Atl. 923.

Washington Boulevard dedicated is not vacated by non-user for five years, under statute of 1909. *Mohr v. Pierce County*, 65 Wash. 370, 118 Pac. 321.

93. See *Sowadzki v. Salt Lake County*, 36 Utah 127, 104 Pac. 111.

§ 1401 *ante*, vol. 3.

Highway or road as including street, § 1284 *ante*, vol. 3.

94. Statute providing for abandonment by failure to use a street applies only to highways laid out or established by methods other

than by dedication. *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108.

Statutory dedication. Statutory provisions that if a county road is unopened for a certain number of years, it is vacated by nonuser has been held not applicable to a street dedicated by the filing of a plat so as to constitute a statutory dedication. *Harden v. Metz*, 62 Kan. 867, 63 Pac. 1126, aff'g ¹⁰ Kan. App. 341, 58 Pac. 281.

95. *Ludlow v. Oswego*, 25 Hun (N. Y.) 260.

Contra, *McMannis v. Butler*, 51 Barb. (N. Y.) 436.

A statutory provision, that a road not used or worked for a period of five years ceases to be a highway, applies to highways created by statutory dedication outside of a municipality as well as to roads established by any other method. *Sowadzki v. Salt Lake County*, 36 Utah 127, 104 Pac. 111.

In Washington, the statute applies to highways created by statutory dedication. *Murphy v. King County*, 45 Wash. 87, 88 Pac. 1115.

use unless use for the dedicated purpose has become impossible or so highly improbable as to be practically impossible.⁹⁶ For example, mere *nonuser* of a street by the public does not authorize the dedicator to resume possession.⁹⁷ And the only remedy for *misuser*, it seems, is by seeking equitable relief to compel a specific execution of the trust by restraining the municipality, or by causing the removal of the obstruction.⁹⁸

96. *McAlpine v. Chicago Great Western R. Co.*, 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85.

Where land dedicated for a particular purpose is used for an entirely different purpose, it reverts to the original owners when the use contemplated in the dedication becomes impossible. *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716.

Misuser does not work reversion. Where land has been dedicated for a particular purpose but is used by the municipality for an entirely different purpose, it does not revert to the original owner. *Williams v. First Presbyterian Society in Cincinnati*, 1 Ohio St. 478; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 8 L. Ed. 477.

Permitting railroads to lay tracks on levee and permitting its use for other unauthorized purposes does not cause a reversion although river commerce has ceased. *McAlpine v. Chicago Great Western R. Co.*, 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85.

Misuser of land dedicated as a common will not work a reversion where its use as a common is not thereby rendered impossible. *Goode v. St. Louis*, 113 Mo. 257, 20 S. W. 1048.

Illustrations of impossibility

of use. Where there is a statutory dedication of land for a court house, and the court house is thereafter located in another place, the property reverts to the dedicator on the theory that the execution of the use is impossible, since while mere delay in the use will not work a reversion, yet in this case it has become impossible from the outset to use the land for the purpose expressed by the donors in the dedication, the county seat being located in another place after the dedication, and the possibility that the block may be used at some time in the future for court house purposes being too remote to be regarded as a substantial basis for the trust to rest upon. *Gaskins v. Williams*, 235 Mo. 563, 139 S. W. 117.

Where an easement is dedicated for the purpose of facilitating commerce on a river by means of transporting freight on flat boats, the right to use land dedicated for a landing for such boats ends with the cessation of commerce on the stream for a longer period of years. *Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869.

97. *Prince v. McCoy*, 40 Iowa 533.

98. *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 507, 8 L. Ed. 477,

However, if land dedicated other than for a street or alley is legally abandoned, it reverts to the dedicator.⁹⁹ But there is no reversion, on an abandonment of the

"The remedy for misuser or wrongful diversion by the city is in equity by injunction, and under similar statute the right to this remedy has been held to be in the city. (*Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540); in the general property owners in the plat (*Price v. Thompson*, 48 Mo. 361); in the owner of a lot abutting on a public square (*Com'rs v. Lathrop*, 9 Kan. 453); in citizens, lot owners, and original dedicators in a class action (*Rowzee v. Pierce*, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402, 65 Am. St. Rep. 625); in one of the original dedicators who also was the owner of lots fronting on the public square (*Warren v. Lyons City*, 22 Iowa 351)." *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 126 N. W. 881.

Injunction. If land, which has been dedicated to a particular purpose is used for an entirely different and inconsistent purpose, equity will interfere by an injunction. *Cooper v. Alden*, Har. (Mich.) 72.

Taxpayer may enjoin purchaser of land dedicated for a park from building thereon. *Davenport v. Buffington*, 1 Ind. Ter. 424, 45 S. W. 128.

99. If an easement is dedicated to a public use it reverts to the grantor on the abandonment of the use for which the easement was granted. *Halley v. Scott County Fiscal Ct.*, 25 Ky.

L. Rep. 1471, 78 S. W. 149.

Park abandoned by city reverts to dedicator. *Rowzee v. Pierce*, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402, 65 Am. St. Rep. 625.

Schools. Where land is dedicated for school purposes it reverts on its abandonment for such purposes. *School District No. 2 of Johnson County v. Hart*, 3 Wyo. 563, 29 Pac. 741.

Cemetery abandoned for burial purposes reverts to dedicator. *Kansas City v. Scarritt*, 169 Mo. 471, 69 S. W. 283; *Tracy v. Bittle*, 213 Mo. 302, 112 S. W. 45, holding that if bodies are not removed the fact that it is otherwise abandoned and no further interments made does not show an abandonment; *Mahoning County Commissioners v. Young*, 59 Fed. 96, 8 C. C. A. 27; *Young v. Mahoning County Commissioners*, 51 Fed. 585.

Where an ordinance and statute prohibited use of lands for burial purposes, title reverted. *Newark v. Watson*, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843.

Change of county seat. If land is dedicated for a county seat and there is no provision for a reversion, in case of a change of the county seat, it has been held that no action for damages lies against the county on changing the county seat. (*Adams v. Logan County*, 11 Ill. 337); but the dedicator retains his rights where the dedication is expressly based on

use of a square, where the dedication thereof was followed by a deed not conveying the property for a specific purpose or time, but which was an absolute conveyance.¹

So far as streets and alleys are concerned, if their use is wholly abandoned by the municipality, they generally revert either to the original dedicator or to the owners of the abutting lots, and usually the reversion is to the abutting owners.² For instance, the title to streets and alleys ordinarily reverts where the municipality goes out of existence or it abandons the use of the property for such purpose.³ So it is the rule in some states that even in case of a statutory dedication, where it is held that the fee passes to the municipality, the fee will revert to the original owner or to the abutting owners.⁴

On the other hand, in some jurisdictions where a statutory plat vests the fee of the street in the munici-

a continuation of the place as a county seat. (*Daniels v. Wilson*, 27 Wis. 492).

Authority to abandon square. The fact that an easement in land dedicated to a municipality for a public square was for the benefit of the public, does not preclude the municipality, as trustee of the easement from destroying the public right by acts of abandonment. *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716.

1. *Prestonburg v. Floyd County*, 23 Ky. L. Rep. 1157, 64 S. W. 907.

2. See *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170; *Robbins v. White*, 52 Fla. 613, 42 So. 841; *Downes v. Dimock & Fink Co.*, 78 N. Y. S. 348, 75 App. Div. 513.

§ 1415 *ante*, vol. 3.

3. *Hunter v. Middletown*, 13 Ill. 50.

An easement held prior to dedication of lands is reinstated after the abandonment of the dedication. *Attorney General v. Morris & E. R. Co.*, 19 N. J. Eq. 386.

4. § 1415 *ante*, vol. 3.

In Ohio, there is a reversion although the dedication is a statutory one. *Mahoning County Commissioners v. Young*, 59 Fed. 96, 8 C. C. A. 27; *Avery v. United States*, 104 Fed. 711, 44 C. C. A. 161.

Colorado. By statute, in Colorado, the title to the part of a street abandoned does not revert to the original grantor but to the abutting owners. *Bothwell v. Denver Union Stockyards Co.*, 39 Colo. 221, 90 Pac. 1127.

pality, the title to the street does not revert on its legal abandonment or vacation.⁵ Likewise the fee which passes by a statutory dedication reverts to the dedicator where the dedication itself provides therefor whenever the street is discontinued by law.⁶ And of course, if the dedication is not accepted, where an acceptance is necessary, the land dedicated reverts.⁷

5. *Lake City v. Fulkerson*, 122 Iowa 569, 98 N. W. 376; *Pettingill v. Devin*, 35 Iowa 344, and see § 1415 *ante*, vol. 3.

6. *Plumer v. Johnston*, 63 Mich. 165, 29 N. W. 687.

If the grant provides for a reversion if the property dedicated is used otherwise than as a street, a forfeiture results if the dedicatee unreasonably delays in stopping an inconsistent use of

such street. What would be a reasonable notice of misuse to enable the dedicatee to protect himself against a reversion depends upon the circumstances of each particular case, where the dedication provides for a reversion in case the property is used other than for a street. *Carpenter v. Graber*, 66 Tex. 465, 1 S. W. 178.

7. *Still v. Griffin*, 27 Ga. 502.

CHAPTER 34.

FRANCHISES; AND HEREIN PUBLIC SERVICE COMPANIES AND PUBLIC UTILITIES—WATER, LIGHT AND TRANSPORTATION.

1. DEFINITION, NATURE AND GENERAL RULES.
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3. POWER TO GRANT OR REFUSE.
4. EXCLUSIVE RIGHTS.
5. PROCEDURE TO OBTAIN.
6. CONTENTS, CONDITIONS, ACCEPTANCE, CONSTRUCTION AND
ASSIGNMENT.
7. DURATION, TERMINATION, REVOCATION AND FORFEITURE.
8. EFFECT OF GRANT, AND RIGHTS AND DUTIES OF GRANTEE.
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 - b. *Police power.*
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12. RATES.
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2. NECESSITY FOR.

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| 1626. Same—curative legislation. | 1632. Propriety of grant of franchise not subject to review. |
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4. EXCLUSIVE RIGHTS.

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| 1633. Power to grant exclusive franchises. | 1635. Construction of franchise as to exclusiveness. |
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8. EFFECT OF GRANT, AND RIGHTS AND DUTIES OF GRANTEE.

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1689. Duty to furnish supply or service.
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9. COMPENSATION TO ABUTTING OWNERS.

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1700. General considerations.
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1717. In general.	1722. Same—liability of municipality for supply or services furnished to it.
1718. Same—power to make contracts.	1723. Same—rescission or modification of contract.
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12. RATES.

a. *General considerations.*

Sec.	Sec.
1725. Limitations on amount.	1730. Payment of cost of meter.
1726. Rates as fixed by contract.	1731. Rates must be definite and certain.
1727. Power to charge meter rates.	1732. Construction of rates in general.
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Sec.	Sec.
1733. Power to contract as to rates as distinguished from power to regulate rates.	1738. Same—power of municipality to make contract as to rates.
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1763. General rules.	1770. Remedies of public service company.
1764. Same—quo warranto.	1771. Same—suits against competitors, attacking their franchises.
1765. Remedies of municipality.	1772. Remedies of patrons.
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1767. Same—injunction in suit by municipality.	1774. Same—injunction.
1768. Same—resisting use of streets by force.	1775. Same—actions for damages.
1769. Same—right of city to restrain public service company from discontinuing the business.	1776. Same—action to recover penalties.
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1. DEFINITION, NATURE AND GENERAL RULES.

§ 1613. Introductory.

This chapter embraces the law relating to *grants to use the streets* to companies, or individuals or partnerships, and includes the rights and duties growing out of grants of the use of streets to water, gas, electric light, heat, power, conduit, telegraph, telephone, commercial railway, street railway, etc., companies which are ordinarily designated as *public service companies*. Such a grant is termed, in this chapter, a *franchise*, although in some jurisdictions a grant by a municipality of the right to use the streets is held to be a *license* and not a franchise.¹

The law relating to franchises to use streets, granted to public service companies, is of great practical importance because of the immense sums invested in public service companies and the intimate connection between the welfare of the inhabitants of the municipality and the enactment of wise statutes and ordinances in relation to the granting to public service companies of franchises to use the streets for water pipes, gas pipes, conduits for wires, telegraph and telephone poles, electric light poles, street car poles, the tracks of commercial railroads and of street railroads, and also the control and regulation of such companies after they have once entered upon the use of the streets by virtue of a franchise.²

1. § 1616 *post*.

2. "Importance of franchise interests. The franchises and public utility fixtures in the streets of New York City are assessed at a little less than \$500,000,000 under the franchise tax law. The public service companies holding these franchises are capitalized at more than \$1,000,000,000. In the United States as a whole, the street railways

alone were in 1907 capitalized at \$3,775,000,000, and their movements in that year were equivalent to the running of one car more than 1,600,000,000 miles. On the average, 20,400,000 paying passengers were carried by the street railways every day of the year. In the year 1900 the capital invested in the business of manufacturing gas was estimated at \$567,000,000, and the total output

"Municipal franchises are the concrete, definite points of contract between large public and large private interests. * * * Franchises have been regarded as special privileges granted by the government to particular individuals or companies to be exploited for private profits. They are coming to be regarded, however, not so much as privileges, but rather as functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control."³

The idea in early days that franchises were of little value has changed, largely because of the phenomenal growth of American cities, so that now, instead of giving away franchises without consideration, the tendency is to protect fully the interests of the municipality, both for the present and the future, and to preserve the right to regulate the operations of the grantee of the franchise, for the protection of the municipality and its inhabitants against the possible greed of the grantee, arising from its having a monopoly.⁴

of coal and water gas in 1907 was about 150 billion cubic feet. Electric light and power companies in 1907 had a total income of more than \$175,000,000. Telephone companies, forming one of the most recent classes of important public service corporations, were capitalized in 1907 at \$815,000,000; and the various telephone systems in the United States furnished facilities for more than eleven billion conversations during that year. Street railways, telephones, telegraphs, gas and electric light and power works, central heating plants, and privately owned water supply systems, involving stupendous investments and rendering necessary and almost limitless service

to the people living in cities, and even in many cases to the inhabitants of the rural districts—all these undertakings are enabled to operate only by virtue of special franchises, granted by governmental authority for the use of the public streets." Wilcox, *Municipal Franchises*, vol. 1, § 1.

3. Wilcox, *Municipal Franchises*, preface.

4. "During the preceding generation, franchises in the streets of our cities were considered of but little or no value and were readily given away to those promising public service benefits. Now they have become of immense value, and the public have become deeply interested in

Formerly, the right to grant franchises to use the streets was to a large extent withheld from municipalities and vested in the legislature which could grant the use of streets without the consent of the municipality and without compensation;⁵ but the tendency of modern legislation is to delegate to the local authorities the exclusive dominion over the streets of the respective municipalities, and the value of local self-government in this respect is self evident,⁶ except perhaps where the public utility is one in which the municipality is only incidentally interested, because only a very small part of its operations are within its boundaries, as in the case of an interstate telegraph company. This *monopoly idea is the basis of nearly all the law relating to franchises and public service companies*; and it has been well observed that many of the difficulties which confront us in the twentieth century are only new forms of those which have troubled every highly organized community called upon to face the fact of monopoly, actual or virtual, in connection with a given calling.⁷ When monopoly appears, regulation, judicial or administrative, is necessary. This is no innovation, but merely an application of common-law principles.

One thing should be kept constantly in mind, and that is that the rules of law governing franchises to use the streets do not depend, except to a very limited extent, on whether the grantee of the franchise is a gas company or a water company or an electric light company or a telegraph or telephone company, or a street railway company, or any other public service company. Moreover in considering this subject, the rights of the public at large, of patrons, of the municipal corporation, of the

having and enjoying the benefits derived therefrom." Re New York Electric Lines Co., 201 N. Y. 321, 94 N. E. 1056.

5. § 1623 *post*.

See §§ 227, 228 *ante*, vol. I; §§ 1310, 1311 *ante*, vol. III.

6. § 71 *ante*, vol. 1, § 228 *ante*, vol. I; § 1311 *ante*, vol. III.

7. See historical introduction to Wyman, Public Service Corporations.

grantee, and of the abutting owners must be ever kept in view as more or less separate and independent. Conflict and confusion, seeming and apparent and real and substantial, abound in the judicial decisions. The precise condition of the law relating to franchises, licenses or privileges to occupy public streets and places and to construct, maintain and operate thereon railroad tracks and cars, water and gas pipes and mains, water and lighting works, and poles, wires and appliances for the transmission and distribution of electricity and electrical power, touching any particular point in a given jurisdiction, can be ascertained only by a patient and intelligent examination and study of the course of judicial decisions in the light of constitutional provisions and legislative enactments.

In connection with the law relating to this subject one who desires general knowledge of municipal franchises as they exist in actual operation in many of the larger cities in this country should consult the interesting and valuable work of Mr. Wilcox, the chief of the Bureau of Franchises of the Public Service Commission for the first district of New York.⁸

The franchises as to which the law is considered in this chapter include those of water, gas, electric light and power, heat, steam, telegraph, telephone, and steam and street railway companies. Most of these companies exercise but one of the named purposes. But as to heat and steam, it is different.

Commercial heating stations have been in continuous and successful operation since about 1877, and in 1902 were in existence in at least one hundred and thirty cities and towns of the United States, but most of them were operated in combination with other public utilities.⁹ The advantages of central steam heating are clearly recognized but inasmuch as such enterprise is usually operated in connection with electric light and power

8. Wilcox, *Municipal Franchises*.

9. Wilcox, *Municipal Franchises*, § 209.

business, the judicial decisions present few rules of law directly relating to heating franchises.¹⁰

§ 1614. Definition and nature.

Under the early English law Blackstone defines a franchise as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject."¹¹ Speaking for the Supreme Court of the United States, after quoting this definition, Mr. Justice Bradley observed: "Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without

10. Company organized to supply electric lights, steam and heat, where given a franchise to use the streets for its pipes, cannot impose a condition that no one who did not use the electricity could have steam. *Seaton Mountain Electric L. & P. Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 111 Pac. 834.

Turnpike is public highway within statute giving to steam heating companies power to lay down their pipes upon any "street, lane, alley or highway." *Berks & Dauphin Turnpike Road*

v. Lebanon Steam Co., 5 Pa. County Ct. Rep. 354.

11. 2 B1. Comm. 37.

Being derived from the Crown, franchises must arise from royal grant, or in some cases may be held by prescription which presupposes a grant. The prerogatives of the Crown embrace the right to take waifs, estrays, wrecks, treasure-trove, royal fish and forfeitures, and all of these are franchises. So the right of forest, chase, park, warren and fishery are franchises since no subject may so apply his property for his own convenience.

legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise."¹²

In American law, a franchise is defined as a special privilege conferred by the government on individuals or corporations and which does not belong to the citizens of a country generally by common right,¹³ and it

12. *California v. Central Pacific R. R. Co.*, 127 U. S. 1, 40, 41, 8 Sup. Ct. 1073, 32 L. Ed. 150.

The word franchise is used with various meanings. In its broad and popular sense it embraces the right of trial by jury, the right to *habeas corpus*, the right to vote at an election, the right to membership in voluntary associations or corporations, the right to hold an office, and perhaps other rights. In its more restricted sense it is, in law, sometimes used to mean an exclusive right held by grant from the sovereign power. The strictly legal signification of the word is not always confined to exclusive rights; but the term is used in law to designate powers and privileges which are not exclusive in their nature. *Chicago and W. I. R. R. Co. v. Dunbar*, 95 Ill. 571.

13. *Rhinehart v. Redfield*, 87 N. Y. S. 789, 93 App. Div. 410,

aff'd in 179 N. Y. 569, 72 N. E. 1150.

In American Law, "franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state." Per Mr. Chief Justice Taney in *Bank of Augusta v. Earle*, 13 Pet. (38 U. S.) 519, 595.

As applied to American law, Blackstone's definition "is not strictly correct; since our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit as well as of individual advantage." 4 *Thomp. Corp.*, § 5335.

is immaterial whether the grant is made direct by the legislature or by a municipality to whom the power is delegated.¹⁴ It need not be granted to a corporation but may be granted to private persons.¹⁵ The term "fran-

Franchise defined.

Arkansas. State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

Connecticut. Bridgeport v. N. Y. & N. H. R. R. Co., 36 Conn. 255, 266.

Illinois. Fliesam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; Chicago & Western Ind. R. R. Co. v. Dunbar, 95 Ill. 571; Chicago Board of Trade v. People ex rel., 91 Ill. 80.

Kansas. State ex rel. v. Western Irrigating Co., 40 Kan. 96, 99, 19 Pac. 349.

Massachusetts. Fay, petitioner, 15 Pick. (Mass.) 243.

Minnesota. State ex rel. v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 225, 41 N. W. 1020.

Nebraska. Abbott v. Omaha Smelting, etc. Co., 4 Neb. 416, 420.

New Hampshire. Pierce v. Emery, 32 N. H. 484, 507.

New York. People ex rel. v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 387.

United States. Railroad Co. v. Georgia, 98 U. S. 359, 365.

The right of eminent domain (Knoup v. Piqua Bank, 1 Ohio St. 603), the right to build on a public highway (Pennsylvania R. Co. v. Philadelphia Belt Line R. Co., 10 Pa. Co. Ct. 625), the right to make a roadway and erect a

bridge (Trustees v. Jessup, 162 N. Y. 122, 56 N. E. 538), the right to construct and lease public market stalls (Maestri v. Board of Assessors, 110 La. 517, 34 So. 658), the right to take toll for a bridge or way (Talcott v. Pine Grove, 23 Fed. Cases 652, 668; Truckee, etc. R. Co. v. Campbell, 44 Cal. 89), the right of fishery (Slingerland v. International Contracting Co., 60 N. Y. S. 12, 43 App. Div. 215), the right to practice law (In re Attorney's Oaths, 20 Johns. (N. Y.) 492), the right to collect wharfage (Flandreau v. Elsworth, 151 N. Y. 473, 45 N. E. 853; Walsh v. New York Floating Dry Dock Co., 77 N. Y. 448), are franchises. A license to keep a saloon has been declared not to be a franchise. Martens v. Rock Island County Atty., 186 Ill. 314, 57 N. E. 871. The right to the use of a name by a corporation as a trademark is not a franchise (Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 137 Ill. 231, 28 N. E. 248), nor is the right to membership in a private corporation, such as the Chicago Board of Trade, a franchise. Board of Trade v. People, 91 Ill. 80, 83.

14. Port of Mobile v. Louisville & N. R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Truckee & T. T. Road Co. v. Campbell, 44 Cal. 89.

15. § 1630 *post*.

chise" includes the term "*privileges*,"¹⁶ but a privilege is not necessarily a franchise.¹⁷

The municipal corporation in granting such privileges acts as the agent of the state. In this relation it represents the state's sovereign power.¹⁸

When granted, a franchise becomes *property* in the legal sense of the word,¹⁹ and is termed an *incorporeal hereditament*, though separate and distinct from the property necessary in its use and exercise.²⁰

16. *Williamette Woolen Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191, 7 Sup. Ct. 187, 30 L. Ed. 384.

17. *McPhee & M. R. Co. v. Union Pacific R. Co.*, 158 Fed. 5, 10.

18. *Alabama. Mobile v. Louisville & N. R. R. Co.*, 84 Ala. 115, 119, 4 So. 106.

Iowa. Des Moines G. Co. v. Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

Missouri. State ex rel. v. East 5th St. Ry. Co., 140 Mo. 539, 550, 41 S. W. 955.

New York. Kittinger v. Buffalo T. Co., 160 N. Y. 377, 54 N. E. 1081.

Wisconsin. State ex rel. v. Milwaukee Co. Sup. Ct., 105 Wis. 651, 674, 81 N. W. 1046.

United States. Hayes v. Mich. Cent. R. Co., 111 U. S. 228; *Transportation Co. v. Chicago*, 99 U. S. 635, 641; *Sioux City St. Ry. v. Sioux City*, 138 U. S. 98, 107.

19. *Board of Liquidation v. New Orleans*, 32 La. Ann. 915.

Franchise is property. "Such a street franchise has been called

by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property." Per Mr. Justice Lamar in *Louisville v. Cumberland Tel. & Tel. Co.* (U. S., decided May 13, 1912), 32 Sup. Ct. 572.

The grantor or owner of a franchise has a property right therein protected by the constitution. *Underground R. R. v. New York*, 116 Fed. 952.

20. *Belington, etc. R. Co. v. Alston, W. Va.* 46 S. E. 612; *Tuckahoe Canal Co. v. Tuckahoe, etc. R. Co.*, 11 Leigh (Va.) 42, 75, 76, 36 Am. Dec. 374; *Horst v. Moses*, 48 Ala. 129, 146; *Enfield Toll Bridge Co. v. Hartford, etc. R. Co.*, 17 Conn. 40, 60, 42 Am. Dec. 716; *Gibbs v. Drew*, 16 Fla. 147, 149, 26 Am. Rep. 700.

Chancellor Kent has said that franchises are classed as incorporeal hereditaments "with some impropriety, as they have no inheritable quality." 3 Kent Com. 459; *State v. Anderson*, 90 Wis. 550, 560, 63 N. W. 746.

§ 1615. Same—corporate franchise distinguished from grant to use streets.

In the strictest sense of the term, a franchise is the right granted by the state, and which cannot be granted by any other body or person, to exist as a corporation.²¹ Such corporate franchises conferring the right to exist as a corporation should be distinguished from franchises to exercise a privilege within a municipality.²²

The term as it is ordinarily used in the decisions and by text writers, and as used in this chapter, means the right granted by the state or a municipality to an existing corporation or to an individual to do certain things

21. *Colorado*. *Iron Silver Min. Co. v. Cowie*, 31 Colo. 450, 72 Pac. 1067; *Londoner v. People*, 15 Colo. 246, 25 Pac. 183.

Connecticut. *State v. Travelers Ins. Co.*, 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138.

Iowa. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081; *Young v. Webster City, etc. R. Co.*, 75 Iowa 140, 39 N. W. 234.

Kansas. *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166.

Ohio. *Knoup v. Piqua Bank*, 1 Ohio St. 603.

Franchise to carry on the business of supplying gas by means of pipes in the streets, as distinguished from consent of municipality to use of streets, see *Ghee v. Northern Union Gas Co.*, 56 N. Y. S. 450, 34 App. Div. 551.

A general franchise of a corporation is its right to live and to do business by the exercise of the corporate powers granted by the state. *People v. State Board*

of Tax Com'rs, 174 N. Y. 417, 67 N. E. 69.

"Corporate franchise" means the right to exist as a corporation. *Adams v. Yazoo & M. D. R. Co.*, 77 Miss. 194, 24 So. 200, 60 L. R. A. 33.

A franchise to be a corporation is not property in the ordinary acceptance of the term. It cannot be transferred by ordinary conveyance, nor by sale under execution, unless the statutes of the state so provide. While corporate franchises are property, they cannot be transferred by voluntary conveyance or by sale under execution against the corporation. *State v. East Fifth St. R. Co.*, 140 Mo. 539, 548, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742.

22. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081; *State v. Farmers' & Mechanics' Savings Bank*, 114 Minn. 95, 130 N. W. 445; *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530.

which a corporation or individual otherwise cannot do.²³ such as the right to use a street or alley for a com-

23. The word "franchises" has various significations, both in a legal and popular sense. The relation in which the term is employed controls its meaning. Speaking generally, a franchise is a special privilege of a public nature conferred by governmental authority upon individuals as such, or artificial personalities usually called corporations, and which privilege did not belong to individuals generally as a matter of common right. It is a generic term embracing all rights granted to corporations by the legislature of the state, or such right as can only be granted by the state in the first instance, which by delegated authority are conferred by the municipal corporation, or other designated public body, acting in such relation as an agency of the state. The right to conduct a business of public utility and use the streets and public ways for this purpose, as, for example, to supply the public with water, light, transportation and other comforts and conveniences in crowded urban centers, is ordinarily required to be conferred by public authority, and this constitutes the giving of a franchise. But the privilege of so providing for the municipal corporation and its inhabitants is not, in the strict sense of the term, a "corporate franchise;" that is (as often pointed out), it is not a privilege derived from or obtained by the act of incorporation. Charter rights and

privileges of a corporation are such only as are derived by virtue of its organization under legislative enactment. They do not include the right to conduct the business above mentioned. McQuillin, Mun. Ord., § 565.

The franchise of taking tolls is distinct from the "corporate franchise." Per Cooley, C. J., in *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 405, 24 Am. Rep. 585.

"The franchise of being a corporation belongs to the corporations, while the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of the corporation." Per Mr. Justice Matthews in *Memphis & Little Rock R. R. Co. v. R. R. Comrs.*, 112 U. S. 609, 619.

"The grant of a franchise presupposes a benefit to the public, and an equal right on the part of every member of such public, within the territory involved, to participate in this benefit upon the same terms and conditions." *Rhinehart v. Redfield*, 87 N. Y. S. 789, 93 App. Div. 410, *aff'd in* 179 N. Y. 569, 72 N. E. 1150.

Grant by town to county of permission to erect bridge on street is not a franchise. *Jackson v. Breathitt County (Ky.)*, 105 S. W. 376.

"There is a marked distinction between a franchise which is essential to the creation and continued existence of a corporation, a right to exist as an artificial

mercial or street railroad track, or to erect thereon poles and string wires for telegraph, telephone, or electric light purposes, or to use the street or alley underneath the surface for water pipes, gas pipes, or other conduits.²⁴

This right to so use the streets or alleys of a municipality is sometimes designated as a *secondary* franchise,²⁵ and sometimes as a *special* franchise,²⁶ although in some jurisdictions the mere grant of such a right is held to be a *license* rather than a franchise.²⁷

being, a right conferred by the sovereignty of the state, and those rights, subsidiary in their nature, by which the corporation obtains privileges of more or less value, to the enjoyment of which corporate existence is not a prerequisite." State ex rel. v. Topeka Water Co., 61 Kan. 547, 60 Pac. 337.

Corporate powers or privileges. While franchises granted by municipal corporations are legislative grants, they are not *corporate powers or privileges* within the meaning of a constitutional provision that no special or private law shall be passed "granting corporate powers or privileges." When granted to a corporation, they become the property of the corporation; but they are not franchises essential to corporate existence, and granted as part of the organic act of incorporation. The phrase, "to grant corporate powers or privileges" is equivalent to the phrase "to grant corporate charters." "A franchise is not essentially corporate, and it is not the grant of a franchise that is prohibited, but of a corporate franchise." Lin-

den Land Co. v. Milwaukee Electric P. & L. Co., 107 Wis. 493, 83 N. W. 851; citing State ex rel. v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697; Atty. Gen. v. Railroad Co.'s, 35 Wis. 425, 560; Black River Imp. Co. v. Holway, 87 Wis. 584, 59 N. W. 126.

24. "Municipal franchises," as used in the statute imposing a franchise tax on certain corporations but providing that it shall not be applicable to any corporation which has not or may not exercise any municipal franchise, means the consent of the municipality to exercise within its limits the franchise granted by the legislature. State ex rel. v. Plainfield Water Supply Co., 67 N. J. L. 357, 52 Atl. 230.

25. Shreveport Traction Co. v. Kansas City, S. & G. R. Co., 119 La. 759, 44 So. 457.

26. People v. State Board of Tax Com'rs, 174 N. Y. 417, 67 N. E. 69.

Statutory definition, as applied to railroads, is the same. New York, L. & W. R. Co. v. Roll, 66 N. Y. S. 748, 32 Misc. Rep. 321.

27. § 1616 *post*.

§ 1616. Same—grant as a license rather than a franchise.

In Illinois and some other jurisdictions, it is held that where a company is incorporated by the state, with power to construct, maintain and operate a public utility in a city, upon the consent of the city, in such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing and operating the same upon a specified street, the grant by the city is a mere license, and not a franchise. "The license granted by the ordinance is no more a franchise than would be a grant of the right of way by a private citizen to the company to construct its road over his land."²⁸ But when the right to use the streets

28. *People v. Chicago Telephone Co.*, 220 Ill. 238, 77 N. E. 245; *East Tennessee Telephone Co. v. Frankfort*, 141 Ky. 588, 133 S. W. 564; *Belington & N. R. Co. v. Alston*, 54 W. Va. 597, 46 S. E. 612; *Chicago City R. Co. v. People ex rel.*, 73 Ill. 541, 548, followed in *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802.

To same effect. *State v. Jacksonville R. Co.*, 29 Fla. 590, 10 So. 590.

Franchise and license distinguished in *McPhee & M. R. Co. v. Union Pacific R. Co.*, 158 Fed. 5, 10.

Grant as a license. The grant of a franchise must be by the legislature—a municipal body cannot confer it. An ordinance granting the right to operate a system of waterworks is a mere license. *Cain v. Wyoming*, 104 Ill. App. 538.

A municipality has no power to grant a franchise. It may grant

a right of way through its streets, but such a right is a license, not a franchise. *Shreveport Tr. Co. v. Kansas City, etc. R. Co.*, 119 La. 759, 44 So. 457.

The right to construct a street railroad is derived from the state and is a franchise; the consent and designation of streets to be occupied is derived from the municipality, and is a license. *Potter v. Calumet Electric St. Ry. Co.*, 158 Fed. 521; *Chicago v. Cobe*, 158 Fed. 521.

Grant as a license discussed. *People ex rel. v. Suburban R. R. Co.*, 178 Ill. 594, 53 N. E. 349; *Quincy v. Bull*, 106 Ill. 337.

"The word franchise is frequently applied (or misapplied) so as to designate a mere license given, for example, by a municipal corporation to a street railway company, or a water supply company, to occupy its public streets for their corporate purpose. * * * But it is essential to the legal idea of a franchise

is granted and accepted and all conditions imposed incident to the right performed, it ceases to be a mere license and becomes a valid contract.²⁹

Grants of this nature are often spoken of as licenses on the theory that a municipal corporation cannot grant a franchise, but can only grant a license, "yet they are franchises in every essential particular as much as though they had been granted directly by the legislature." ³⁰

that it should be a special privilege emanating from sovereign authority." 7 Thomp. Corp., § 8294.

Ordinance granting use of street to electric light company, where right is not exclusive, is a mere license. Crowder v. Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647.

In Colorado, a constitutional provision prohibited the city of Denver from granting any *franchise* relating to any streets, alley or public place without a majority vote of the electors, but the charter adopted pursuant thereto authorized the council to grant a revocable *license* or *permit* at any time to use a street, alley, or public place. It was held that a permission granted a railroad company to construct its track for several blocks on a street, with an express provision that the permission was revocable at any time on repaying the amount required to be paid by the company for paving, was a revocable license rather than a franchise and hence need not be

submitted to a vote of the people. McPhee & McGinnity Co. v. Union Pac. R. Co., 158 Fed. 5, 10.

29. Harvey v. Aurora & Geneva Ry. Co., 186 Ill. 283, 293, 57 N. E. 857; Belleville v. Citizens Ry. Co., 152 Ill. 171, 38 N. E. 584; Chicago Municipal Gas Light Co. v. Lake, 130 Ill. 42, 22 N. E. 616.

Accepted license is a contract. "The privilege to use the public streets of a city or town, when granted by ordinance, is not always a mere license revocable at the pleasure of the municipality granting it, for if the grant is for an adequate consideration, and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a valid and binding contract; and the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust." Peoria Ry. Co. v. Peoria Ry. Terminal Co., 252 Ill. 73, 96 N. E. 689, 692.

30. Thomp. Corp., § 5335.

§ 1617. Same—grant to use streets usually held to be a franchise.

The question as to what constitutes a franchise is of little practical importance, however, in so far as it relates to whether a grant by a municipality to a public service company to use the streets (and this is the subject of this chapter) is a franchise. And inasmuch as this chapter is to deal with only a limited class of what are usually called franchises, it is deemed unnecessary to consider further the definition of a franchise or the classification thereof, except to state that in nearly every jurisdiction, with only a few exceptions, a grant to a public service company of the right to use streets,³¹ for railway tracks,³² gas pipes to supply gas for hire,³³

31. *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 53 N. E. 692; *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

32. *People ex rel. v. Sutter Street R. Co.*, 117 Cal. 604, 49 Pac. 736; *Denver, etc. R. Co. v. Denver City R. Co.*, 2 Colo. 673, 682; *People v. Kerr*, 37 Barb. (N. Y.) 357, 393; *Davis v. New York*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611, 619, 84 Am. Dec. 314; *Olathe v. Missouri & K. Interurban R. Co.*, 78 Kan. 193, 96 Pac. 42.

Constitutionality. The grant of a right to use the streets of a municipal corporation for street railway purposes is not unconstitutional as being a grant of immunity, a mere exemption, but it is the grant of a franchise. *Shreveport Tr. Co. v. Shreveport*, 122 La. 1, 47 So. 40.

Subway. Making of contract by city of New York for construction of a subway does not

grant a franchise so as to require independent approval of mayor. *Admiral Realty Co. v. Gaynor*, 132 N. Y. S. 220.

In Wisconsin, an ordinance granting the right to use streets for railway purposes was held to have the force of a statute of the state, and hence, for a violation of the provisions of such ordinance, an action can be maintained to vacate the charter or annul the existence of such corporation. *State ex rel. v. Madison Street Ry. Co.*, 72 Wis. 612, 40 N. W. 487.

33. *Connecticut. Norwich Gas L. Co. v. Norwich City Gas Co.*, 25 Conn. 19.

Kentucky. Newport v. Newport, etc. Co., 84 Ky. 166, 176.

Massachusetts. Boston v. Richardson, 13 Allen (Mass.) 146, 160.

New Jersey. State (Montgomery) v. Trenton, 36 N. J. L. 79; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242, 248.

water pipes to supply water,³⁴ telegraph or telephone poles,³⁵ electric light poles,³⁶ etc., is a franchise.

An ordinance purporting to grant to a company a franchise to use the streets, where the right to use the streets is conferred by federal or state statutes, is a mere attempt to give what the company already has and it seems that it should not be considered a fran-

Ohio. State v. Cincinnati Gas Co., 18 Ohio St. 262, 291.

United States. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516.

Gas franchise. The passage by a city council of resolutions contemplating and providing for contracts for lighting with gas a certain part of the city confers a franchise. *People v. Littleton*, 96 N. Y. S. 444, 110 App. Div. 728.

Right to lay gas pipes in the public streets, was termed a "local easement," resting only on contract or license. *Maybury v. Mutual Gas Light Co.*, 38 Mich. 154, 156, per Campbell, C. J.

The grant of an exclusive privilege to construct a water or gas plant in a municipality and the right to use the streets for the purpose is the grant of a franchise. *Adams v. Samuel R. Bullock & Co.*, 94 Miss. 27, 47 So. 527.

34. *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493, 529; *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697; *Adams v. Samuel R. Bullock & Co.*, 94 Miss. 27, 47 So. 527, 530.

35. *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315,

"Permission" to erect telephone poles, granted by a city council, and followed by the expenditure of a large sum in erecting a line, constitutes a franchise rather than a mere license revocable at the will of the city. *East Tennessee Telephone Co. v. Frankfort Board of Councilmen*, 190 Fed. 346, 348, refusing to follow on this point the decision of the Kentucky Court of Appeals in recent litigation between the same parties (143 Ky. 86, 136 S. W. 138).

In *South Dakota*, however, municipal consent to construction of telephone system within the limits of the municipality is not a franchise, although such consent is necessary. *Dakota Central Telephone Co. v. Huron*, 165 Fed. 226.

36. *Purnell v. McLane*, 98 Md. 589, 56 Atl. 830.

Contra. Contract, between a municipality and a public service company for lighting the streets for a term of years is not the grant of a franchise. *Des Moines v. Welsbach Street Lighting Co.*, 188 Fed. 906, 909, following *McPhee & McGinnity Co. v. Union Pacific R. Co.*, 158 Fed. 5, 87 C. C. A. 619,

chise;³⁷ but it would seem that if the state grants to a telegraph company, which is protected by the federal statute so as to be entitled to use streets of a municipality, the right to *exclusive* possession of portions of the public highways without compensation, such grant confers rights not acquired by the company under the act of congress and constitutes a franchise.³⁸

The fact that an ordinance is called a franchise, and that it is couched in terms frequently used in granting franchises, is not conclusive as to its character, since if the provisions themselves are simply police regulations, they do not become franchises because they are so called.³⁹

§ 1618. What are "public utilities."

In connection with the law relating to franchises, the term "public utilities" is often used. This term is generally understood to refer to any utility employed in the rendition of *quasi* public service, including steam and street railways,⁴⁰ telegraph and telephones, water works, gas works, electric light plants, etc. However, the term has been given a broader meaning in Oklahoma, in construing a particular constitutional provision, where it is held that a *convention hall* owned by the city is a public utility within the meaning of a constitutional provision requiring a vote of the people before incurring indebtedness above the constitutional limit for the purchase or construction of a "public

37. *Western Union Tel. Co. v. Wisalia*, 149 Cal. 744, 87 Pac. 1023; *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

38. *Western Union Telegraph Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557.

39. *State ex rel. v. Milwaukee, B. & L. G. R. Co.*, 116 Wis. 142, 92 N. W. 546.

40. The term "public utility"

"is certainly broad enough to include a street railway; is one that would ordinarily be understood as including any such utility as is employed in the rendition of *quasi* public service, such as water works, gas works, a telephone system, street railroads, etc." *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 304.

utility" or for repairing it,⁴¹ and also that a *public park* owned by the municipality is a public utility within such provision,⁴² as are *public fire stations* and street cleaning equipment and machinery,⁴³ but that *street improvements* are not public utilities.⁴⁴

In some jurisdictions, the term "public utility" is defined by statute.⁴⁵

§ 1619. Control over by state commissions.

In a considerable number of states, statutes have established state boards, generally known as public service commissions, which to some extent take out of the control of municipalities the regulation of public service companies.⁴⁶

41. *State v. Barnes*, 22 Okla. 191, 97 Pac. 997.

42. *Ardmore v. State*, 24 Okla. 862, 104 Pac. 913.

43. *Oklahoma City v. State*, 28 Okla. 780, 115 Pac. 1108.

44. *Coleman v. Frame*, 26 Okla. 193, 109 Pac. 928, 31 L. R. A. (N. S.) 556; *Hooper v. State*, 26 Okla. 646, 110 Pac. 912; *Dingman v. Sapulpa*, 27 Okla. 116, 111 Pac. 319.

45. In New Jersey, the term "public utility" is defined to include every individual, co-partnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control within the state of New Jersey any steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by the state of New Jer-

sey or by any political subdivision thereof. Public Laws (N. J., 1911), c. 195.

In Wisconsin, a public utility is defined as "every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every town, village or city that now or hereafter may own, operate, manage or control any plant or equipment, or any part of a plant or equipment within the state for the conveyance of *telephone* messages or for the production, transmission, delivery or furnishing of *heat, light, water or power*, either directly or indirectly, to or for the public;" and it is held thereunder that the furnishing of heat, light and power by the owner of an office building to the tenants of the building does not make the operation of the plant a public utility. *Cawker v. Meyer*, 147 Wis. 320, 133 N. W. 157.

46. Fourteen states with utility commissioners over function of supplying gas, electric, trans-

In those states which have a public service commission established to promote uniformity and consistency in authoritative directions to be given public service corporations, and to constitute a tribunal trained to consider and determine controversies and problems relating to such corporations and to direct and supervise their relations to and dealings with the public as their patrons, the orders of such commission cannot be disregarded and set at naught by inconsistent ordinances of

portation, telephone and water service. Five years ago there were only two states with such commissions. Now twenty-seven states have commissions exercising control of varied degree over one or more classes of utilities.

Supervision of local utilities by state commissions, see Wilcox, *Municipal Franchises*, §§ 520-530.

In Mississippi, the railroad commission has charge of telegraph and telephone companies as well as other common carriers. *Cumberland Telephone & Telegraph Co. v. State ex rel.* (Miss., 1911), 54 So. 446.

In Massachusetts, the board of gas and electric light commissioners are given supervision and control over all companies furnishing gas or electricity to the public for lighting; and the state has taken complete control of these corporations so far as is necessary to prevent the abuses of monopoly. *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556, 84 N. E. 101.

In New Jersey, a recent statute creates a board of public utility commissioners and prescribes its duties and powers in detail. Pub-

lic Laws (N. J., 1911), c. 195, amending earlier statute.

In Washington, authority of the public service commission was by the legislature of 1911 extended so as to include within its reach all public service corporations. *State ex rel. v. Superior Court of King County* (Wash., 1912), 120 Pac. 861.

In Virginia, state corporation commission held to have no jurisdiction of controversy between water company caused by one occupying with its mains the streets already occupied by the other. *Newport News Light & Water Co. v. Peninsular Pure Water Co.*, 107 Va. 700, 59 S. E. 1099.

Issuance of bonds. Under many of the public service commission statutes the commission is empowered to pass on the issuance of corporate bonds and mortgages by the company in order to protect the public from the improper issuance for purposes other than proper corporate purposes. See *People ex rel. v. Stevens*, 203 N. Y. 7, 96 N. E. 114, rev'g 128 N. Y. S. 440; *People ex rel. v. Public Service Commission*, 122 N. Y. S. 641, 137 App. Div. 810,

a municipality.⁴⁷ The prominent features of such statute are the following:⁴⁸ Single control by railroad

47. *Troy v. United Traction Co.*, 202 N. Y. 333, 95 N. E. 759, holding that where frequency of street car service was regulated by state public service commission, a city had no power to require a more frequent service.

In the conception of some, one of the most advanced of the statutes, and by a few regarded as a model, is the Wisconsin statute of 1907, the workings of which so far seem to have been highly successful. See *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

48. The essentials of "public utility" to acquire an indeterminate permit for an old privilege, are referable to section 1797m1 of the Statutes; that of corporate status is satisfied by corporate existence *de jure* or *de facto*, referable to Wisconsin written law; that of existing privilege, by ownership of any right from the municipality, whether resting in grant, permit, license, or franchise in the technical sense, either being a statutory franchise; and that of operating under the privilege in *praesenti*; services offered and affordable, and willingness and ability in that regard, except for reasonable and excusable cessations not involving any purpose to abandon. *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

Want of corporate power referable to defect in organization and not militating against existence *de facto*, or referable to limitations

of corporate purpose specified in the organic articles, which under ordinary circumstances are only subject to be inquired into by the state, directly, does not affect capacity to acquire an indeterminate permit. *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

The general grant of power under the circumstances specified in section 1797m77 of the Statutes, to acquire an indeterminate permit, by necessary implication was intended to enlarge, if necessary, corporate powers, enabling the organization to legitimately deal with the state in the exchange of equivalents — to surrender its rights, whatever they may be, and take and enjoy the one offered in lieu thereof. *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

In *La Crosse v. La Crosse Gas & Electric Company*, 145 Wis. 408, 130 N. W. 530, it was held, that the evident intention of the legislature, expressed in unambiguous language, when read in the light of the situation dealt with, was that by treaty with the owner of existing franchises, to displace the old situation, in its entirety, with all its complications, the growth of years, and we may add, with all its bitter controversies, the like of which is pictured in this case, and to substitute a new situation, all looking to unity, in practical effect, of a multitude of diverse units corresponding to the many outstanding franchises, and others

commission; *all* public utilities within the statute; franchise *perpetual*, subject to the conditions and limitations of the statute—indeterminate as it is said; franchise subject only to the *conditions* in the statute, *i. e.*, freedom from all conditions, reservations and limitations theretofore prescribed or imposed by the municipality as a state agency, but subject to the conditions and limitations of the public utility law;⁴⁹ exclusive rights;⁵⁰ the right of the municipality to take over the property by purchase upon “terms and conditions determined by the commission;” *municipal competition* forbidden except as prescribed by statute;⁵¹ *charges* required to be “reasonable and just;”

in prospect, harmonizing them by making them referable to a single standard, to wit, the public utility law, and to an ultimate single control to wit, control by the trained impartial state commission, so as to effect the one supreme purpose, *i. e.*, “the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit—a condition as near the ideal probably as could be attained.”

49. Calumet Service Co. v. Chilton, 148 Wis. 334, 135 N. W. 131.

50. In other words, the idea is that the grantee, under state control, and subject to prescribed limitations and supervision, *shall have a “monopoly,”* as it has been several times called by the railroad commission, in its administrative work, and by this court, within the field covered by the privilege, as to rendering the particular public utility service, whether directly or indirectly, to

or for the public. We should say, in passing, that the term “monopoly” as thus used is to be taken in the sense of a mere exclusive privilege granted for a consideration equivalent; monopoly only in the sense that the field of activity is reserved to the grantee—the mere element of exclusiveness. Calumet Service Co. v. Chilton, 148 Wis. 334, 135 N. W. 131.

51. Section 1797m79, provides four distinct methods by which a municipality may become the owner of a public utility plant and conduct public utility business: First, by constructing a plant; second, by purchasing an existing plant by agreement; third, by condemnation of an existing plant whether operating under a public privilege or not; fourth, by purchase of an existing plant through the Commission as provided in the act. In each case the power is granted “subject to the provisions of this act.” Such provisions, in all cases of the existence of a privately owned plant, require a per-

ample power as regards *police regulations* reserved to the municipality; franchise *assignable*,⁵² etc. Subject to the special right reserved to the city, not having to do with rules and charges for service, the whole field is placed under the supervision of the commission with power to enforce the dominant purpose of the grant to render it as certain as practicable that all public utility service rendered "either directly or indirectly to or for the public" shall be reasonable as to character, and reasonable and just as to charges.

The regulations by public service commissions, acting as state officers, is not within the scope of this work and will be noticed only incidentally.

2. NECESSITY FOR.

§ 1620. Necessity for obtaining consent of municipality to use of streets.

"The rule must be considered settled that no person can acquire the right to make a special or exceptional use of the public highway, not common to all citizens of the state, except by grant from the *sovereign power*." ⁵³

Sometimes the right to use the streets is conferred by a general statute or the charter of the company,⁵⁴ or

mit from the Commission upon a showing of public necessity and convenience. *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

52. A public utility property and privilege constitute an entirety, partaking of the character of the privilege, and is of proprietary nature, and assignable the same as property commonly, in the absence of any express prohibition. *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

53. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

Presumptions. The right to a franchise is not to be presumed. *Purnell v. McLane*, 98 Md. 589, 56 Atl. 830.

Nuisance. The construction and operation of a railroad upon a street, without authority, is a public nuisance. *McEniry v. Tri-City R. Co.* (Ill., 1912), 98 N. E. 227.

54. *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606, 33 N. W. 749; *Public Service Corp. v. De Grote*, 70 N. J. Eq. 454, 62 Atl. 65, holding that company was authorized to lay pipes

by a constitutional provision,⁵⁵ and in such case the consent of the municipality is not required,⁵⁶ provided the legislature is not prohibited by the state constitution from granting the use of the streets.⁵⁷

large enough for transmission of gas to other municipalities.

Repeal. If a public service company is given the right to use streets, by a statute or its charter, such right is not repealed by a statute giving a certain board of a city exclusive control over the use of all streets of the city. *Louisville v. Louisville Water Co.*, 105 Ky. 754, 49 S. W. 766, 20 Ky. L. Rep. 1529.

55. In California, the matter of granting certain franchises to use the streets has been entirely taken away from the control of the legislature or of the municipality by constitutional provisions that if there is no municipal plant any person or corporation may use the streets to supply water or light. See, debates in constitutional convention as set forth in *Madera Waterworks v. Madera*, 185 Fed. 281, 289, construing California constitution.

56. Charter power conferred on a public service corporation by the legislature to enter upon streets does away with the necessity of obtaining leave to use the streets from the municipality. *New Cumberland Borough v. Riverton*, 232 Pa. 531, 81 Atl. 799.

Water pipes in adjoining municipality. In some jurisdictions, statutes grant the right to water companies to lay pipes in any

street of a town adjoining the town to be supplied with water. *Pelham Manor v. New Rochelle Water Co.*, 67 Hun (N. Y.) 98, 21 N. Y. S. 1110, aff'd in 143 N. Y. 532, 38 N. E. 711. Where a public service company is given the right by statute to lay its pipes in any street of a city adjoining a municipality where permission has been obtained, a city between the source of supply and the municipality which had given consent to the laying of pipes, cannot prevent the laying of pipes through its streets, notwithstanding it may become a competitor with the plant owned by the city; but in such a case the public service company cannot arbitrarily select its route through the city. *Rochester & L. O. Water Co. v. Rochester*, 82 N. Y. S. 455, 84 App. Div. 71, aff'd in 176 N. Y. 36, 68 N. E. 117. A water company authorized by statute to lay its pipes through the streets of an adjoining city to a city where the company has a permit to furnish water, is not authorized to sell and distribute water in an adjoining municipality in which it has no permit, without the consent of such municipality. *Rochester v. Rochester & L. O. Water Co.*, 189 N. Y. 323, 82 N. E. 154.

57. § 1623 *post*.

But if a public service company is not granted the right to use the streets of a municipality by a federal statute, the state constitution, a state statute, or by its own charter, it has no right to use such streets unless the municipality consents thereto;⁵⁸ and this applies

58. *Kansas*. Longenecker v. Wichita R. & L. Co., 80 Kan. 413, 102 Pac. 492.

Maryland. Purnell v. McLane, 98 Md. 589, 56 Atl. 830; Edison Illuminating Co. v. Hooper, 85 Md. 110, 36 Atl. 113.

New Jersey. Madison v. Morristown Gaslight Co., 65 N. J. Eq. 356, 54 Atl. 439; Saddle River v. Garfield Water Co. (N. J. Ch.), 32 Atl. 978.

New York. Re New York Independent Telephone Co., 118 N. Y. S. 290, 133 App. Div. 635.

Ohio. Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 N. E. 440.

Pennsylvania. Philadelphia Company v. Freeport Borough, 167 Pa. St. 279, 31 Atl. 571.

United States. Potter v. Calumet Electric Street R. Co., 158 Fed. 521.

When a public service company invokes municipal action for its protection in occupying the streets of a municipality, it must appear that the company acted strictly in accordance with the authority conferred. McKim v. Philadelphia, 217 Pa. 243, 66 Atl. 340.

Necessity for consent to use of streets. Consent of township to incorporation of water company is not equivalent to consent to use of streets. Franklin v. Nutley Water Co., 53 N. J. Eq. 601. 32 Atl. 381.

Permit from unincorporated village, see Witcher v. Holland Waterworks Co., 20 N. Y. S. 560, 65 Hun (N. Y.) 624, 66 Hun 619, aff'd in 142 N. Y. 626, 37 N. E. 565.

Conduits. An applicant for the use of conduit space, who has not obtained a special franchise from the state or municipality to use the streets, cannot compel the issuance of a permit to him for the use of the conduit. Purnell v. McLane, 98 Md. 589, 56 Atl. 830.

Renewal. Electric light company given municipal consent to use streets was not required to obtain a renewal of the consent on surrender of its original charter and the taking out of a charter under another statute for the purpose of supplying light and heat and power by electricity. Allegheny County Light Co. v. Booth, 216 Pa. St. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404.

"A railroad company has no power to enter upon, occupy, or cross the streets of a municipality without the consent of the municipality." Chester v. Baltimore & Ohio R. Co., 217 Pa. St. 402, 66 Atl. 654.

In Minnesota, a railroad company cannot obtain the right to use streets of a municipality by condemnation proceedings but must obtain a franchise to use the streets from the municipality.

to foreign corporations as well as to domestic corporations.⁵⁹

Furthermore, the *constitutions* of many of the states expressly forbid the use of streets by certain public service companies without the consent of the municipality.⁶⁰

And where the constitution makes the provisions of a *freeholder's charter* paramount to general laws enacted by the state legislature "in municipal affairs," a provision in such a charter giving the municipality full control of its streets relates to "municipal affairs," within the meaning of the constitution, so that the question as to the right of a public service company to use the streets of a city is governed by the charter rather than by the general statutes.⁶¹

Where a franchise from a municipality is necessary to authorize the use of streets, the company cannot evade obtaining a franchise by using the plant or tracks of another company which has obtained a franchise.⁶²

Duluth Terminal Ry. Co. v. Duluth, 113 Minn. 459, 130 N. W. 18.

Steam rollers. City may prohibit operation of any steam engine over the streets, except on a railroad track, and on a special permit. Municipal Paving Co. v. Donovan Co. (Tex. Civ. App., 1911), 142 S. W. 644.

Right to condemn where no grant. If a railroad company has not acquired by lawful grant the right to occupy a street in a municipality, as against the right of the public to use it as a street, the company cannot condemn the rights of an abutting owner. State ex rel. v. Superior Court of Spokane County, 62 Wash. 96, 113 Pac. 576.

59. Patapsco Electric Co. v. Baltimore, 110 Md. 306, 72 Atl. 1039.

60. East Tennessee Telephone Co. v. Russellville, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. Rep. 305; Louisville v. Louisville Water Co., 105 Ky. 754, 49 S. W. 766, 20 Ky. L. Rep. 1529.

61. Sunset Telephone & Telegraph Co. v. Pasadena (Cal., 1911), 118 Pac. 796.

62. Aurora v. Elgin A. & S. Traction Co., 227 Ill. 485, 81 N. E. 544, 118 Am. St. Rep. 284.

A grant to a street railway company to operate its lines on certain streets and subject to certain conditions and regulations does not carry with it the right to permit other companies to come into the city and use its tracks without municipal consent and against municipal protest. Erie v. Erie Traction Co., 222 Pa. St. 43, 70 Atl. 904.

It is sometimes difficult, however, to determine whether the charter of a company or a statute actually confers authority to use the streets without the consent of the municipality;⁶³ but statutes granting a franchise to a public utility company and including therein a general right to use the streets and alleys of a municipality or municipalities, should not be construed as an express grant of the right to use such streets or alleys without the consent of the municipality, unless it is clearly apparent that such was the intention of the legislature.⁶⁴

In Illinois, an interurban railway desiring to enter city and use the streets must obtain a license from the city and cannot obtain the right to use the streets by a contract for the use of the tracks of a local street railway. *Aurora v. Elgin, Aurora & S. T. Co.*, 227 Ill. 485, 81 N. E. 544, 118 Am. St. Rep. 284.

63. Statute authorizing railroad companies to construct their road upon or across any highway which the road shall intersect does not confer right to construct road longitudinally on street without the consent of the municipality. *Newcastle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 57 N. E. 516.

A street railway company's charter granted it certain powers and privileges and "such other privileges as may be granted by the municipal authorities." Held, not to give the city any additional power, but merely authorized it to exercise the power it had in furtherance of the objects of the company. *Asheville St. R. Co. v. West Asheville, etc. R. Co.*, 114 N. C. 725, 19 S. E. 697.

Authority to supply gas to towns and to lay pipes in the streets of towns for this purpose does not give authority to do this without the consent of the town, under a municipal charter giving the town authorities power to control and regulate its streets. *Chicago Gaslight and Fuel Co. v. Lake*, 120 Ill. 42, 22 N. E. 616, aff'g 27 Ill. App. 346.

Construction of statute by companies. In determining whether it is necessary to obtain a grant from a municipality of the right to use its streets, some weight should be allowed to the practical construction placed upon the statute by the public service corporations in that they have for many years proceeded under statutory provisions as to obtaining the consent of municipalities for the use of their streets. *Farmers' Telephone Co. v. Washta (Iowa, 1911)*, 133 N. W. 361.

64. *Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353, holding that 1909 statute giving right to every domestic gas pipe line corporation to construct its pipes over all streets in the

If an electric light company changes from the pole to the conduit system, it having been granted the right to use the streets, equity will not decree the removal of the conduit where no complaint either by the municipality or others has been made for over six years.⁶⁵

§ 1621. Same—telegraph and telephone companies.

Statutes in some of the states grant the right to telegraph or telephone companies, or both, to use the "public roads and highways" or the like and it is generally held that such statutes apply to *streets* in municipalities, and grant the right to use such streets without the consent of the municipality.⁶⁶

state, etc., does not preclude the necessity of obtaining a franchise to use the streets of a particular municipality for that purpose.

65. *Allegheny County Light Co. v. Booth*, 216 Pa. St. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404.

66. *Iowa. Chamberlain v. Iowa Tel. Co.*, 119 Iowa 619, 93 N. W. 596; *State v. Nebraska Tel. Co.*, 127 Ia. 194, 103 N. W. 120.

Minnesota. Northwestern Tel. Exch. Co. v. Minneapolis, 81 Minn. 140, 86 N. W. 69, 53 L. R. A. 175.

Montana. State v. Red Lodge, 30 Mont. 338, 76 Pac. 758.

Ohio. Farmer & Getz v. Columbiana County Tel. Co., 72 Ohio St. 526, 74 N. E. 1078.

Texas. Texarkana v. Southwestern Tel. & Tel. Co., 48 Tex. Civ. App. 16, 106 S. W. 915.

Wisconsin. State v. Sheboygan, 111 Wis. 23, 86 N. W. 657.

United States. Abbott v. Duluth, 104 Fed. 833.

Contra, Nebraska Tel. Co. v. Western Independent Long Distance Tel. Co., 68 Neb. 772, 95 N. W. 18.

"Public highway" includes streets. *Southern Bell Tel. & Tel. Co. v. Mobile*, 162 Fed. 523, 528, and see § 1284, *ante*, vol. 3.

In California, the statutory provision that telegraph and telephone companies may construct their lines upon public roads and highways in such manner as not to incommode the public use of the road, in so far as it authorized telegraph and telephone companies to use the streets of a municipality without its consent, was repealed by the franchise act of 1905 providing that every franchise to erect telegraph or telephone wires, etc. should be granted "upon the conditions specified in the act and not otherwise," and providing for sale to the highest bidder, except as to companies doing an interstate business; and a telephone company which has not obtained the franchise from a city, in California, cannot maintain posts and wires by which it connects with subscribers in the municipality, although it does an interstate

However, on the theory that a grant is to be strictly construed in favor of the public, a statute authorizing

business as well as a local business. *Pomona v. Sunset Tel. & Tel. Co.*, 224 U. S. 330, 56 L. Ed. —, 32 Sup. Ct. 477, rev'g 172 Fed. 829, 97 C. C. A. 251, which rev'd 164 Fed. 561.

The 1911 amendment of the California constitution providing that "any municipal corporation may establish and operate public works for * * * telephone service," either by construction or by purchase, and that persons or corporations may establish and operate works for supplying the inhabitants with such service *upon such conditions* and under such regulations as the municipality may subscribe under its organic law, on condition that the municipal government shall have the right to regulate the charges therefor," does not contain a grant to a telephone company of the right to use streets of a municipality without its consent, so as to be protected by the contract clause of the Federal constitution. *Pomona v. Sunset Tel. & Tel. Co.*, 224 U. S. 330, 56 L. Ed. —, 32 Sup. Ct. 477, rev'g 172 Fed. 829, 97 C. C. A. 251, 264, which rev'd 164 Fed. 561.

In Iowa, however, a telephone system cannot be erected upon the streets of a municipality without first obtaining from the municipality a grant of the right to use the streets notwithstanding broad provisions of the statute granting the franchise to the company as to the use of streets. *Farmers' Telephone Co. v.*

Washta (Iowa, 1911), 133 N. W. 361, distinguishing *Chamberlain v. Iowa Telephone Co.*, 119 Iowa 619, 93 N. W. 596. Judge McClain dissented on this point. Former cases had held that telephone companies have a right under the statutes to use the streets of a city or town without obtaining a license from the municipality. *Chamberlain v. Iowa Telephone Co.*, 119 Iowa 619, 93 N. W. 596; *State v. Nebraska Telephone Co.*, 127 Iowa 194, 103 N. W. 120; *East Boyer Telephone Co. v. Vail* (Iowa, 1911), 129 N. W. 298.

In Kansas, general statute conferring right to use streets on telegraph and telephone companies is limited by the charter act of cities of the first class so as to give such cities the right to determine and designate the streets and alleys which may be used by the poles and wires of such company. *Wichita v. Missouri & K. Telephone Co.*, 70 Kan. 441, 78 Pac. 886.

In Minnesota, while prior to the act of 1893 it was held that telegraph and telephone corporations had the right to use city streets without the consent of the municipality (*Northwestern Telephone Exchange Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; *Abbott v. Duluth*, 104 Fed. 833), yet since such 1893 statute the consent of the municipality is necessary (*Duluth v. Duluth Telephone Co.*, 84 Minn. 486, 491, 87 N. W. 1127) and the later rule is

“telegraph corporations” to construct lines along or on any public road or highway will not be construed to

not changed by the statute of 1899 giving the corporations the right to acquire by condemnation the necessary property to transact their business, etc. *Tri-State Telephone & Telegraph Co. v. Thief River Falls*, 183 Fed. 854, citing Minnesota statute.

In Missouri, the statute gives telephone companies the right to erect telephone poles in the streets but does not deny the right to individuals or foreign corporations, and hence a city may contract with the latter as to compensation for the use of streets. *Plattsburg v. People's Tel. Co.*, 88 Mo. App. 306.

Montana statute applies to foreign as well as to domestic corporations. *State v. Red Lodge*, 30 Mont. 338, 76 Pac. 758.

New York. Telephone companies in New York get their right to the use of the streets directly from the legislature, but subject to police regulation by the municipal authorities. *Carthage v. Central New York Tel. & Tel. Co.*, 185 N. Y. 448, 78 N. E. 165; *Gannett v. Independent Telephone Co.*, 106 N. Y. S. 3, 55 Misc. Rep. 555.

In Wisconsin, a telephone company is entitled to use the streets of a municipality without its consent, where it is incorporated in the state (*Kenosha v. Kenosha Home Tel. Co.* (Wis., 1912), 135 N. W. 848); and a city has no power to grant a franchise to a telephone company nor to impose any condition except such as may

be imposed under the police power. *Wisconsin Telephone Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581, 110 Am. St. Rep. 886; *State ex rel. v. Milwaukee Independent Telephone Co.*, 133 Wis. 588, 114 N. W. 108, 315.

Highways of township as “streets of an incorporated town,” within statute excluding such streets, see *Summit Tp. v. New York & New Jersey Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146.

Right to regulate. “By amendment to the charter of the city of Rochester enacted in 1894 (chapter 28, § 8), authority is given to the common council ‘to regulate and control the erection, construction, laying, stringing, maintaining and removing of all wires, cables, poles, conduits, and subways upon, over and under the streets, avenues, lane, squares, parks, bridges, aqueducts and public places within said city.’ This provision does not relate to the right to the use of the streets. It is no infringement upon the power vested in the state legislature to grant the franchise to telephone corporations. When a corporation of this kind is to avail itself of the legislative grant, the manner of its exercise, the location of its poles, the stringing of its wires, etc., are within the control and regulation of the local legislative body. That is one of the police functions committed to the municipality. This right of regulation is, how-

include *telephone* companies;⁶⁷ but in Texas a statute providing that corporations created for the purpose of constructing and maintaining "magnetic telegraph lines" are entitled to set their poles, etc. upon and across any streets, has been held broad enough to include telephone lines.⁶⁸

And a telephone company has no right to occupy the streets of a municipality to the exclusion of the public,

ever, entirely distinct from the original granting of the privilege. It is subordinate to that right. The local body has no authority to intervene until the corporation is seeking to exercise the privilege accorded to it by the state, and then not to enjoin such exercise if within the letter of its authority, or to exact compensation for the franchise, but to protect the citizens and the public. It may intercede to reduce to a minimum this interference with the public user, to require that the privilege shall be exercised most beneficially to all people interested, or for any other purpose involving 'control and regulation' by the local authorities. But this intervention recognizes the franchise as existing in the corporation." *Barhite v. Home Telephone Co.*, 63 N. Y. S. 659, 50 App. Div. 25.

67. *Sunset Telephone & Telegraph Co. v. Pasadena* (Cal., 1911), 118 Pac. 796 (explaining and distinguishing *Davis v. Pacific Telephone & Telegraph Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698); *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

68. *San Antonio & A. P. R. Co. v. Southwestern Tel. & Tel.*

Co., 93 Texas 313, 55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884; *Texarkana v. Southwestern Tel. & Tel. Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915.

Reason for rule. "When we consider the nature of the business of telegraph and telephone lines in this busy commercial age, we have a most cogent reason for the legislature declining to commit to the arbitrary control of the municipalities throughout the state the use by such companies of the public streets and alleys. These companies are not primarily of local concern, affecting only the inhabitants of the towns and cities through which they pass, but they essentially concern the public at large, in that they furnish quick and cheap means of communication between all points throughout the country, by which a very large percentage of the business of the country is transacted. In other words, the business is such a one as calls for the exercise of state regulation rather than the delegated power of municipal control." *Texarkana v. Southwestern Telegraph & Telephone Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915.

without the consent of the municipality, merely because it is engaged in *interstate commerce*.⁶⁹

If a *telegraph company* has accepted the restrictions and obligations prescribed as to such corporations by congress, the sole source of its authority to enter any of the states or territories where there are military and post roads and government water ways, for the purpose of doing business therein, is in the acts of the federal congress, and no state or municipality has the power to exclude such corporations from the right or privilege of carrying on the business for which they are formed within its borders.⁷⁰

§ 1622. Same—express grant not necessary.

As against the municipality, an express grant of the right to use the streets is not always necessary. Such a grant may be waived by the municipality or the municipality may be estopped to object to the use of the streets on that ground.⁷¹

So the granting of a franchise to use the streets sometimes takes the form of a contract between the municipality and the public service company for a supply of services which grants the use of the streets by necessary implication.⁷²

3. POWER TO GRANT OR REFUSE.

§ 1623. Power of legislature.

Primarily the legislature, representing the people at

69. *Sunset Telephone & Telegraph Co. v. Pasadena* (Cal., 1911), 118 Pac. 796.

70. *Western Union Telegraph Co. v. Superior Court* (Cal. App., 1911), 115 Pac. 1091.

Post roads. Streets in Los Angeles are letter carrier routes established in such city for the collection and delivery of mail matter and consequently are post roads within the federal statute.

Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 116 Pac. 557.

71. § 1687 *post*.

72. The making of a contract for a water supply for a municipality carries with it the right, on the part of the contractor, to lay the pipes and to operate the plant. *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782, 10 C. C. A. 60.

large, possesses full and paramount power over all highways, streets, and alleys in the state.⁷³

The power to grant franchises to use the streets resides primarily in the legislature,⁷⁴ and it has the power to grant to a public service corporation the right to use streets without compensation to, or the consent of, the municipality,⁷⁵ unless the state constitution other-

73. *People ex rel. v. Chicago Tel. Co.*, 245 Ill. 121, 91 N. E. 1065.

§§ 227, 228 *ante*, vol. 1; § 1310 *ante*, vol. 3.

74. *Colorado. Denver, etc. R. Co. v. Denver City R. Co.*, 2 Colo. 673.

Illinois. Lasher v. People, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. Rep. 103.

Louisiana. Harrison v. New Orleans, etc. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438.

New Jersey. Jersey City Gas Co. v. Dwight, 29 N. J. Eq. (2 Stew.) 242.

Pennsylvania. Mercer v. Pittsburgh, etc. R. Co., 36 Pa. St. 99; *Riley v. Pennsylvania Co.*, 32 Pa. Super. Ct. 579.

75. *Georgia. Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106.

Illinois. Chicago v. Illinois Steel Co., 66 Ill. App. 561.

Kansas. La Harpe v. Elm Tp. Gas Light, Fuel & Power Co., 69 Kan. 97, 76 Pac. 448, holding statute not invalid because no provision made for payment of compensation to the city.

Kentucky. Louisville Bagging Co. v. Central Pass. Ry. Co., 95 Ky. 50, 23 S. W. 592, 15 Ky. L. Rep. 417, 44 Am. St. Rep. 203.

Louisiana. New Orleans, M. & C. R. Co. v. New Orleans, 26 La. Ann. 517; *Harrison v. New Orleans Pacific R. Co.*, 34 La. Ann. 462, 44 Am. Rep. 438.

Maryland. Dulaney v. United Rys. & Electric Co., 104 Md. 423, 65 Atl. 45.

Missouri. State ex rel. v. Missouri & Kan. Tel. Co., 189 Mo. 83, 88 S. W. 41; *Dubach v. Hannibal & St. Jo. R. Co.*, 69 Mo. 483, 1 S. W. 86.

New Jersey. Madison Borough v. Morristown Gaslight Co., 63 N. J. Eq. 120, 52 Atl. 158.

New York. Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117; *Re Consolidated Gas Co.*, 106 N. Y. S. 407, 56 Misc. Rep. 49.

Ohio. Kumler v. Silsbee, 38 Ohio St. 445.

Pennsylvania. Mercer v. Pittsburgh, Fort W. & C. R. Co., 36 Pa. St. 99.

See *Jersey City v. Jersey City & B. R. Co.*, 20 N. J. Eq. 360.

§ 227 *ante*, vol. 1.

"There is no doubt of the legislature's authority to grant railroad companies the right to lay their tracks longitudinally upon the streets of a municipality without its consent or over its objec-

wise provides; but it cannot authorize the holder of such franchise to interfere with the property rights of an abutter without just compensation.⁷⁶

However, the *constitutions* of several of the states limit the legislative authority over streets by providing that no law shall be passed by the legislature granting a street railroad company (and in some states the prohibition is extended to other or all public service companies) the right to use the streets within any municipality without the consent of the local authorities,⁷⁷ and in some states, by constitutional provision, the consent of the voters,⁷⁸ or of abutting owners,⁷⁹ is necessary, at least as to grant of the right to use streets for a street railway.

Likewise, the *legislature may delegate* to the municipality the right to grant such use of the streets.⁸⁰ And

tion." *Newcastle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 57 N. E. 516.

Statute authorizing any corporation having power to lay pipes in streets for gas to use the pipes to transmit gas to any other municipality to which it may have lawful authority to distribute gas, is constitutional. *Public Service Corporation of New Jersey v. De Grote*, 70 N. J. Eq. 454, 62 Atl. 65.

Grant of right to use streets of intervening municipality. The legislature has power to grant the right to use the streets of a municipality by a public service company operating in another municipality, though the former is not served or in any way benefited by such use. *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436.

76. § 1700 *et seq.*, *post*.

77. § 228 *ante*. vol. 1.

78. § 1639 *post*.

79. § 1640 *post*.

80. *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 660, 3 Pac. 284; *Grand Trunk & W. R. Co. v. South Bend*, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L. R. A. (N. S.) 850; *Harrison v. New Orleans Pac. Ry. Co.*, 34 La. Ann. 462, 44 Am. Rep. 438; *Mercer v. Pittsburgh, Ft. W. & C. R. Co.*, 36 Pa. St. 99; *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114, modifying *Citizens' St. R. Co. v. City Ry. Co.*, 64 Fed. 647; *Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252, construing Tennessee law.

See § 228 *ante*, vol. 1.

"All franchises or privileges known by that term proceed from the state in the exercise of its sovereign powers. Through different mediums or agencies the state may act in granting franchises, but it is itself the source

it may empower the municipality to accompany the grant with such restrictions and limitations as may seem proper to protect the public in the use of the highways of the municipality.⁸¹ The legislature may also delegate such power to particular municipal boards.⁸²

When franchises are granted by municipal corporations, they are regarded as coming from the state;⁸³ such an act of the municipality being considered an act of the state.⁸⁴

and depositary from which the right proceeds. Sometimes the franchise is conferred directly by the state through some grant or legislative enactment, but more generally the sovereign delegates its power to municipal or local authorities." *Wilcox v. McClellan*, 185 N. Y. 9, 16, 77 N. E. 986.

Constitutionality. An act of the legislature empowering municipal corporations to grant the use of their streets for street railway purposes, is not in conflict with a constitutional provision that the power of granting special privileges or immunities shall only be exercised by the legislature. *Atchison St. Ry. Co. v. Missouri Pac. R. Co.*, 31 Kan. 660, 3 Pac. 284.

Constitutional provision as self executing. Constitutional provision as to use of streets by telegraph and telephone companies held not self-executing. *State ex rel. v. Spokane*, 24 Wash. 53, 60, 63 Pac. 1116.

81. § 1644 *post*.

82. *Sheehy v. Clausen*, 55 N. Y. S. 1000, 26 Misc. Rep. 269, *aff'd* in 59 N. Y. S. 1114, 42 App. Div. 622.

83. *Andrews v. National Foun-*

dry, etc. Works, 61 Fed. 782, 787, 10 C. C. A. 60.

84. *City R. Co. v. Citizen St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114.

Municipal legislative body are public officers especially designated by the legislature for that purpose. *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492; *Boston Consol. Gas Co. v. Cheney*, 198 Mass. 356, 84 N. E. 492.

Exercise of legislative function. In granting a license to use streets and alleys, the municipality exercises a legislative function as a governmental agency of the state, and the grant is made by the municipality in its governmental and not in its proprietary capacity. *People ex rel. v. Chicago Tel. Co.*, 245 Ill. 121, 91 N. E. 1065; *Potter v. Calumet Electric St. Ry. Co.*, 158 Fed. 521.

"The distinction is again affirmed in *Meyer v. Boonville*, 162 Ind. 165, 70 N. E. 146, where it is held that in granting a franchise to use the 'streets, alleys, and public places,' to furnish heat, light, water, telephone, etc., it exercises a legislative power; but when the town or city enters into

§ 1624. Power of municipality.

It is undisputed that a municipal corporation has no inherent power to grant an individual or corporation a franchise or license to use the streets and that its authority is limited to that conferred upon it expressly or by implication by the legislature.⁸⁵ Thus, unless authority has been delegated, a municipality cannot grant a franchise or license to use the streets to a *commercial railroad*,⁸⁶

a contract with a second party, having such franchise, * * * it exercises a business, and not a legislative power—citing numerous cases. "Grand Trunk & W. Ry. Co. v. South Bend, 174 Ind. 203, 89 N. E. 885, 890.

85. *Alabama*. Mobile v. Louisville & Nashville R. Co., 124 Ala. 132, 26 So. 902.

Colorado. Denver & S. R. Co. v. Denver City R. Co., 2 Colo. 673.

Florida. Florida, etc. R. Co. v. Ocala, etc. R. Co., 39 Fla. 306, 22 So. 692.

Georgia. Kavanagh v. Mobile, etc. R. Co., 78 Ga. 271, 2 S. E. 636.

Indiana. New Castle v. Lake Erie, etc. R. Co., 155 Ind. 18, 57 N. E. 516.

Maryland. Purnell v. McLane, 98 Md. 589, 56 Atl. 830.

New Jersey. Green v. Trenton, 54 N. J. L. 92, 23 Atl. 281.

New York. Rhinehart v. Redfield, 179 N. Y. 569, 72 N. E. 1150; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314.

Ohio. Raynolds v. Cleveland, 24 Ohio Cir. Ct. 215.

Pennsylvania. Potts v. Quaker City Elevated R. Co., 161 Pa. St. 396, 29 Atl. 108.

Wisconsin. Washburn Waterworks Co. v. Washburn, 129 Wis. 73, 108 N. W. 194.

§ 227 *ante*, vol. 1.

Irrigation ditches. Power of municipality to permit construction of irrigating ditches in streets and control thereof, see Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306, 113 Pac. 9.

In Maine, prior to 1895, franchise rights in streets granted only by the legislature. Twin Village Water Co. v. Damariscotta Gaslight Co., 98 Me. 325, 56 Atl. 1112.

In New Jersey, cities having less than twelve thousand inhabitants are not authorized by statute to grant a dredging company the privilege of laying pipes in the street to pump sand to the beach front. Hill Dredging Co. v. Ventnor City, 77 N. J. Eq. 467, 78 Atl. 677.

86. *Colorado*. Denver & S. Ry. Co. v. Denver Ry. Co., 2 Colo. 673. See Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714.

Georgia. Davis v. East Tennessee, V. & G. Ry. Co., 87 Ga. 605, 13 S. E. 567, following Daly v. Georgia S. & F. R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep

or to a street railway company,⁸⁷ or to a gas company

286; *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 271, 2 S. E. 636.

New Jersey. *Thompson v. Ocean City R. Co.*, 60 N. J. L. 74, 36 Atl. 1087.

New York. *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. 44.

Pennsylvania. *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. 339, 67 Am. Dec. 471.

See *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Bullen v. Higgins*, 115 Ill. 155, 3 N. E. 456.

In absence of statutory power, a municipality cannot authorize a railroad company to construct its tracks in a street to a tobacco company's warehouse. *Butler v. F. R. Penn Tobacco Co.*, 152 N. C. 416, 68 S. E. 12.

Street not yet opened. A municipal corporation cannot grant a railroad company a right of way over a proposed extension of a street which has not yet been opened. *Wichita & Western Railway Co. v. Fechheimer*, 36 Kan. 45, 12 Pac. 362.

Public landing. A municipality cannot grant to a railroad company the right to construct tracks, siding, switches, etc., on a public landing. *Chicago, R. I. & P. R. Co. v. People ex rel.*, 222 Ill. 427, 78 N. E. 790.

Third track. Where statute authorized railroads to construct a single or double track, a municipality has no power to grant the use of a street for a third track to be laid by the same company. *Los Angeles v. Southern*

Pacific R. Co., 157 Cal. 363, 108 Pac. 65.

87. *Alabama.* *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740.

Colorado. *Denver & S. Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673.

Indiana. *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261, 41 Am. Rep. 561.

Minnesota. *Stillwater v. St. Paul & M. S. Ry. Co.*, 83 Minn. 275, 86 N. W. 103.

New Jersey. *State v. Trenton*, 54 N. J. L. 92, 23 Atl. 281; *State v. Newark*, 54 N. J. L. 102, 23 Atl. 284.

New York. *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 47 N. E. 277; *Milbau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *New York & H. R. Co. v. New York*, 1 Hilt. (N. Y.), 562.

North Carolina. *Asheville St. Ry. Co. v. West Asheville & S. S. Ry. Co.*, 114 N. C. 725, 19 S. E. 697.

Tennessee. *People's Passenger R. Co. v. Memphis (Tenn.)*, 16 S. W. 973.

Wisconsin. *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181.

Compare *Coast Line R. Co. v. Cohen*, 50 Ga. 451.

Board of commissioners of electrical subways held not authorized by statute to grant franchise to use streets for poles and wires to electric street railway. *Trustees Presbyterian Church v. State Board Com'rs Electrical Sub-*

of the right to lay pipes in a street,⁸⁸ or to an *electric light company*,⁸⁹ or a telegraph or telephone company,⁹⁰ of the right to erect poles and string wires in the streets. So a municipality cannot grant the use of

ways, 55 N. J. L. 436, 27 Atl. 809.

Elevated railway, franchise cannot be granted by municipality unless power delegated. *Potts v. Quaker City El. R. Co.*, 161 Pa. St. 396, 29 Atl. 108.

In Ohio, however, it is held that municipality has inherent power to permit and regulate construction and operation of street railroad through its streets. *Hattersly v. Waterville*, 26 Ohio Cir. Ct. R. 226.

In California, a statute provided that a street could not be occupied with two railroads for more than five blocks, and it was held that an ordinance permitting it was void. *People v. Rich*, 54 Cal. 74.

"The express prohibition of section 499 of the Civil Code against the occupation and use of the same street or track for a distance of more than five blocks by two lines of street railway operated under different managements was eliminated by amendment in 1907 (St. 1907, p. 837), and the section now expressly permits two or more lines of street railway, operated under different managements, by arrangement among themselves, to use the same streets or tracks for any distance exceeding five consecutive blocks; the use for not exceeding five consecutive blocks being authorized without any arrangement." *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 304.

In New York City, in early days, the city had no power to grant a franchise to a street railroad to use its streets. *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201.

88. *Jersey City Gas. Co. v. Dwight*, 29 N. J. Eq. (2 Stew.) 242.

In the absence of legislative authority, express or implied, a municipality has no power to grant a franchise to construct a gas plant and use the streets of the city for pipes. *Elizabeth City v. Banks*, 150 N. C. 407, 64 S. E. 189.

89. *McLean v. Brush Electric Light Co.*, 8 Ohio Dec. 619, 9 Wkly. Law Bul. 65; *Brush Electric Light Co. v. Jones*, 3 O. C. D. 168, 5 Ohio Cir. Ct. R. 340, affirmed in 29 Wkly. Law Bul. 72.

Authority to grant franchises for all "lawful purposes" does not authorize granting of franchise to electric light company to erect its power line along a highway, the title to the soil of which belongs to the abutters. *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 117 Pac. 906.

90. *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. Rep. 305; *State v. Newark*, 49 N. J. L. 344, 8 Atl. 128; *South McAlester-Eufaula Telephone Co. v. State ex rel.*, 25 Okla. 524, 106 Pac. 962,

the surface under the streets for a *conduit* to carry wires unless the power so to do has been delegated,⁹¹ and the same rule applies to *pneumatic tubes*.⁹²

On the other hand, if the power so to do has been conferred on the municipality by the legislature, it may grant a franchise or license to use the streets to a *commercial railroad*,³⁹ or to a *street*

91. *State ex rel. v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 56 Am. St. Rep. 515, 34 L. R. A. 369.

92. § 1625 *post*.

Pneumatic tubes. History of the use of pneumatic tubes, etc. see Wilcox, *Municipal Franchises*, §§ 233-242.

93. *California. Arcata v. Arcata & M. R. Co.*, 92 Cal. 639, 28 Pac. 676.

Colorado. Denver & S. F. R. Co. v. Domke, 11 Colo. 247, 17 Pac. 777.

Illinois. Parlin v. Mills, 11 Ill. App. 396.

Indiana. Grand Trunk & W. R. Co. v. South Bend, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L. R. A. (N. S.) 850; *Tate v. Ohio & M. R. Co.*, 7 Ind. 479.

Iowa. Cook v. Burlington, 36 Iowa 357.

Kansas. Atchison & N. R. Co. v. Garside, 10 Kan. 552.

Kentucky. Wolfe v. Covington & L. R. Co., 15 B. Mon. (54 Ky.) 404.

Louisiana. New Orleans v. Steinhardt, 52 La. Ann. 1043, 27 So. 586.

New York. Reining v. New York, L. & W. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133, *aff'd* 13 N. Y. S. 238; *Williams v. New York Cent. R. Co.*,

18 Barb. (N. Y.) 222, *rev'd* in 16 N. Y. 97, 69 Am. Dec. 651; *Milhau v. Sharp*, 15 Barb. (N. Y.) 193.

North Carolina. Griffith v. Southern R. Co., 150 N. C. 312, 64 S. E. 16.

Oklahoma. McKay v. Enid, 26 Okla. 275, 109 Pac. 520.

Pennsylvania. McHale v. Easton & B. Transit Co., 169 Pa. St. 416, 32 Atl. 461.

Texas. Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525.

Utah. Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 77 Pac. 849.

Washington. State ex rel. v. Superior Court (Wash. 1911), 117 Pac. 487.

West Virginia. Yates v. West Grafton, 34 W. Va. 783, 12 S. E. 1075.

Compare Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; *Bullen v. Higgins*, 115 Ill. 155, 3 N. E. 456.

Branch track from private elevator. *Clarke v. Blackmar*, 47 N. Y. 150.

Under the statutes of Illinois, municipal corporations have power to regulate the use of their streets, to permit their use by street railways, to regulate the crossing of streets by railroads, and power to authorize the crossing of a rail-

railroad,⁹⁴ or for *gas pipes* to convey gas for light-

road track over a street by a street railroad; and such power is not abridged by a statute empowering the state railroad and warehouse

commission to prescribe the place where, and the manner in which, the tracks of one railroad company may cross the tracks of another company. *East St. Louis R. Co. v. Louisville & Nashville R. Co.*, 149 Fed. 159, 79 C. C. A. 107.

Railroad crossings. A city having authority to grant permission to street railway companies to use its streets for laying tracks and operating cars thereon, may authorize one company to cross with its tracks the tracks of another company. *St. Louis & Sub. R. Co. v. Lindell R. Co.*, 190 Mo. 246, 88 S. W. 634.

Nuisance. A railroad track is not necessarily *per se* a public nuisance, nor as a matter of law, an obstruction. *Wabash, St. Louis & Pac. Ry. Co. v. People*, 12 Ill. App. 448.

Bridge. A city may itself, or it may delegate authority to a railroad company to build a bridge in a public street, and, incidentally, close the street during the progress of the construction of the bridge, when such is necessary or useful by way of public improvement. *Adair v. Atlanta*, 124 Ga. 288, 52 S. E. 739.

Depots. Cannot authorize depot. *Douglass v. Leavenworth*, 6 Kan. App. 96, 49 Pac. 676, and see § 1365 *ante*, vol. 3.

City held to have authority to grant to a railroad company the right to use a portion of a com-

mons to erect a railroad depot thereon. *Larkin v. Allegheny*, 162 Fed. 611, 89 C. C. A. 369.

94. *Iowa.* *Stange v. Dubuque*. 62 Iowa 303, 17 N. W. 518.

Kansas. *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 660, 3 Pac. 284, where, however, authority was very general.

Kentucky. *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 95 Ky. 50, 23 S. W. 592, 15 Ky. L. Rep. 417, 44 Am. St. Rep. 203.

Louisiana. *Brown v. Duplessis*, 14 La. Ann. 842.

Maryland. *Jeffers v. Annapolis*, 107 Md. 268, 68 Atl. 361.

Missouri. *St. Louis & S. Ry. Co. v. Lindell Ry. Co.*, 190 Mo. 246, 88 S. W. 634; *Placke v. Union Depot Ry. Co.*, 140 Mo. 634, 41 S. W. 915.

New Jersey. *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61.

Ohio. *Cincinnati & Spring Grove Ave. St. Ry. Co. v. Cummins*, 14 Ohio St. 523.

West Virginia. *Watson v. Fairmont & S. Ry. Co.*, 49 W. Va. 528, 39 S. E. 193, holding that legislative authority conferred* on municipality to grant and regulate all franchises over its streets conferred authority to grant right to construct and operate a street railway.

Wisconsin. *Linden Land Co. v. Milwaukee Electric Ry. & Lighting Co.*, 107 Wis. 493, 83 N. W. 851 (may extend existing franchises); *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181, construing statute.

ing,⁹⁵ or for pipes to furnish *water* to the municipal-

See *State ex rel. v. King*, 104 La. 735, 29 So. 359.

Validity of ordinance granting use of street to street railway company, in New Jersey, under statutes, see *St. Paul's Catholic Church v. Jersey City*, 81 N. J. L. 110, 78 Atl. 1064.

Municipal authority conferred on a railroad company to cross a street with its tracks is subordinate to the use of the street for a street railroad thereon pursuant to municipal grant. *East St. Louis R. Co. v. Louisville & N. R. Co.*, 149 Fed. 159, 79 C. C. A. 107.

Effect of paving. The fact that a street has been paved and the cost assessed against abutters does not preclude the right of the municipality to consent to the tracks of a street car company being laid in the street. *Lockhart v. Craig St. Ry. Co.*, 139 Pa. 419, 21 Atl. 26.

Power to grant as exhausted by refusal. Where, under a legislative act, it is necessary for the city to give its consent for the construction of a street railway, and the city by ordinance declines to permit the use of its streets for this purpose, the city cannot by subsequent ordinance consent to such use of a street, since the power designated by the legislature was exhausted by the passage of the first ordinance. *Musser v. Fairmount R. Co.*, 5 Pa. L. J. (5 Clark) 466.

Federal statutes applicable to territories. In Utah, the federal statutes of 1886 forbidding territories to pass local or special laws granting the right to lay down

railroad tracks was held not to preclude a city, under power delegated to it by the territorial legislature, to grant a franchise to use the streets for a railway. *Henderson v. Ogden City R. Co.*, 7 Utah 199, 203, 26 Pac. 286.

Description of street railway franchises in Greater New York, see Wilcox, *Municipal Franchises*, §§ 312-326.

Description of street railway settlement franchises of Chicago and Cleveland, see Wilcox, *Municipal Franchises*, §§ 327-347.

Franchises for elevated railways, description of, see Wilcox, *Municipal Franchises*, §§ 423-437.

Passenger subway and freight tunnel franchises, description of, see Wilcox, *Municipal Franchises*, §§ 438-453.

Interurban railway franchises, description of, see Wilcox, *Municipal Franchises*, §§ 454-467.

95. *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. Rep. 183; *Sharp v. South Omaha*, 53 Neb. 700, 74 N. W. 76.

Gas franchises, historical and descriptive, see Wilcox, *Municipal Franchises*, §§ 246-276.

Granting right to lay gas pipes is not invalid within the restrictions against disposition of the city property. *Smith v. Metropolitan Gas Light Co.*, 12 How. Prac. (N. Y.) 187.

Power to permit foreign corporation gas companies to lay pipes in the streets of a city, see *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 182 Fed. 667, 673.

ity,⁹⁶ or for poles and wires to furnish *electricity* for lights.⁹⁷ or to transmit messages by *telephone or telegraph*⁹⁸ or for *conduits* underneath the surface to carry wires and the like.⁹⁹

96. *State ex rel. v. Tampa Water Works Co.*, 56 Fla. 858, 47 So. 358; *Boliver v. Boliver Water Co.*, 70 N. Y. S. 750, 62 App. Div. 484.

Water works and water supply franchises, from a descriptive standpoint, see Wilcox, *Municipal Franchises*, §§ 188-202.

Financial ability of municipality. Power of town to grant water franchises is not precluded by fact that it is financially unable to construct system of water-works itself. *Fidelity Trust & Guaranty Co. v. Fowler Water Co.*, 113 Fed. 560.

97. *Illinois. McWethy v. Aurora Electric Light & Power Co.*, 202 Ill. 218, 67 N. E. 9, aff'g 104 Ill. App. 479.

Iowa. Hanson v. Hunter, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

Michigan. Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 43, 82 N. W. 821.

Missouri. Western Union Tel. Co. v. Guernsey & Scudder Electric Light Co., 46 Mo. App. 120.

New York. Tuttle v. Brush Electric Illuminating Co., 50 N. Y. Super. Ct. 464.

See *Johnson v. Thompson-Houston Electric Co.*, 7 N. Y. S. 716, 54 Hun 469.

Electric light, heat and power as a public utility and franchise conditions imposed on such companies, see Wilcox, *Municipal Franchises*, §§ 103-134.

Where the fee of the streets is

owned by the municipal corporation, it may authorize their use by an electric light company to provide light to its citizens although the light is provided for private gain, provided, however, the ordinary use of the streets is not materially obstructed. *Aurora Electric Light and Power Co. v. McWethy*, 104 Ill. App. 479, aff'd in 202 Ill. 218, 67 N. E. 9.

Repeal of authority. A statute empowering villages to grant franchises for operating light plants, is not impliedly repealed by a subsequent statute authorizing them to maintain municipal lighting plants. *Wakefield v. Thresa*, 109 N. Y. S. 414, 125 N. Y. App. Div. 38.

98. *Plattsburgh v. Nebraska Telephone Co.*, 8 Neb. 460, 114 N. W. 588; *Domestic Telegraph & Telephone Co. v. Citizens' Tel. Co.*, 9 N. J. L. 210; *Kirby v. Citizens' Telephone Co.*, 17 S. D. 362, 97 N. W. 3, express statute.

Telegraph companies and the conditions imposed upon them by local authorities, from a descriptive standpoint, see Wilcox, *Municipal Franchises*, §§ 157-167.

Telephone as a public utility and telephone franchise regulations, as they actually exist in cities in this country, see Wilcox, *Municipal Franchises*, §§ 135-156.

99. *State ex rel. v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *Missouri-Edison Electric Co. v. Weber*, 102 Mo. App. 95, 76 S. W. 736; *Edison General Elec-*

In determining whether a municipality has the power to grant to a public utility company the right to use a

tric Co. v. Cincinnati, Prob. R. (Ohio) 304.

Conduit companies in New York City. Corporation has been formed to construct and maintain conduits for carrying wires for other corporations authorized to operate electrical conductors in that city. *Re Long Acre Electric Light & Power Co.*, 188 N. Y. 361, 80 N. E. 1101, aff'g 102 N. Y. S. 242, 117 App. Div. 80.

"Before considering further the incidental character of the construction and maintenance of subways in which to place wires as electric conductors, a reference will be made to the acts of the legislature and the contracts executed in conformity therewith relating to electric subways in the city of New York. The importance of a general system of subways or conduits under the surface of the streets of the city to include all electric conductors was such as to require action on the part of the city to establish such general system. The space necessarily occupied under the surface of the streets of a great city for sewer, water, gas, steam, and other pipes, subways for electric conductors and openings for transportation, and many other purposes for which space is required, makes it necessary to consolidate, combine, and group the spaces used as much as possible. Acts properly looking to that end are necessary in the public interest, not only on account of preserving and economizing the space under the surface of the streets, but also to avoid any

unnecessary interference with the surface of the streets, and thus incommode the public in the general or ordinary use of the streets themselves. If the surface of the streets is to be constantly opened to allow corporations and persons authorized to use electric conductors to construct their own conduits independent of a general plan or system, it would become almost as intolerable as the maintenance of innumerable wires strung above the surface of the ground. The desirability and importance of one system of conduits for all electric conductors is manifest and conceded. By the subway act of 1884 it was provided that all telegraphic, telephonic, and electric light wires and cables used in any incorporated city having a population of 500,000 or over should thereafter be placed under the surface of the streets of said city, and it was further provided that such wires and cables, including what is known as 'telegraph poles' then in the streets of such cities, should be removed from the surface of the streets on or before the first day of November, 1885, and in case any company should fail to comply with the provisions of the act the local governments of said cities should without delay remove them therefrom." *People ex rel. v. Ellison*, 188 N. Y. 523, 81 N. E. 447, 449.

Electrical conduits, and franchises therefor, as existing in various cities, see *Wilcox, Municipal Franchises*, §§ 180-187.

street or streets, it is wholly immaterial whether the municipality owns the fee in the soil over which the streets are laid out, or only an easement;¹ but it cannot grant rights outside its territorial limits,² and of course, after streets and alleys become attached to another municipality, the original municipality has no further power to regulate and control them.³

If the power to grant franchise is conferred upon the city council, the consent of the people of the city to such franchise is not necessary.⁴

In some states, by statute, a franchise to use the streets granted by a municipality is not valid until approved by the board of public utility commissioners.⁵

1. *Elizabeth City v. Banks*, 150 N. C. 407, 64 S. E. 189.

While this rule as to ownership of the fee being immaterial has not been directly passed on except in one other case, so far as can be found, it is undoubtedly correct, notwithstanding the title of the municipality to the street is treated as an important feature in the recent Colorado decision of *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122, 95 Pac. 343, 16 L. R. A. (N. S.) 874, 127 Am. St. Rep. 100.

2. A municipality is limited in granting franchise rights to its territorial limits. On the other hand, an act of the legislature may authorize the use of roads and streets beyond the limits of a city and within designated counties as it may from time to time be deemed expedient.

See *Gas Light Co. v. South River Borough*, 77 N. J. Eq. 487, 77 Atl. 473, holding that gas company was authorized by statute to extend its mains to a borough

outside of the municipality which it was originally authorized to supply with gas.

3. *People ex rel. v. Chicago Tel. Co.*, 245 Ill. 121, 91 N. E. 1065.

4. *Lawrence v. Hennessy*, 165 Mo. 659, 65 S. W. 717.

5. "No privilege or franchise hereafter granted to any public utility as herein defined, by any political subdivision of this state, shall be valid until approved by said board, such approval to be given when, after hearing, said board determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests, and the boards shall have power in so approving to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interests may reasonably require." Public Laws, N. J. 1911, c. 195.

§ 1625. Same—power of municipality to grant rights in streets as conferred by implication.

The most important matter in relation to the power of a municipality to grant a franchise or license to use streets is whether the legislature, not having expressly conferred such power, has conferred it by implication, and whether the power can be conferred other than expressly, and in regard to these matters the decisions are not entirely harmonious.⁶

6. A statute empowering a city council to prescribe the manner in which privileges for the use of, or digging up, streets to lay pipes should be exercised, did not authorize the council to make an original grant. *Fogg v. Ocean City*, 74 N. J. L. 362, 65 Atl. 885.

A grant of power to municipal corporations to authorize the erection of gas-works or electric light plants, upon the approval by a majority of the voters of the municipality at a general or special election, includes within its provisions an ordinance granting the right to erect poles and wires in the streets for the distribution of electricity for light and power. *Hanson v. Hunter*, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

Commercial railroads. Charter authority to grant permission to lay railroad tracks on streets held limited to street railroads and not to include railroads incorporated under the general railroad law. *Tallon v. Hoboken*, 60 N. J. L. 212, 37 Atl. 895; *Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43, 2 Atl. 775.

Statute permitting sale by city of railway franchises held applicable only to street railways.

East Louisiana R. Co. v. New Orleans, 46 La. Ann. 526, 15 So. 157.

Street railways. Cannot grant permission to erect poles and string wires for electric street railway where statute merely authorizes use of electric motors. *State v. Trenton*, 54 N. J. L. 92, 23 Atl. 281.

Under a grant of power to pass such ordinances as are necessary to regulate street car, a municipality was held to be authorized to grant franchise to use its streets, and to fix the rates of fares by agreement with the street railway company. *Shreveport Tr. Co. v. Shreveport*, 122 La. 1, 47 So. 40.

Pneumatic tubes. Municipality has no power to confer the right to use streets for laying pneumatic tubes to carry packages by compressed air and to supply compressed air, under statutory authority to permit the use of its streets for the supply of heat and power or automatic package carrier. *Ampt v. Cincinnati*, 21 Ohio Cir. Ct. R. 300, 11 O. C. D. 805.

Power to vacate streets does not authorize a municipal corpor-

It must be kept in mind, however, that grants of power held to confer *implied* authority to grant certain franchises, such as water and light franchises, would not be held, although in the same general language, to confer power to grant franchises to use the streets for railways. Generally, the power need not be *expressly* conferred,⁷ but in some cases it has been held, although largely *dicta*, that *express* authority is necessary to confer power on a municipality to grant franchises to use the streets for railways,⁸ or for telephone poles or wires.⁹

The ultimate source of franchises to use the streets in all cases being the state, "the difference between municipal power to grant them and authority to consent to the exercise of them is a difference of words rather than of substance,"¹⁰ and constitutional provisions or statutes prohibiting the use of the streets of a municipality, without the consent of the municipality, are to be construed the same as if they expressly authorized the municipality to grant the use of its streets to such companies.¹¹

ation to grant the use of its streets for an elevated railroad, such not being a vacation but a joint use with the public. *McAboy's Appeal*, 107 Pa. St. 548.

See also extensive note in 22 L. R. A. (N. S.) 925.

7. *Denver & S. F. R. Co. v. Dunke*, 11 Colo. 247, 17 Pac. 777 (for commercial railway); *Eichels v. Evansville Street R. Co.*, 78 Ind. 261, 41 Am. Rep. 561 (for street railway).

8. If no express statutory authority, city has no power to permit use of steam motors upon its streets either by ordinary railroad or street railroad. *Stanley v. Davenport*, 54 Iowa 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216.

Elevated railroad. Right of city to authorize the building and operation of elevated street passenger railroad denied, in absence of express legislative authority. *Potts v. Quaker City El. R. Co.*, 161 Pa. St. 396, 29 Atl. 108.

9. *State ex rel. v. Trenton*, 36 N. J. L. 79.

10. *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782, 788, 10 C. C. A. 60, 66.

11. *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782, 10 C. C. A. 60.

If the charter of a street railroad company authorizes it to construct its road on any street, and a constitutional provision forbids the legislature to authorize the construction of any street

In most jurisdictions, the *general powers* ordinarily conferred on municipalities do not include the right to grant such franchises and privileges,¹² but there are decisions expressly or in effect to the contrary.¹³ For

railroad within the limits of a municipality without the consent of the corporate authorities, there is implied authority in the municipality to grant such permission. *Almand v. Atlanta Consol. St. Ry. Co.*, 108 Ga. 417, 34 S. E. 6.

Constitutional provision prohibiting legislature from granting a right to operate a street railway within a municipality without the consent of the local authorities is a clear recognition of the right of any city to grant the right to use its streets to street railway companies. *Houston v. Houston City St. Ry. Co.*, 83 Texas 548, 19 S. W. 127. And see *Laager v. San Antonio* (Tex. Civ. App.), 57 S. W. 61.

Contra, to statement in text, is *Missouri River Tel. Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67.

12. *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561 (for street railway); *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186.

See § 227 *ante*, vol. 1.

Statutory power to grant the right to erect *water* and *gas* works, and to lay pipes, does not authorize a permit to erect an *electric light* plant and to occupy the streets with wires. *Carthage v. Carthage Light Co.*, 97 Mo. App. 20, 70 S. W. 936.

General welfare clause in charter does not authorize granting

of franchise for water works. *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 29.

Commercial railroads. Authority to a municipality to devote a part of a street to railroad use is not given by the grant of a general power to establish, change and maintain its streets and alleys. *Athens Terminal Co. v. Athens Foundry & Machine Works*, 129 Ga. 393, 58 S. E. 891.

Authority to permit the use of a street by a railroad company is not conferred on a municipality by a charter provision "that in all cases of encroachments on the streets, lanes or alleys of said city, the mayor and council shall have power to remove the same upon reasonable notice or permit, and sanction same for a fair and reasonable compensation." *Athens Terminal Co. v. Athens Foundry & Machine Works*, 129 Ga. 393, 58 S. E. 891; *Daly v. Georgia Southern Ry. Co.*, 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286.

13. See *Atchison St. R. Co. v. Missouri P. R. Co.*, 31 Kan. 660. 3 Pac. 284 (holding power to open and improve streets authorized grant of use of streets for street railway); *New Orleans v. Steinhart*, 52 La. Ann. 1043, 27 So. 586.

Granting a water franchise is within the incidental powers of a municipality. *Gadsden v. Mitchell*, 145 Ala. 137, 40 So. 557, 6 L.

instance, it has been held that the power to "*regulate*" the use of streets includes the right to grant public service companies the right to use the streets, at least for some purposes,¹⁴ while other cases have held the con-

R. A. (N. S.) 781, 117 Am. St. Rep. 20.

In Missouri, it is held that the usual powers conferred by charter on a municipality over its streets are sufficient to authorize it to permit their use for horse railway. *State v. Corrigan*, Consol. St. Ry. Co., 85 Mo. 263, 55 Am. Rep. 361.

Commercial railroads. Charter power to control streets and alleys, and the laying of railroad tracks and switches authorizes a municipality to grant a railroad company the right to occupy a street. *McCammon & Lang Lumber Co. v. Trinity & B. V. Ry. Co.* (Tex. Civ. App., 1910), 131 S. W. 85, rev'd on other grounds in 133 S. W. 247.

Where a county road has been included within a municipal corporation which has assumed control over it, the municipal corporation may, by virtue of its power of control over its streets, grant a railroad the right to construct its road in the same. *Yates v. West Grafton*, 34 W. Va. 783, 12 S. E. 1075.

Telegraph and telephone lines. Under power "to grant the right of way" to a telephone company, the municipality may determine and designate the streets and alleys which may be used by the company. *Wichita v. Missouri & K. Telephone Co.*, 70 Kan. 441, 78 Pac. 886.

In Indiana, "by a long line of decisions it seems to have been thoroughly settled that municipalities in this state, under their *general powers*, have authority to grant railroad companies the right to lay their tracks longitudinally upon a street, provided that the use does not destroy or unreasonably impair the street as a highway for the general public." *Newcastle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 57 N. E. 516.

14. *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333.

Power to regulate as power to grant franchise. Charter power "to regulate the use of streets" is very comprehensive. The word "regulate" is one of broad import. It may be likened to the comprehensive power conferred upon the congress by the federal constitution relating to foreign and interstate commerce. The federal courts have always held this power to be broad and comprehensive. *Mr. Justice Brewer in St. Louis v. W. U. Tel. Co.*, 149 U. S. 465, 469.

"Under its general powers to regulate the use of streets, the city has authority to authorize corporations and persons, for the purpose of serving the public, to string *telegraph, telephone, or electric light* wires upon poles above the surface or through conduits beneath the surface of the streets, provided such struc-

trary in regard to certain uses of the street.¹⁵ So a general clause in a municipal charter giving the city power to *control* its streets does not, it has been held, grant authority to permit the laying of railroad tracks in the streets,¹⁶ although in Illinois the power to

tures and mechanical appliances do not materially interfere with the ordinary use of the streets and public travel thereon." *State v. Murphy*, 134 Mo. 548, 562, 31 S. W. 784, 34 L. R. A. 369, 56 Am. St. Rep. 515.

Poles and wires for electric light. *Dickson v. Kewanee Electric Light & Motor Co.*, 53 Ill. App. 379; *Western Union Tel. Co. v. Guernsey & Scudder Light Co.*, 46 Mo. App. 120.

Gas pipes. *Chicago Municipal Gas Light & Fuel Co. v. Lake*, 130 Ill. 42, 54, 22 N. E. 616.

Telegraph and telephone lines. Charter power to "regulate" streets includes power to grant a telephone company the right to use the street. *Southern Bell Tel. & Tel. Co. v. Mobile*, 162 Fed. 523, 529; *Owensboro v. Cumberland Tel. & Tel. Co.*, 174 Fed. 739, 750; *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 469, 13 Sup. Ct. 990, 37 L. Ed. 810; *McWethy v. Aurora Electric Light & P. Co.*, 202 Ill. 218, 67 N. E. 9.

Charter power "to license, tax, and regulate" telephone companies includes power to grant them the right to erect poles in the street. *Hershfield v. Rocky Mountain Bell Tel. Co.*, 12 Mont. 102, 29 Pac. 883.

Street railroads. Charter authority to open, close and widen streets and to prescribe, control

and regulate the manner in which they shall be used and enjoyed, is sufficient to authorize a city to consent to the use of its streets by a street railroad company. *Detroit Citizens' St. Ry. Co. v. Detroit*, 64 Fed. 628, 12 C. C. A. 365, 22 U. S. App. 570.

Regulate and control—confers authority to grant franchise for horse railway. *State v. Jacksonville R. Co.*, 29 Fla. 590, 10 So. 590.

15. It seems that the laying of gas pipes in a street cannot be authorized under power granted the municipality to regulate and control the use of the streets. *Elizabeth City v. Banks*, 150 N. C. 407, 64 S. E. 189.

Commercial railroads. Power to regulate streets does not confer authority to allow them to be used by a commercial railroad company. *Tallon v. Hoboken*, 60 N. J. L. 212, 37 Atl. 895.

Statutory power to make ordinances concerning regulation of rights of way, street cars, street railways, etc., does not confer authority to grant a franchise to a railroad company to lay its tracks on streets. *Louisville & N. R. Co. v. Mobile, J. & K. C. R. Co.*, 124 Ala. 162, 26 So. 895.

16. *Daly v. Georgia, S. & F. R. Co.*, 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; *Ruttle v. Covington (Ky., 1889)*, 10 S. W. 644;

control streets conferred on a municipality is held to include the right to authorize their use for street railway purposes¹⁷ and *a fortiori*, for a waterworks system.¹⁸

Power to make a contract for a water supply includes power to grant a franchise to use the streets to furnish such supply,¹⁹ and the same rule applies to franchises to use the streets for lighting.²⁰

10 Ky. L. Rep. 766; Stillwater v. Lowry, 83 Minn. 275, 86 N. W. 103; Attorney General v. Lombard & S. St. P. R. Co., 10 Phila. (Pa.) 352.

Municipal power to lay out, establish, alter, and open streets does not include converting street or part of it into a railway. Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186.

In Colorado, however, plenary control over streets vested in a municipality authorizes it to grant the use of its street for ordinary railroad purposes, the fee of the streets being vested in the municipality. Denver & S. F. R. Co. v. Hannegan, 43 Colo. 122, 95 Pac. 343, 16 L. R. A. (N. S.) 874, 127 Am. St. Rep. 100.

17. Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; reversing Govin v. Chicago, 132 Fed. 848, construing and following Illinois law.

Exclusive control of streets, where delegated to a municipality, authorizes grant of streets for railway. People ex rel. v. Blocki, 203 Ill. 363, 67 N. E. 809.

18. In Illinois, exclusive control of streets conferred on municipalities authorizes grant for water pipes. Quincy v. Bull, 106 Ill. 337.

19. Jack v. Grangeville, 9 Idaho 291, 74 Pac. 969; Quincy v. Bull, 106 Ill. 337; Wood v. National Water Works Co., 33 Kan. 590, 7 Pac. 233; Mercantile Trust & D. Co. v. Columbus, 161 Fed. 135; Andrews v. National Foundry & Pipe Works, 61 Fed. 782, 10 C. C. A. 60.

Power to own public utility. Power "to provide for the erection of waterworks" includes power to grant a franchise for a water supply. Andrews v. National Foundry & Pipe Works, 61 Fed. 782, 10 C. C. A. 60.

General welfare clause in charter gives authority to supply the municipality with water, and the latter power is sufficiently broad to authorize the granting of the right to lay water pipes in the streets to supply the municipality with water. Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. 864, 112 Pac. 1083.

20. Lighting. Authority to light streets and public places confers power to grant franchises to use the street for such purposes. Levis v. Newton, 75 Fed. 884, affirmed in Newton v. Levis, 79 Fed. 715, 25 C. C. A. 161, construing Iowa law.

A city having power to contract for water and light supply for its

§ 1626. Same—curative legislation.

If a municipality had no power to grant the right to use streets, its grant may be validated by a subsequent act of the legislature for that purpose unless the state constitution forbids.²¹

§ 1627. Same—power to grant for private purposes.

The grant must be for a public use. It is invalid where for a private use from which neither the municipality nor its citizens nor the public receive any consideration or benefit,²² unless the power to grant such a franchise has been expressly conferred by the legislature.²³ But it will be presumed, where a municipality grants a right to use its streets for gas or electric light-

own and its inhabitants' use, may also grant such franchises for the use of its streets as are necessary or convenient for the construction and maintenance of the necessary works and appliances for furnishing the same. *Little Falls E. & W. Co. v. Little Falls*, 102 Fed. 663.

Contra. Municipal authority "to light the streets" insufficient. *Ransberry v. Keller*, 9 Pa. Co. Ct. R. 299.

21. **Curative legislation.** *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787; *Passaic v. Public Service Corporation*, 75 N. J. Eq. 379, 73 Atl. 122; *Kumler v. Silsbee*, 38 Ohio St. 445; *Barre v. McFarland*, 82 Vt. 310, 73 Atl. 577.

Legislative curative power as to void ordinances, § 707 *et seq.*, *ante*, vol. 2.

22. *Brown v. Chicago, etc. R. Co.*, 137 Mo. 529, 38 S. W. 1099; *State v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 A. St. R. 515; *Morie v. St. Louis Transit*

Co., 116 Mo. App. 12, 91 S. W. 962; *Watson v. Robberson Avenue R. Co.*, 69 Mo. App. 548; *Pittsburg, etc. R. Co. v. Cincinnati*, 9 Ohio Dec. 695, 16 Wkly. Law Bul. 367; *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333.

See §§ 1333-1367 *ante*, vol. 3, as to encroachments on streets by others than public service companies, and use thereof other than for travel.

Subway. The grant by a municipal corporation to a company of a right to use its streets for the construction of subways for private use is *ultra vires* and void. *State ex rel. v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 34 L. R. A. 369, 56 Am. St. Rep. 515.

Private railroads and switches. Grant of right to construct private railroads and switches. § 1363 *ante*, vol. 3.

23. *People ex rel. v. Keating*, 168 N. Y. 390, 61 N. E. 637.

ing, or the like, that the use is for public as distinguished from private purposes.²⁴ And the fact that the company is organized for private gain is immaterial where the use is in fact public.²⁵

Under the rule that a municipality cannot grant a right to use the streets for a private purpose, it has been held that a municipality cannot authorize individuals to use streets to lay conduits for supplying gas generated from ammonia for the purposes of refrigeration, where for the benefit of a limited number of people within a restricted district and there is no obligation to furnish all of the people even in the locality of the plant.²⁶

§ 1628. Delegation by municipality of power.

What constitutes a delegation of legislative power has already been considered in a previous volume.²⁷ Mere ministerial duties may be delegated,²⁸ such as the issuance of a permit where such issuance is merely a ministerial duty.²⁹ But the power conferred on a municipal body or officers to grant a franchise cannot be delegated.³⁰ Thus, where the power to grant a franchise is conferred on the common council, it must be exercised by such council, and the authority cannot be delegated by the council to any officer or board.³¹

So, under this rule as to delegation of power, it has been held that a municipality cannot make a general grant to a street railway company of the right to construct its road in any of the streets of the municipality

24. *Levis v. Newton*, 75 Fed. 884.

25. *Aurora Electric L. & P. Co. v. McWethy*, 104 Ill. App. 479, *aff'd* in 202 Ill. 218, 67 N. E. 9; *State v. St. Louis*, 161 Mo. 371, 61 S. W. 658.

26. *Rhinehart v. Redfield*, 87 N. Y. S. 789, 93 App. Div. 410, *aff'd* in 179 N. Y. 569, 72 N. E. 1150.

27. §§ 382-387 *ante*, vol. 1.

28. § 387 *ante*, vol. 1.

29. *Carthage v. Garner*, 209 Mo. 688, 108 S. W. 521.

30. *Board of Liquidation of City Debt v. New Orleans*, 32 La. Ann. 915; *State v. Bell*, 34 Ohio St. 194.

31. § 385, note 30, § 386 *ante*, vol. 1.

at any time the company desires, since a delegation of the power to determine what streets could be used and occupied for street railway purposes consistently with the public safety and welfare is void.³² However, the act of a city council in granting a railroad company a permit to construct its road at any point to be selected by the company, within a certain district, has been held not a delegation of the powers of the city council.³³

§ 1629. Power of municipality to refuse to allow use of streets.

A municipality cannot absolutely refuse to allow the use of its streets by a public service company where the right to use the streets has been unconditionally granted by the legislature.³⁴

So where the right to the use of the streets has been expressly granted to a public service company by the legislature, no municipal power to prohibit such use of the streets can be inferred from the clause in the grant that the use shall be subject to such *regulations and restrictions* as may be imposed, since the restrictions thereby intended must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use, or impose new conditions to the power to exercise the franchise.³⁵

32. Logansport R. Co. v. Logansport, 114 Fed. 688, 693; Knoxville v. Africa, 77 Fed. 501, 23 C. C. A. 252.

33. Chicago & W. I. R. Co. v. Dunbar, 100 Ill. 110.

Contra, Hickey v. Chicago & W. R. I. Co., 6 Ill. App. 172.

34. Louisville v. Louisville Water Co., 105 Ky. 754, 49 S. W. 766; Rochester and Lake Ontario Water Co. v. Rochester, 176 N. Y. 36, 50, 68 N. E. 117; Re Consolidated Gas Co., 106 N. Y. S. 407, 56 Misc. Rep. 49; Dorrance v. Bristol Borough, 224 Pa. St. 464,

73 Atl. 1015; State ex rel. v. Sheboygan, 111 Wis. 23, 86 N. W. 657.

"Vicinity." Statutory authority to lay gas pipes in streets of a named municipality and its vicinity does not give right to use streets in another borough outside said municipality. Madison v. Morristown Gaslight Co., 65 N. J. Eq. 356, 54 Atl. 439, rev'g 63 N. J. Eq. 120, 52 Atl. 158.

35. Summit v. New York & N. J. Tel. Co., 57 N. J. Eq. 123, 41 Atl. 146.

On the other hand, where it is provided that the consent of the municipality must be obtained before the streets can be used, a municipality has power to refuse to allow a public service company to use its streets, and its authority is not limited to a reasonable regulation of the method of using the streets.³⁶ Here, however, a distinction should be drawn between a franchise to use the streets and a permit to dig into the streets, since it is well settled that if the right to use the streets exists, a permit to dig into the streets to lay pipes, tracks, etc., cannot be refused without cause.³⁷

Telegraph companies which accept the provisions of the federal statute of 1866 (Post Roads Act) and its amendments,³⁸ or which are authorized by a state statute to use the streets of municipalities within the state,³⁹ need not apply to a municipality for a franchise to use the streets, and the municipality cannot refuse to allow such companies to use its streets; but the federal statute does not apply to telegraph companies which have not accepted the provisions of such statute,⁴⁰ nor to district

36. *State v. Spokane*, 24 Wash. 53, 63 Pac. 1116 (telephone company); *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801.

See *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 47 S. E. 848; *Southern Bell Tel. Co. v. Richmond*, 103 Fed. 31, 37, 44 C. C. A. 147.

Right to refuse consent to use streets. A city forbidden to grant an exclusive right for the use of its streets is not thereby prohibited from withholding its consent, to occupy its streets, to a telephone company, when there is already a telephone company using the same. *State v. Spokane*, 24 Wash. 53, 63 Pac. 1116.

Where a public service com-

pany has no right to lay its pipes across a street, the municipality may refuse to allow it to cross a street, where its object is to use the pipe to transport water to another state, which is forbidden by statute. *Bayonne v. North Arlington Borough*, 78 N. J. Eq. 283, 79 Atl. 357.

37. *Gas Light Co. v. South River*, 77 N. J. Eq. 487, 497, 77 Atl. 473.

§ 1679 *post*.

38. Rev. St. U. S., § 5263, as amended.

License taxes, § 1683 *et seq.*, *post*.

39. § 1621 *ante*.

40. *Chicago & A. Bridge Co. v. Pacific Mut. Tel. Co.*, 36 Kan. 113, 12 Pac. 535.

telegraph companies,⁴¹ nor to telegraph companies incorporated under the laws of a foreign country,⁴² nor to telephone companies.⁴³

§ 1630. To whom franchise may be granted.

In the absence of any statutory or charter provision to the contrary, a municipality may grant a franchise to use the streets to an individual or a partnership as well as to a corporation.⁴⁴ Thus, a street railway franchise, while ordinarily granted to a corporation, may be granted to individuals,⁴⁵ unless

41. *Toledo v. Western Union Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730.

42. *De Castro v. Compagnie Francaise du Telegraphe*, 32 N. Y. S. 960, 85 Hun (N. Y.) 231, 66 N. Y. St. Rep. 391.

43. *Richmond v. Southern Bell Tel. & Tel. Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162, rev'g on this point, 85 Fed. 19, 28 C. C. A. 659.

44. *London Mills v. White*, 208 Ill. 289, 70 N. E. 313, aff'g 105 Ill. App. 146; *Citizens' Electric Light & Power Co. v. Sands*, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411; *Black River Imp. Co. v. Holway*, 87 Wis. 584, 59 N. W. 126; *Watson v. Fairmont & S. R. Co.*, 49 W. Va. 528, 39 S. E. 193; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

Limitation of authority. Where a statute expressly enumerates certain corporations and persons to whom municipal corporations may grant franchises for street railway purposes, it impliedly excludes the power to grant to any

others. *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181.

Contract to furnish light may be with individuals. *Citizens Electric Light & Power Co. v. Sands*, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411.

45. *Re Kerr*, 42 Barb. (N. Y.) 119; *Henderson v. Ogden City R. Co.*, 7 Utah 199, 26 Pac. 286; *Watson v. Fairmont, etc. R. Co.*, 49 W. Va. 528, 39 S. E. 193.

May be granted to partnership. *O'Neil v. Lamb*, 53 Iowa 725, 6 N. W. 59; *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787.

New York. The question has recently arisen in New York as to whether a municipality can grant to an individual, as distinguished from a corporation, a franchise to construct a street railroad in the streets of the municipality, and such question has been answered in the affirmative after a review of many railroad statutes, especially the provision that in cities containing over a million and a quarter inhabitants, the bidder to whom a franchise is sold must be a duly incorporated corporation. *Phoenix v. Gannon*,

a statute restricts the granting of such franchises to corporations.⁴⁶

§ 1631. Same—grant before organization of corporation.

The fact that a company is not completely incorporated at the time a grant is made to it by a municipality to use the streets does not in most jurisdictions, affect the validity of the grant.⁴⁷ But such grant cannot

195 N. Y. 471, 88 N. E. 1066, rev'g 108 N. Y. S. 255, 123 App. Div. 93, holding that individual could assign franchise to corporation thereafter to be formed for the purpose of exercising the franchise.

In California, a grant to construct tracks was made to individuals who afterwards organized a corporation which assumed the franchise, but no formal transfer thereof was executed. The franchise was sustained. *Santa Rosa, etc. R. R. Co. v. Central Street Ry. Co.* (Cal., 1895), 38 Pac. 986.

Compare *Homestead Street Ry. v. Pittsburg, etc. Street Ry.*, 166 Pa. St. 162, 30 Atl. 950, 27 L. R. A. 383; *Atkinson v. Asheville Street Ry.*, 113 N. C. 581, 18 S. E. 254.

46. *Wilder v. Aurora, etc. El. T. Co.*, 216 Ill. 493, 75 N. E. 194; *Goddard v. Chicago, etc. R. Co.*, 202 Ill. 362, 66 N. E. 1066.

Where a statute provides that any incorporated street railway company may locate its road on any street or highway, but also provides that such company must obtain consent from the county board before constructing its road on any highway outside of any incorporated city, town or village, the board was not au-

thorized to grant to an *individual* the right to construct a street railway in the highways. *Goddard v. Chicago, etc., R. Co.*, 104 Ill. App. 526, aff'd in 202 Ill. 362, 66 N. E. 1066.

47. *Domestic Tel. & Tel. Co. v. Citizens' Tel. Co.*, 9 N. J. L. 210; *Woodbridge Tp. v. Middlesex Water Co.* (N. J. Eq.), 68 Atl. 464.

Under laws requiring an organization certificate of a water company to be filed with the secretary of state, together with the written consent of the authorities of the municipal corporation to be supplied with water to the incorporation, and which also requires the company to obtain consent of the municipality before laying pipes in the streets, the consent to lay the pipes and the consent to the incorporation may be given at the same time. The consent to lay pipes was not void because given before the company was fully incorporated. *Woodbridge Twp. v. Middlesex Water Co.* (N. J. Eq.), 68 Atl. 464.

In West Virginia, a grant by a municipal corporation to an intended company, though at the time the corporation was not chartered, but was chartered sub-

take effect until the corporation is organized.⁴⁸ And in Illinois it has been decided that the ordinance granting the franchise may be presented before the corporation grantee is fully organized, where the organization is completed before the passage and acceptance.⁴⁹ But in New Jersey, where the first and second readings of the ordinance occurred before the organization of the gas company which was to obtain the grant, the franchise was declared void.⁵⁰

§ 1632. Propriety of grant of franchise not subject to review.

The propriety or expediency of granting the use of streets to a public service company is not subject to review by the courts.⁵¹ If a municipal corporation has the power to grant a franchise, the courts will not, in the absence of abuse, fraud or unjust exercise of the power, interfere with the exercise of such power.⁵²

sequently and accepted the grant, was sustained. *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

Deed conveying land prior to formal incorporation, held good. *Spring Garden Bank v. Hurlings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583.

48. *Aspen Water & L. Co. v. Aspen*, 5 Colo. App. 12, 37 Pac. 728.

49. Where a corporation has been fully organized at the time a franchise is granted it by a municipal corporation, such franchise is not invalid merely because granted and accepted before the final certificate of incorporation has been filed in the recorder's office by the company as required by law. *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199

Ill. 324, 65 N. E. 329, aff'g 100 Ill. App. 57.

The fact that the corporation is not organized when the ordinance granting the franchise is passed is an irregularity which may be waived by the parties. Property owners cannot enjoin on this ground. *McWethy v. Aurora Electric L. & P. Co.*, 202 Ill. 218, 67 N. E. 9, aff'g 104 Ill. App. 479.

Application may be made before incorporation if the grant is made after incorporation. *Sloane v. People's El. Ry. Co.*, 7 Ohio Cir. Ct. Rep. 84.

50. *Stevens v. Merchantville*, 62 N. J. L. 167, 40 Atl. 688.

51. *Lange v. La Crosse, etc. R. Co.*, 118 Wis. 558, 562, 95 N. W. 952.

52. *Illinois. Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill.

Nor will a court interfere on the ground of favoritism.⁵³

4. EXCLUSIVE RIGHTS.

§ 1633. Power to grant exclusive franchises.

Exclusive franchises cannot be asserted unless there is a statutory or municipal grant of an exclusive right.⁵⁴

324, 65 N. E. 329; Cairo, etc. R. Co. v. People, 92 Ill. 170.

Iowa. Des Moines Gas Co. v. Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

Louisiana. Forman v. New Orleans & C. R. Co., 40 La. Ann. 446, 4 So. 246.

Missouri. Atkinson v. Wykoff, 58 Mo. App. 86.

New York. Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85, rev'g 14 N. Y. S. 159; People ex rel. v. Draper, 15 N. Y. 533; Adamson v. Nassau El. R. Co., 89 Hun 261, 34 N. Y. S. 1073, rev'g 12 N. Y. Misc. 600, 33 N. Y. S. 732.

Wisconsin. Lange v. La Crosse & E. Ry. Co., 118 Wis. 558, 95 N. W. 952.

§ 1629 *ante*.

Grant of franchise discretionary. If a city council is empowered to grant franchises, the exercise of such power cannot be defeated or restrained by any consideration of policy or expediency, or by any mere regard for the preference of property holders. *Jeffers v. Annapolis*, 107 Md. 268, 68 Atl. 361.

But *certiorari* will lie to review the proceedings of a board of public works of a city in granting a street railway company the right to construct an electric motor road without making proper provision for compensat-

ing abutting land owners. *Roebeling v. Board of Public Works* (N. J. Sup.), 28 Atl. 1043.

Injunction. Contracts made by a city council, granting street railway companies easements in the streets, are contracts made in behalf of the city, within the meaning of a statute authorizing the city solicitor to sue to enjoin the performance of any contract made in behalf of the city in violation of its ordinances. *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291.

Judiciary will not control exercise of discretionary powers, §§ 376, 379 *ante*, vol. 1.

Judicial interference in enacting ordinances. §§ 703-705 *ante*, vol. 2.

53. *Adamson v. Nassau Electric R. Co.*, 34 N. Y. S. 1073, 89 Hun 261, rev'g 12 Misc. Rep. 600, 33 N. Y. S. 732.

Individual interest of city officers. But a privilege grant to a street railway company to use the streets of a village for its lines is void where several members of the board owned stock in the railway company and participated in granting the privilege. *Hough v. Smith*, 75 N. Y. S. 451, 37 Misc. Rep. 363.

54. *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74, 40 Atl. 153.

The *legislature*, in the absence of special constitutional restrictions, may grant an *exclusive* franchise in the streets of a particular city,⁵⁵ or may delegate such

55. *California*. California State Telephone Co. v. Alta Telephone Co., 22 Cal. 398.

Iowa. Grant v. Davenport, 36 Iowa 396.

Louisiana. Crescent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Ann. 138.

Wisconsin. State v. Milwaukee Gaslight Co., 29 Wis. 454, 9 Am. Rep. 598.

United States. Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co., 182 Fed. 667, 669; New Orleans Gaslight Co. v. Louisiana Gaslight Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683, 6 Sup. Ct. 265.

See Slaughter House Cases, 16 Wall. (U. S.) 36, 29 L. Ed. 510; St. Tammany Water Works Co. v. N. O. Waterworks, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563.

Contra, Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19.

Construction of statutes. Appeal of Freeport Waterworks Co., 129 Pa. 605, 18 Atl. 560 (holding statute not applicable as against individual who had prior rights); Luzerne Water Co. v. Toby Creek Water Co., 148 Pa. St. 568, 24 Atl. 117 (holding statute of 1887 not applicable to water companies).

In Pennsylvania, a gas company incorporated under the act of 1874 giving exclusive rights to the company first incorporated until it has divided among its

stockholders certain dividends for five years, has an exclusive right, where it has never declared any dividends, as against a company subsequently incorporated, notwithstanding the franchise was not exclusive against an earlier company incorporated under the act of 1854 to furnish gas in the same territory. Commonwealth ex rel. v. Consumers' Gas Co., 214 Pa. St. 72, 63 Atl. 463, in which case, however, there are strong dissenting opinions by Judges Brown and Potter.

Where a statute makes the franchise of an electric light company exclusive until it shall from its earnings have "realized and divided among its stockholders during five years" a dividend of eight per cent, the exclusive right is not terminated because its profits have exceeded fifty per cent in less than five years, where they have been in good faith invested in betterments. Wilkes-Barre Electric Light Co. v. Wilkes-Barre Light, Heat & Motor Co., 4 Kulp. (Pa.) 47.

Water. Refusing charter to water company because of exclusive franchise of another water company, under statute of 1874. Re Union Water Co., 12 Pa. Co. Ct. R. 61; Re Granite Water Co., 12 Pa. Co. Ct. R. 63.

In Maine, if there is an existing company in a municipality supplying gas or electricity, a new company cannot obtain a fran-

power to a municipality,⁵⁶ and in such a case the grantee may call upon the courts to restrain a would be competitor from interfering with its monopoly right.⁵⁷

But, in some jurisdictions, it is held that *constitutional provisions against monopolies* preclude the granting to a public service company of exclusive franchise as against other like companies.⁵⁸

chise to use the streets unless by consent of the company or special legislative authority. *Twin Village Water Co. v. Damariscotta Gaslight Co.*, 98 Me. 325, 56 Atl. 1112.

Constitutional prohibition, see *St. Louis Gas Light Co. v. St. Louis Gas, Fuel & Power Co.*, 16 Mo. App. 52.

56. *Freeport Waterworks Co. v. Prager*, 3 Pa. Co. Ct. R. 371.

57. *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 182 Fed. 667, 669.

§ 1771 *post*.

"Whether such competition shall or shall not be permitted or even encouraged is a question to be answered by the legislative branch of the government. Except in so far as the legislature may be restrained by the federal or state constitution, it may do what it thinks best about such matters. The principle that the people are 'the best judges of what is for their own interest is the foundation of our political institutions.' Chief Justice Taney, *Ohio Life Insurance & Trust Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *New Orleans Gaslight Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516." *Cumberland Gaslight Co. v. West*

Virginia & Maryland Gas Co., 182 Fed. 667, 670.

"Where the public policy of a state contemplates that the use of the public streets shall be granted only by special acts of the legislature, or shall be granted under such circumstances as to hold out to the owner or possessor of such a franchise a reasonable expectation that the law will keep him free from competition, then the holder of a franchise is in the same position as the holder of a franchise to keep a bridge or ferry. He may recover damages at law for unauthorized competition from one whose competition has diminished his profits; or equity will, at his instance enjoin such competition altogether. *Raritan & Delaware Bay R. Co. v. Delaware & Raritan Canal Co.*, 18 N. J. Eq. 546; *Pennsylvania R. Co. v. National Ry. Co.*, 23 N. J. Eq. 441, 445." *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 182 Fed. 667, 674.

58. *Thrift v. Elizabeth City*, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427.

In Texas, exclusive grants are invalid as a monopoly. *Altgelt v. San Antonio*, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383; *Edwards*

A *municipality* has no power to grant an exclusive franchise to use the streets, to a public service corporation, unless the power not only to grant a franchise but also to grant an exclusive franchise has been delegated to it by the legislature either expressly or by necessary implication,⁵⁹ and if in-

County v. Jennings, 89 Tex. 618, 35 S. W. 1053.

In Tennessee, however, an exclusive privilege to a city to erect waterworks, or a like privilege to a private company for a specified term of years, is not a monopoly within the constitutional provision forbidding monopolies. Memphis v. Memphis Water Co., 5 Heisk. (52 Tenn.) 495.

59. *Connecticut*. Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19.

Florida. State ex rel. v. Tampa Water Works Co., 56 Fla. 858, 47 So. 358; Capital City Light & Fuel Co. v. Tallahassee, 42 Fla. 462, 28 So. 810, affirmed in 186 U. S. 401, 22 Sup. Ct. 866, 46 L. Ed. 1219; Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692.

Illinois. Russell v. Chicago & M. E. Ry. Co., 205 Ill. 155, 68 N. E. 727.

Indiana. Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Crowder v. Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Citizens' Gas & Mining Co. v. Elwood, 114 Ind. 332, 16 N. E. 624.

Louisiana. New Orleans, C. & L. R. Co. v. New Orleans, 44 La. Ann. 728, 11 So. 78.

Missouri. Grand Avenue Ry. Co. v. Citizens' Ry. Co., 148 Mo.

665, 50 S. W. 305; Grand Ave. Ry. Co. v. People's Ry. Co., 132 Mo. 34, 33 S. W. 472; St. Louis Transfer Ry. Co. v. St. Louis Merchants' Bridge Terminal Ry. Co., 111 Mo. 666, 20 S. W. 319; Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637, 68 S. W. 761.

Nebraska. May v. Gothenburg, 88 Neb. 772, 130 N. W. 566, holding franchise void in so far as exclusive.

New Jersey. See Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co., 75 N. J. 410, 67 Atl. 1005.

New York. Parfitt v. Ferguson, 159 N. Y. 111, 53 N. E. 707, aff'g 38 N. Y. S. 466, 3 App. Div. 176; Potter v. Collis, 156 N. Y. 16, 30, 50 N. E. 413; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546.

Ohio. Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89; Cincinnati Gas, Light & Coke Co. v. Avondale, 43 Ohio St. 257, 1 N. E. 527; Cincinnati St. R. Co. v. Smith, 29 Ohio St. 291; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Toledo Consolidated St. Ry. Co. v. Toledo Electric St. Ry. Co., 6 Ohio Cir. Ct. Rep. 362; Cleveland, C., C. & St. L. R. Co. v. Cincinnati, Prob. R. (Ohio) 269.

Oklahoma. Territory v. De Wolfe, 13 Okla. 454, 74 Pac. 98.

Oregon. Parkhurst v. Capital

ferred from other powers, it is not enough that the

City R. Co., 23 Ore. 471, 32 Pac. 304.

Pennsylvania. See Appeal of Meadville Fuel Gas Co. (Pa.), 4 Atl. 733.

Tennessee. Memphis City R. Co. v. Memphis, 4 Cold. (44 Tenn.) 406.

Texas. Grayson v. Marshall (Tex. Civ. App., 1912), 145 S. W. 1034; Crouch v. McKinney, 47 Tex. Civ. App. 54, 104 S. W. 518.

Utah. Henderson v. Ogden City R. Co., 7 Utah 199, 26 Pac. 286.

Washington. Charter of Seattle forbids. Wood v. Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

West Virginia. Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650.

United States. Detroit Citizens' St. Ry. Co. v. Detroit Ry., 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67; Nelson v. Murfreesboro, 179 Fed. 905; Water, Light & Gas Co. v. Hutchinson, 144 Fed. 256, *aff'd* in 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257; Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Westerly Waterworks v. Westerly, 75 Fed. 181 (following Smith v. Westerly, 19 R. I. 437, 35 Atl. 526); Grand Rapids, E. L. & P. Co. v. Grand Rapids, E. E. L. & F. G. Co., 33 Fed. 659; Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co., 24 Fed. 306; New Orleans City R. Co. v. Crescent City R. Co., 12 Fed. 308.

See Curry v. District of Columbia, 14 App. (D. C.) 423.

Contra, see Newport v. Newport Light Co., 84 Ky. 167, 8 Ky. L. Rep. 22.

Exclusive right to remove dead animals, garbage, etc.

§ 914 *ante*, vol. 3.

City cannot grant exclusive franchise to furnish water for twenty-one years. Illinois Trust & Savings Bank v. Arkansas City Water Co., 67 Fed. 196.

However, provision that no other gas company would be granted use of streets for a period of two years was held a valid regulation. Meadville Natural Gas Co. v. Meadville Fuel Gas Co., 1 Pa. Co. Ct. Rep. 448.

Agreement between gas company and municipality that no other company shall have consent to lay its pipes within the municipality during the term of the contract is invalid. Parfitt v. Ferguson, 38 N. Y. S. 466, 3 App. Div. 176, 73 N. Y. St. Rep. 621.

Constitutional prohibition. Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809, *aff'g* 108 Mo. 550, 17 S. W. 884.

Statutes forbidding grant of exclusive franchise, see Cincinnati Gaslight & Coke Co. v. Avondale, 43 Ohio St. 257, 1 N. E. 527.

In Iowa, however, grant to railway company of exclusive franchise for thirty years, without delegated authority, was sustained in Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602.

So, in Kentucky, a statute authorizing a city to provide by

authority is convenient to them, but it must be indispensable to them.⁶⁰

ordinance for the lighting of the streets and the furnishing of light to the inhabitants, authorizes the city to sell at public bidding the exclusive privilege of supplying the city with gas for twenty years. *Truesdale v. Newport*, 28 Ky. L. Rep. 840, 90 S. W. 589.

In Wisconsin, since the 1907 statute, franchises are now called "*indeterminate permits*" and all corporations accepting such permits thereby agree to sell the utilities which they own in the manner provided by the statute, and where a public utility is acting under such a permit, the local municipality cannot grant a permit to another corporation to engage in the same line of business, unless a certificate is obtained from the railroad commission stating that the public convenience and necessity demand that the second utility be authorized to go into competition with the older corporation. See *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530.

Exclusive street railway franchises, description of, see *Wilcox*, *Municipal Franchises*, §§ 377-388.

60. *Nelson v. Murfreesboro*, 179 Fed. 905, 911.

General power to "regulate," etc., streets insufficient. *Capital City Light & Fuel Co. v. Tallahassee*, 42 Fla. 462, 28 So. 810, aff'd in 186 U. S. 401, 22 Sup. Ct. 866, 46 L. Ed. 1219; *Detroit Citizens' St. Ry. Co. v. Detroit Ry.*, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67.

Authority "to cause the streets
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of a city to be lighted" and to make "reasonable regulations" in regard thereto does not confer power to grant an exclusive right to furnish gas for thirty years. *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529.

Charter power to make "ordinances, rules, regulations, and by-laws for lighting the streets and public buildings of the city and to supply the city with water" does not authorize city to grant any exclusive privileges. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546.

A municipality has no power to grant an exclusive franchise merely because the statutes (of Kansas) confer power on it to construct water and light plants of its own, to make contracts with any person or company for such purposes, and to grant franchises for any length of time not exceeding twenty-one years. *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385, 28 Sup. Ct. 135, aff'g 144 Fed. 256.

"Such franchises constitute monopolies, which the law has through ages condemned, because they tie down and restrain and cripple the public right and interest and sacrifice great public interests to the benefit and aggrandizement of the few. Still, where such rights are valid and lawful, the courts must and do protect them. I state the proposition, as sustained by authorities in all quarters, that to authorize such exclusive franchise that statute must admit of no other reason-

And if there is no authority in a municipality to grant an exclusive franchise, it cannot be ratified by the municipality.⁶¹

A municipality cannot grant an exclusive privilege in its streets to any corporation so as to prevent it granting like privileges to another, if such a grant is forbidden by the constitution,⁶² or if it is not prohibited but the legislature has not delegated the power.⁶³ Thus, statutory authority to grant the use of the streets for such time "*and on such terms as they may deem proper*" does not authorize the granting of an exclusive franchise.⁶⁴ So the general rule is that power of a municipality to contract for a supply of water or light

able construction." *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

The charter of a street railway granting to the company certain powers and privileges and "such other privileges as may be granted by the municipal authorities" does not authorize the municipality to grant an exclusive franchise. *Asheville St. Ry. Co. v. West Asheville & S. S. Ry. Co.*, 114 N. C. 725, 19 S. E. 697.

61. *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526.

Validating void ordinance by municipality, § 706 *ante*, vol. 2.

62. *Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co.*, 142 Ala. 462, 38 So. 1026.

Exclusive ferry privileges. A municipal corporation cannot grant exclusive ferry privileges. Thus, a city ordinance which granted an exclusive ferry privilege for the period of ten years was held void under the constitution which forbids the granting

of exclusive rights, privileges or monopolies. *Carroll v. Campbell*, 110 Mo. 557, 19 S. W. 809; *Minturn v. Larue*, 23 How. (U. S.), 435; see *State ex rel. v. Cramer*, 96 Mo. 75, 8 S. W. 788.

In Texas, the constitutional provision prohibiting monopolies is held to preclude a municipality from granting an exclusive franchise to a public service company. *Brenham v. Water Co.*, 67 Tex. 543, 4 S. W. 143; *Ennis Waterworks v. Ennis* (Tex. Civ. App., 1911), 136 S. W. 513, *aff'd* in (Tex., 1912), 144 S. W. 930.

An agreement not to grant to any other person the right to furnish water for fire hydrants is invalid as a monopoly. *Hartford Fire Insurance Co. v. Houston*, 102 Tex. 317, 116 S. W. 36, *aff'g* (Tex. Civ. App.), 110 S. W. 973.

63. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

64. *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526.

or the like does not confer authority to grant exclusive rights to use the streets,⁶⁵ although there is some authority to the contrary,⁶⁶ especially in so far as competing works of a municipality are concerned.⁶⁷

A contract between a public service company and a municipality for a supply of water or light or the like, is not invalid as creating a *monopoly*, although for a term of years so as to prevent like contracts with others furnishing the same things.⁶⁸

It follows that a municipality which has granted a franchise may nevertheless grant a similar franchise to some other person, firm or corporation, unless the former franchise was made exclusive in express and unequivocal terms.⁶⁹

65. *Long v. Duluth*, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547; *Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143.

66. *Muncy Electric Light, Heat & Power Co. v. Peoples' Electric Light, Heat & Power Co.*, 218 Pa. St. 636, 67 Atl. 956.

67. Chapter 35 on Municipal Ownership of Public Utilities, *post*.

68. § 1719 *post*.

69. *California*. *Oakland R. R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 13 Am. Rep. 181.

Iowa. *Merchants' Union Barb-Wire Co. v. Chicago, R. I. & P. Ry. Co.*, 70 Iowa 105, 28 N. W. 494.

New York. *Western Union Tel. Co. v. Syracuse Electric Light & Power Co.*, 178 N. Y. 325, 70 N. E. 866, holding that company granted right to construct a subway could not object to grant to another company of right to locate subway so close to first subway as to cause expense in making repairs.

Oklahoma. *Sapulpa v. Sapulpa Oil & Gas Co.*, 22 Okla. 347, 97 Pac. 1007.

Texas. *Gulf City St. Ry. Co. v. Galveston City Ry. Co.*, 65 Tex. 502.

Street railways. A municipality which has granted a franchise to a street railroad company is not precluded from granting another franchise to use the same street to another street railroad company, especially where the first franchise expressly provides that the grant is not exclusive and where the second franchise expressly provides for a recovery of any damages exercised by the second company laying tracks on the same street. *Seattle Electric Co. v. Seattle R. & S. Ry. Co.*, 185 Fed. 365, 370.

So a municipality, unless prohibited by statute, may grant to two or more railways having tracks of different width the right to operate their cars on the same street. *San Jose-Los Gatos In-*

§ 1634. Exclusive use of street as distinguished from exclusive franchise.

Granting an *exclusive franchise* is to be distinguished from granting the *exclusive use of a street* so as to preclude travel thereon and in effect constitute a vacation or abandonment of the street, although the same rule applies in both cases. Unless power so to do has been delegated by the legislature to the municipality expressly or by necessary implication, a municipality cannot grant the right to a public service company to use all or a part of the street in such a way as to exclude travel thereupon or greatly to interfere with, or destroy, its public usefulness as a highway.⁷⁰

terurban Ry. Co. v. San Jose Ry. Co., 156 Fed. 455, 84 C. C. A. 265.

In New York, "there is nothing in the law to prevent the local authorities of a village or town from granting a consent or franchise for the building, maintaining, and operating of a street surface railway to two or more rival companies, provided the routes are not the same." *People ex rel. v. Bauer*, 103 N. Y. S. 1081, 54 Misc. Rep. 28.

May grant right to construct street railroad over substantially the same route embraced within franchise of another corporation. *Electric City Ry. Co. v. Niagara Falls*, 95 N. Y. S. 73, 48 Misc. Rep. 91.

Gas pipes. The grant of a franchise by a municipality to a foreign corporation to lay pipes in the streets is not subject to attack by another gas company having a franchise to use such streets. *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 188 Fed. 585, 590-594.

70. *Alabama.* *Mobile v. Louisville & N. R. Co.*, 124 Ala. 132, 26 So. 902.

Illinois. *Chicago, R. I. & P. R. Co. v. People*, 120 Ill. App. 306; *Chicago, B. & Q. R. Co. v. Quincy*, 32 Ill. App. 377.

Indiana. *Pittsburgh, C. C. & St. L. R. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934.

Michigan. *People v. Ft. Wayne & E. Ry. Co.*, 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; *Re Grand Rapids Street Rys.*, 48 Mich. 433, 12 N. W. 643 (multiplication of street car tracks).

Missouri. *Sherlock v. Kansas City Belt Ry. Co.*, 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551; *Placke v. Union Depot Ry. Co.*, 140 Mo. 634, 41 S. W. 915; *Schulenburg & Boeckeler Lumber Co. v. St. Louis, K. & N. W. R. Co.*, 129 Mo. 455, 31 S. W. 796; *Dubach v. Hannibal & St. J. R. Co.*, 89 Mo. 483, 1 S. W. 86; *Burnes v. St. Joseph*, 91 Mo. App. 489.

New Jersey. *Methodist Episcopal Church of Camden v. Pennsyl*

So a municipality ordinarily has no power to authorize the construction of a railroad in a street so narrow

vania R. Co., 48 N. J. Eq. 452, 22 Atl. 183.

New York. Delaware, L. & W. R. Co. v. Buffalo, 38 N. Y. S. 510, 4 App. Div. 562, aff'd in 158 N. Y. 266, 53 N. E. 44.

Ohio. Lake Shore & M. S. Ry. Co. v. Elyria, 69 Ohio St. 414, 69 N. E. 738.

Tennessee. Tennessee Brewing Co. v. Union Ry. Co., 113 Tenn. 53, 85 S. W. 864.

Texas. San Antonio & A. P. Ry. Co. v. Bergsland, 12 Tex. Civ. App. 97, 34 S. W. 155.

Utah. Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610.

Cannot grant right to exclusively occupy street. Willamette Iron Works v. Oregon Ry. & Nav. Co., 26 Ore. 224, 37 Pac. 1016, 29 L. R. A. 88, 46 Am. St. Rep. 620, holding such grant not an exercise of the power to alter or change the grade.

Exclusive use of streets. "It is true that the public, when the right of way is legally granted to railways through streets, etc., must submit to any inconvenience, not unreasonable, that may be caused in consequence of the reasonable use of the privilege granted. But the public are entitled to the reasonable use of the public streets and alleys for their ordinary travel; but where the grantee of the privilege is empowered to use the privilege when he pleases, and as often as he pleases, and every time he uses it such use totally obstructs,

for the time being, though not long at a time, the ordinary public travel along the street or alley, the grant, in such case, is unauthorized." *Commonwealth v. Frankfort*, 92 Ky. 149, 17 S. W. 287, 13 Ky. L. Rep. 705.

Unless a municipality is expressly authorized by the constitution or the legislature to grant to a railroad company the use of all of a street or the exclusive use of part of a street, a municipality has no authority to make such a grant. *Los Angeles v. Southern Pacific R. Co.*, 157 Cal. 363, 108 Pac. 65, holding that franchise to use street was nevertheless valid to the extent that it was within the power of the council to grant.

Alley, rule applies to. *Sherlock v. Kansas City Belt Ry. Co.*, 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551.

Depot. Unless specially authorized by the legislature a municipality cannot grant to a railroad company the right to obstruct a street by a depot in or across it. *State ex rel. v. Louisville & N. R. Co.*, 158 Ala. 208, 48 So. 391; *Daly v. Georgia. S. & F. R. Co.*, 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; *St. Paul v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 34 L. R. A. 184; *Barney v. Keokuk, Fed. Cas. No. 1032*, 4 Dill 593, aff'd in 94 U. S. 324, 24 L. Ed. 224.

Freight platform. Cannot authorize railroad company to exclusively occupy twelve feet of a

that such use will practically destroy it for the purpose of other travel.⁷¹

§ 1635. Construction of franchise as to exclusiveness.

A franchise will not be construed as exclusive, in the absence of express words or necessary implication,⁷²

street by a freight platform and roof. *State v. Jersey City*, 52 N. J. L. 65, 18 Atl. 586, 696.

In Ohio, a municipality has no power to grant to a railroad company the right to occupy a public common or landing with an elevated railroad structure. *Louisville & N. R. Co. v. Cincinnati*, 76 Ohio St. 481, 81 N. E. 983.

Part of street. A municipality cannot grant to a public utility company the right to use a part of a street for its exclusive purpose so as to prevent its use by the public, unless power so to do has been expressly conferred by the legislature. *State ex rel. v. Superior Court of Spokane County*, 62 Wash. 96, 113 Pac. 576, holding that an ordinance authorizing a railroad company to use exclusively half of a street with its tracks by depressing them by making a cut was unauthorized, notwithstanding the grade was made sufficiently low so as not to interfere with the surface of the part of the street not occupied.

Trees. Municipality cannot authorize telephone company to damage or destroy trees between the street and sidewalk belonging to abutting owners without compensation. *Braham v. Meridian Home Tel. Co.*, 97 Miss. 326, 52 So. 485.

71. *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547.

72. *Indiana*. *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Indianapolis Cable Street R. Co. v. Citizens' Street R. Co.*, 127 Ind. 369, 24 N. E. 1054, 8 L. R. A. 539.

Maine. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

New Jersey. *Atlantic City Waterworks Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427, 15 Atl. 581.

New York. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546. See *Empire City Subway Co. v. Broadway & S. A. R. Co.*, 33 N. Y. S. 1055, 87 Hun 279, 67 N. Y. St. Rep. 741.

Ohio. *State v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262.

Tennessee. *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. (56 Tenn.) 314.

Wisconsin. *Murray Hill Land Co. v. Milwaukee Light, etc. Co.*, 110 Wis. 555, 86 N. W. 199.

United States. *Bartholomew v. Austin*, 85 Fed. 359, 29 C. C. A. 568; *Stein v. Bienville Water Supply Co.*, 34 Fed. 145, aff'd in 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622.

and a grant of exclusive privileges must be strictly construed against the grantee.⁷³ However, the latter principle applies only where there is doubt or ambiguity

A franchise will not be construed as exclusive "except by unavoidable implication arising from the terms used in the grant." *Brummitt v. Ogden Waterworks Co.*, 33 Utah 285, 93 Pac. 828.

Grant held not exclusive. *Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

"Ever since the case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, it has been equally well settled that one who claims an exclusive privilege must show that the legislature intended to give it to him. The mere grant of a franchise to him does not preclude the legislature from giving the same privilege to another." *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 182 Fed. 667, 670.

The fact that a grant by a municipal corporation to a gas company of a right to use the streets for its pipes, specifies the grantee by name, does not make the grant exclusive. *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

An ordinance granting, for a period of twenty-five years, the right to use certain streets for gas mains to supply gas for light, provided for the erection by the company of certain lamp posts, and additional posts from time to

time as the council might direct, and for the city taking gas from the company to supply the lamps, and provided for a rate of payment. Held, not to grant an exclusive use in the streets for that purpose. *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

73. *Capital City Light & Fuel Co. v. Tallahassee*, 42 Fla. 462, 28 So. 810; *West End R. Co. v. Atlanta St. R. Co.*, 49 Ga. 151; *New Orleans City R. Co. v. Crescent City R. Co.*, 12 Fed. 308.

Exclusive franchise to use streets to supply streets and other public places with water is not exclusive franchise to supply inhabitants with water for domestic and industrial purposes. *Mitchell v. Tulsa Water, L. H. & P. Co.*, 21 Okla. 243, 95 Pac. 961.

When exclusive feature attaches. Where a statute authorizes a city to grant an exclusive privilege of using its streets for railway purposes for a time which may be agreed upon, it is the actual use of the streets for the purpose which confers the exclusive privilege, and the exclusive right to use the same attaches only when the use or its equivalent begins, and the city cannot leave it to the company to determine when public necessity requires a road to be built on certain streets. *Citizens' St. R. Co. v. Jones*, 34 Fed. 579.

and where there is something to construe; it does not apply where there is no room for construction.⁷⁴

As illustrating the rule of strict construction,⁷⁵ it is held that a company which has been granted an *exclusive* franchise to use streets for piping *manufactured gas* for lighting purposes cannot exclude from the use of the streets another gas company which has been granted a franchise to use the streets to convey *natural gas* for both fuel and lighting purposes;⁷⁶ and that an exclusive right to light a city with *gas* for a certain number of years is not impaired by a subsequent contract with another company to light the streets with *electricity*.⁷⁷

So an exclusive franchise to operate a *horse railway* does not preclude a street railway operated by steam,⁷⁸ or cable,⁷⁹ or any other means than animal power.⁸⁰

Likewise, an exclusive grant of the right to use certain streets for a street railroad does not preclude the granting of a franchise for a street railway over other streets,⁸¹ and a grant of exclusive rights to lay a street railroad over certain streets named and all other streets

74. *Commonwealth ex rel. v. Consumers' Gas Co.*, 214 Pa. St. 72, 63 Atl. 463.

75. Exclusive right to supply water to city from certain stream held not impaired by subsequent grant of right to supply city with water from other streams. *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622, aff'g 34 Fed. 145.

76. *Emerson v. Commonwealth*, 108 Pa. St. 111; *Warren Gaslight Co. v. Pennsylvania Gas Co.*, 161 Pa. 510, 29 Atl. 101; *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 188 Fed. 585, 590-594.

See also *Circleville Light & Power Co. v. Buckeye Gas Co.*, 69 Ohio St. 259, 69 N. E. 436.

77. *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. 529; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 442, 4 S. E. 650.

78. *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673.

79. *Omaha Horse R. Co. v. Cable Tramway Co.*, 30 Fed. 324.

80. *Teachout v. Des Moines Broad Gauge St. R. Co.*, 75 Iowa 722, 38 N. W. 145.

81. *Savannah, S. & S. R. Co. v. Coast Line R. Co.*, 49 Ga. 202.

within the corporate limits does not confer an exclusive privilege as to streets other than those named.⁸²

A grant in general terms to a corporation of a franchise to supply a city with water or the like does not give an exclusive right,⁸³ and there is no exclusive grant merely because of the existence of a contract whereby the municipality agrees to take a certain amount of water or gas or the like for a specified time at a fixed price;⁸⁴ and the contract is not invalid as creating a monopoly.⁸⁵

So an ordinance granting a *telephone company* the right to use the streets, alleys and public grounds of the city in the construction and operation of its plant is not the grant of an exclusive right of privilege.⁸⁶

The question whether a *contract* is exclusive is governed by the same principles as control the question of exclusive franchises and hence no distinction is made in this connection between exclusive contracts and exclusive franchises.

Whether a franchise is exclusive, in so far as to preclude a *municipality from competing with the grantee*, is considered in the following chapter.

82. *Citizens' St. Ry. Co. v. Jones*, 34 Fed. 579.

See also *City R. Co. v. Citizens' St. R. Co. (Ind.)*, 52 N. E. 157.

83. *Re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

84. *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Long Island Water-Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; *Cunningham v. Cleveland*, 98 Fed. 657, 662, 39 C. C. A. 211 (per Judge Taft, refusing to follow *Brenham v. Bren-*

ham Waterworks Co., 67 Tex. 542, 4 S. W. 143); *Bartholomew v. Austin*, 85 Fed. 359, 366, 29 C. C. A. 568; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

85. *Denver v. Hubbard*, 17 Colo. App. 346, 68 Pac. 993; *Davenport Gas & Electric Co. v. Davenport*, 124 Iowa 22, 98 N. W. 892; *Reid v. Trowbridge*, 78 Miss. 542, 29 So. 167.

86. *Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, 114 N. W. 588.

§ 1636. Effect of exclusive grant where authorized.

If a statute authorizes the granting of exclusive privileges, such a grant by a municipality is valid.⁸⁷

A grant to a public service company of the exclusive privilege to use the streets for a certain purpose, such as the supply of water or lights or the like, is a contract,⁸⁸ the obligation of which cannot be impaired by the state or the municipality,⁸⁹ unless the power to revoke has been reserved.⁹⁰

If an exclusive franchise is granted, another like franchise cannot be granted,⁹¹ nor can the municipality thereafter grant inconsistent rights to another company,⁹² provided the exclusive feature of the franchise is not *ultra vires*, and the municipality cannot operate a competing plant during the term of such franchise.⁹³

However, the granting of an exclusive franchise does not preclude the granting of another franchise not in-

87. *Thoroughgood v. Georgetown Water Co.* (Del. Ch., 1910), 77 Atl. 720; *Tahlequah v. Guinn*, 5 Ind. Ter. 497, 82 S. W. 886, holding exclusive water franchise for sixty years to be valid.

88. *City Railway Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114.

89. *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.*, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563.

§ 761 *ante*, vol. 2.

An exclusive franchise for supplying the inhabitants of the city with water, in which the city reserved the right to grant any person contiguous to the river the right to lay pipes to the river for his exclusive use, is violated by a grant to a hotel many blocks from the river to lay pipes to sup-

ply its own demand for water. *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525.

90. *Hamilton Gaslight, etc. Co. v. Hamilton*, 146 U. S. 253, 13 Sup. Ct. 90, 36 L. Ed. 963.

91. *Atlantic City Waterworks Co. v. Atlantic City*, 39 N. J. Eq. 367.

But see *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 24 Am. Rep. 756.

92. *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525.

But see *Norwich Gaslight Co. v. Norwich Gas Co.*, 25 Conn. 19.

Compare *Attorney General v. Walworth Light & Power Co.*, 157 Mass. 86, 31 N. E. 482, 16 L. R. A. 398.

93. See following chapter.

consistent therewith,⁹⁴ nor preclude the municipality from subscribing to the stock of a new company formed for the same purpose, as that for which the grantee of the franchise was formed.⁹⁵

§ 1637. Effect of exclusive grant where unauthorized.

The fact that a franchise is exclusive, even where the exclusive feature is wholly unauthorized, does not render it invalid *in toto* but merely in so far as it is exclusive.⁹⁶ But in Texas it is held that if a grant of a franchise is exclusive, so as to create a monopoly in violation of the constitution, it is void *in toto*.⁹⁷

If the municipality had no power to grant an exclusive franchise, the grant is not a contract so as to be protected by the federal constitution,⁹⁸ and does not preclude a grant by the municipality of a like franchise to another company.⁹⁹

94. New Orleans Waterworks Co. v. Louisiana Sugar Refinery Co., 35 La. Ann. 1111.

95. Memphis v. Dean, 8 Wall. (U. S.) 64, 19 L. Ed. 326.

96. Gadsden v. Mitchell, 145 Ala. 137, 40 So. 557, 6 L. R. A. (N. S.) 781, 117 Am. St. Rep. 20; State ex rel. v. Tampa Water Works Co., 56 Fla. 858, 47 So. 358; Quincy v. Bull, 106 Ill. 337; Carlyle Water, Light & Power Co. v. Carlyle, 31 Ill. App. 325; Zimmerer v. Stuart, 88 Neb. 530, 130 N. W. 300.

An ordinance granting an exclusive water right for twenty years held valid though a provision for an extension for another twenty years was invalid, the grant for each period being distinct and severable. Neosho Water Co. v. Neosho, 136 Mo. 498, 38 S. W. 89; Saleno v. Neosho, 127 Mo. 627, 30 S. W. 190.

97. Hartford Fire Insurance Co. v. Houston (Tex. Civ. App.), 110 S. W. 973.

98. Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

99. Citizens' Gas & Mining Co. v. Elwood, 114 Ind. 332, 16 N. E. 624.

The grant of the exclusive right to lay and maintain water pipes in the public highways without express power to do so will not estop the municipal corporation from taking advantage of the invalidity of such contract, although the water company had, in good faith, performed its part of the contract. The well established rule was invoked that the company was bound to know the extent of the authority of the local corporation. Smith v. Westerly, 19 R. I. 437, 35 Atl. 526.

5. PROCEDURE TO OBTAIN.

§ 1638. Application for franchise and action thereon.

In making application for a franchise, and in the granting thereof, it is important to follow strictly all the provisions of the governing statute or charter regulating the matter.¹

1. Metropolitan City R. Co. v. Chicago, 96 Ill. 620; Quincy v. Chicago, etc. R. Co., 92 Ill. 21; Indianapolis v. Miller, 27 Ind. 394; Merchants Union, etc. Co. v. Chicago, etc. R. Co., 70 Iowa 105, 28 N. W. 494; Hunt v. Lambertville, 45 N. J. L. 279; People's Gas Light Co. v. Jersey City, 46 N. J. L. 297; West Jersey Tr. Co. v. Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333; West Jersey Tr. Co. v. Shivers, 58 N. J. L. 124, 33 Atl. 55.

Statutes prescribing the manner in which franchises shall be granted are mandatory. Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146; People's Gas Light Co. v. Jersey City, 46 N. J. L. 297.

A law prescribing that "every franchise shall be granted upon the conditions in this act provided and not otherwise," held imperative. The provisions therein contained must be strictly followed both on the terms on which the franchise is granted and the time and manner of procedure. Pacific Electric Co. v. Los Angeles, 118 Fed. 746.

Ordinance need not be passed at meeting at which it is introduced. Hutchinson v. Belmar, 62 N. J. L. 450, 45 Atl. 1092.

Where a statute makes it necessary for a city to designate the

streets which a lighting company may use before it may construct its poles, etc., in any street, a permission granted by a city to use all of its streets is sufficient and legal. Meyers v. Hudson County Electric Co., 63 N. J. L. 573, 44 Atl. 713, rev'g 37 Atl. 618.

In New Jersey, under a statute requiring public notice and hearing before granting right to use a street to a street railroad company, and the filing of certain consent of abutting owners, a resolution authorizing company to construct turnouts is invalid where there is no such notice, or hearing, or consent. Specht v. Central Passenger Ry. Co., 76 N. J. L. 631, 68 Atl. 785.

Public hearing, as required by statute, on application for street railway franchise, see Shepard v. East Orange, 69 N. J. L. 133, 53 Atl. 1047.

Where no particular form for granting a franchise is prescribed by law, the action of the common council in passing resolutions providing for executing contracts with a gas company for lighting certain part of the city may fairly be regarded as the giving of the required consent to the use of the streets. People ex rel. v. Littleton, 96 N. Y. S. 444, 110 App. Div. 728.

Among the requirements which are often contained in a statute or charter, where a franchise is granted by the common council, are the following: passage of *ordinance*,² vote in meeting duly assembled, upon which vote

Street railways. In Illinois, street railway franchise cannot be granted except on petition of property owners, and where petition was for forty year franchise, ordinance granting franchise for thirty-eight years was invalid. *Wilder v. Aurora. De K. & R. Electric T. Co.*, 216 Ill. 493, 75 N. E. 194.

Procedure in New York on application to municipality for consent to construct street railroad, see *Re Buffalo Traction Co.*, 49 N. Y. S. 1052, 25 App. Div. 447; *Smith v. Buffalo*, 99 N. Y. S. 986, 51 Misc. Rep. 216; *Hough v. Smith*, 75 N. Y. S. 451, 37 Misc. Rep. 363.

In **Pennsylvania**, by statute enacted in 1901, street railway company must apply for right to use streets within two years from date of its charter. *Nanticoke Suburban Street R. Co. v. Peoples' Street R. Co.*, 211 Pa. 395, 61 Atl. 997.

2. *Meyer v. Boonville*, 162 Ind. 165, 70 N. E. 146; *Mannel v. Detroit, Mt. C. & M. C. Ry.*, 139 Mich. 106, 102 N. W. 633 (holding, however, that change of location may be authorized by a mere motion); *West Jersey Traction Co. v. Shivers*, 58 N. J. L. 124, 33 Atl. 55; *State v. Newark*, 54 N. J. L. 102, 23 Atl. 284; *People's Gaslight Co. of Jersey City v. Jersey City*, 46 N. J. L. 297; *Potter v. Calumet*

Electric Street R. Co., 158 Fed. 521.

See *Hunt v. Lambertville*, 45 N. J. L. 279; *Appeal of McGee*, 114 Pa. 470, 8 Atl. 237.

Necessity for ordinance. Where a city is empowered to grant franchises for the use of its streets by "ordinance," it cannot grant the same by resolution; nor can it amend such an ordinance in any of its terms or conditions by resolution. *Morristown v. East Tennessee Tel. Co.*, 115 Fed. 304, 53 C. C. A. 132.

If the grant of a franchise by a municipal corporation is required to be by ordinance, such a grant can only be ratified by the municipal corporation by ordinance and not by resolution. *State ex rel. v. Cowgill & Hill Milling Co.*, 156 Mo. 620, 634, 57 S. W. 1008.

Sometimes the grant is required to be by "general ordinance." *McHale v. Easton & B. Transit Co.*, 169 Pa. 416, 32 Atl. 461.

Ordinance not invalid because passed as an amendment to a void ordinance. *Wilder v. Aurora De K. & R. Electric T. Co.*, 216 Ill. 493, 75 N. E. 194.

Where general ordinance fixes mode of obtaining privilege for digging up any street, every grant of such privilege need not be by ordinance. *Stowe v. Kearny*, 72 N. J. L. 106, 59 Atl. 1058.

the *yeas and nays* must be called and recorded;³ certain number of days public notice of the time and place of presenting the petition;⁴ *publication* of application for franchise in some newspaper;⁵ publication of ordi-

3. *Farmers Telephone Co. v. Washta* (Iowa, 1911), 133 N. W. 361, holding that no presumption can be indulged in regard thereto and that the omission to record the yeas and nays cannot be cured by parol evidence.

So the franchise or consent to use the streets, where required to be granted or given by a certain body, must be given when such body or majority of them are assembled in corporate meeting. *West Jersey Traction Co. v. Camden Horse R. Co.*, 53 N. J. Eq. 163, 35 Atl. 49.

In Illinois, a license to use streets must be by ordinance passed by the yeas and nays of a majority and approved by the mayor. *Potter v. Calumet Electric St. Ry. Co.*, 158 Fed. 521.

4. *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 620; *Seccomb v. Wurster*, 83 Fed. 856, holding that new notice need not be given after change in membership of committee of common council.

See *Moore v. West Jersey Traction Co.*, 62 N. J. L. 386, 732, 41 Atl. 946.

Statute held not to apply to application for an extension of a street railroad. *State v. Cincinnati & H. Electric Street R. Co.*, 19 Ohio Cir. Ct. Rep. 79.

Notice to persons interested of hearing on application to use streets for a street railway, see

Camden Horse R. Co. v. West Jersey Traction Co., 58 N. J. L. 102, 32 Atl. 72; *Kennelly v. Jersey City*, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281; *West Jersey Traction Co. v. Camden*, 56 N. J. L. 431, 29 Atl. 163.

5. *Aydelott v. Cincinnati*, 11 Ohio Cir. Ct. Rep. 11.

Publication in successive issues of weekly newspaper held sufficient. *Benwood v. Wheeling Ry. Co.*, 53 W. Va. 465, 44 S. E. 271.

Publication in weekly paper in village, where no daily paper is published is sufficient. *Secor v. Pelham Manor*, 39 N. Y. S. 993, 6 App. Div. 236.

Two papers. Advertising in one paper, where statute requires publication in two papers, is insufficient, and the application cannot be entertained. *People v. Grant*, 21 N. Y. S. 232, 50 N. Y. St. Rep. 465, aff'd in 138 N. Y. 653, 34 N. E. 513. But where ordinance requires publication in two papers and statute requires publication in one or more, publication in one is sufficient. *Simmons v. Toledo*, 5 Ohio Cir. Ct. Rep. 124.

Contents. Where publication of notice of application for a franchise is required it has been held that the notice shall contain the terms of the franchise. *Hall v. Cedar Rapids*, 115 Iowa 199, 88 N. W. 448.

nance;⁶ lapse of a specified number of days between introduction of resolution or ordinance and time of passage;⁷ passage of ordinance or resolution at a regular as distinguished from a *special meeting*;⁸ two-thirds vote of the council.⁹

Likewise, the power to grant being legislative in its character, an *ordinance* has been held necessary, independent of any statute or charter requirement;¹⁰ although, in some jurisdictions, the authority may be exercised by *resolution or vote* as well as by ordinance, where the manner of exercising the authority is not prescribed.¹¹

6. *Strohmeyer v. Consumers' Electric Co.*, 111 La. 506, 35 So. 723; *Manhattan & Bronx Electric Co. v. Fornes*, 95 N. Y. S. 851, 47 Misc. Rep. 209.

7. Where a statute prohibited telephone companies from using the streets of a municipality without its consent, and another statute provided that no resolution granting a franchise shall be passed within five days after its introduction, or at any other than a regular meeting, a resolution granting a telephone company the right to use the streets for its poles, wires, etc., passed at a special meeting at which it was introduced, was void. *Rough River Tel. Co. v. Cumberland Tel. & Tel. Co.*, 119 Ky. 470, 27 Ky. L. Rep. 32, 84 S. W. 517.

See *Benwood v. Wheeling Ry. Co.*, 53 W. Va. 465, 44 S. E. 271.

8. *Rough River Telephone Co. v. Cumberland Tel. & Tel. Co.*, 119 Ky. 470, 84 S. W. 517 (otherwise void).

9. *Sullivan v. Bailey*, 125 Mich. 104, 83 N. W. 996.

Under a law which requires the right to construct railroads to be by a two-thirds vote of the municipal authority, held the board of trustees could grant the right. *Arcata v. Arcata & M. R. Co.*, 92 Cal. 639, 28 Pac. 676.

The vote granting the franchise to use the streets must be passed by the necessary number of votes. *State ex rel. v. Superior Court of Benton County*, 64 Wash. 594, 117 Pac. 487.

10. *Indianapolis v. Miller*, 27 Ind. 394; *West Jersey Traction Co. v. Camden*, 58 N. J. L. 536, 37 Atl. 578; *Holst v. Savannah Electric Co.*, 131 Fed. 931, rev'd on other grounds in 132 Fed. 901, 65 C. C. A. 449.

11. *Quincy v. Chicago, B. & Q. R. Co.*, 92 Ill. 21; *Merchants' Union Barb-Wire Co. v. Chicago, B. & Q. Ry. Co.*, 70 Iowa 105, 28 N. W. 494.

May be by joint resolution. *Babcock v. Scranton Traction Co.*, 1 Lack. Leg. N. (Pa.) 223.

Authority to grant telephone privileges in streets is usually exercised by ordinance. It was

An ordinance granting a franchise is invalid where *vetoed* by the mayor and no action is taken on the veto.¹²

Unless prohibited by statute or charter, the grant may be to an *individual* as well as to a corporation,¹³ and where franchises are required to be sold to the highest bidder, an individual as well as a corporation may be a bidder.¹⁴

So statutes sometimes prohibit the grant of a right of way unless it is for a consideration in cash or otherwise.¹⁵

An ordinance granting a right to use the streets may be withdrawn by a repealing ordinance before it is accepted and acted upon.¹⁶

§ 1639. Submitting franchise to vote of people.

Statutes sometimes require that ordinances granting franchises, or certain franchises, shall be submitted to a vote of the people,¹⁷ and the *referen-*

held in Illinois that there was no decision in that state holding that such a license could not be granted in any other mode. *London Mills v. Fairview-London* Telephone Circuit, 105 Ill. App. 146.

When ordinance necessary to exercise power, in general, §§ 373-375 *ante*, vol. 1.

12. *Los Angeles v. Davidson*, 150 Cal. 59, 88 Pac. 42.

13. § 1630 *ante*.

14. § 1641 *post*.

15. § 1645 *post*.

16. *Logansport Ry. Co. v. Logansport*, 114 Fed. 688.

§ 1661 *post*.

17. *Keokuk v. Ft. Wayne Electric Co.* 90 Iowa 67, 57 N. W. 689, following *Hanson v. Hunter*, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

And where so required, an ordinance granting such a right to an electric light company for its poles and wires, is invalid. *Hanson v. Hunter*, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

Vote as to granting franchise.

If there are several different propositions in relation to municipal contracts to be submitted to the people they should be submitted separately and not as one proposition. *Americus Ry. & Light Co. v. Americus*, 136 Ga. 25, 70 S. E. 578.

Ordinance passed after election voting on grant of franchise and contract for water, containing the contract, is not invalid because it differs in some details from the ordinance submitting the matter to a vote, where no bad faith or injury to the municipality is ap-

dum has been applied by statute to franchises in some states.¹⁸

parent. *Centerville v. Fidelity Trust & Guaranty Co.*, 118 Fed. 332, 55 C. C. A. 348.

In Nebraska, the consent of a majority of the electors of the municipality must be given before the construction of a street railroad can be commenced. *State v. Lincoln Street Ry.*, 80 Neb. 333, 114 N. W. 422.

Where it is necessary for a street railway company to secure the consent of a majority of the electors of a municipal corporation before constructing its tracks in the streets, such consent irregularly given will not have the effect of invalidating the company's rights where it has spent large sums of money in constructing its lines in reliance on the validity of the votes cast by the electors. *State ex rel. v. Citizens' St. Ry. Co.*, 80 Neb. 357, 114 N. W. 429.

Majority of all the votes cast at the election. *State v. Bechel*, 22 Neb. 158, 34 N. W. 342.

Constitutional provisions requiring an election to grant a franchise are self-executing. *Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353.

In Washington, statute of 1903 as amended in 1907, conferring power on the mayor and council to grant the right to use the streets for street railways, controls charter provisions enacted subsequent to the direct amendment statute requiring such franchise ordinances to be submitted to the voters. *Benton v. Seattle*

Electric Co., 50 Wash. 156, 96 Pac. 1033.

Mandamus. If the constitution or statute provides that after a franchise to use streets has been voted at a municipal election by a majority of the qualified electors, the franchise shall be granted at the next regular meeting of the legislative body of the municipality, a ministerial duty is imposed upon the municipality which may be enforced by mandamus. *Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353.

18. *Meyer v. Boonville*, 162 Ind. 165, 70 N. E. 146; *Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353.

Initiative and referendum. In some of the newer states the initiative and referendum have been applied to the granting of franchises to use streets by constitutional provisions, and in such cases where the granting of a franchise is initiated by a petition filed with a municipal officer, it is necessary to fully and carefully comply with all the constitutional and statutory provisions relating thereto. *Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353, holding that petition in Oklahoma must be filed with the chief executive officer or mayor rather than the city clerk, but that if petition was filed with city clerk and thereafter acted upon by mayor, there was a substantial compliance.

But a mere enlargement of the facilities previously granted to a public service company is not an attempt to "grant, extend or review" a franchise so as to come within the constitutional provision requiring a vote of the electors in such cases,¹⁹ and a mere extension of existing street railway lines on other streets need not, in Wisconsin, be submitted to a direct vote.²⁰

§ 1640. Consent of abutters.

While the consent of abutting owners need not be obtained, in the absence of a constitutional, statutory or charter provision so requiring, as a condition to the use of a street by a public service company,²¹ yet in some jurisdictions such consents of all or a certain proportion of the abutters are required by the constitution, statute or charter,²² although ordinarily such provisions

In Kansas, statute provides that before any "grant, franchise or contract, or renewal shall be binding, it must be published for a certain number of days and if thirty per cent of the voters shall on or before a certain number of days from the first publication of the proposed contract or franchise petition to submit such proposed "grant, contract, or franchise," the municipality must do so for their approval or rejection, it was held that it was not the intention of the legislature that a mere change of rates, made under reserved power intrusted to the mayor and council, should be submitted to the voters for their approval or rejection. *State ex rel. v. Redding*, 84 Kan. 654, 114 Pac. 1094, in which case three of the justices dissented on this point.

Oregon. *State ex rel. v. Portland Railway Light & Power Co.*, 56 Ore. 32, 107 Pac. 958, holds

charter provision not affected by constitutional amendment, and hence petition for referendum must be filed within fifteen days from final passage of ordinance.

Initiative and referendum in franchise matters, discussion of, description of provisions, see Wilcox, *Municipal Franchises*, §§ 710-731.

19. *Overholser v. Oklahoma Interurban Traction Co.* (Okla., 1911), 119 Pac. 127.

20. *State v. Wauwautosa*, 124 Wis. 451, 102 N. W. 894.

21. *Paterson Traction Co. v. Westbrock* (N. J. Ch.), 56 Atl. 698.

22. *People v. Decatur, S. & St. L. R. Co.*, 120 Ill. App. 229; *Somerville Water Co. v. Somerville Borough*, 78 N. J. Eq. 199, 78 Atl. 793; *Meyers v. Hudson County Electric Co.*, 60 N. J. L. 350, 37 Atl. 618 (holding particular statute applicable only to lighting, heat and power companies seek-

apply only to the use of streets by a *street railway*. Generally, if the consent of abutting owners is necessary to

ing to obtain use of street for their private purposes and not to public lighting by the city or town itself); *St. Columba's Church v. Public Service R. Co.*, 80 N. J. L. 353, 78 Atl. 219 (street railway); *North Chicago Street Ry. Co. v. Cheetham*, 58 Ill. App. 318; *Beeson v. Chicago*, 75 Fed. 880.

Sufficiency of petition, with some signatures of agents. *Tibbetts v. West & S. T. Street R. Co.*, 153 Ill. 147, 38 N. E. 664, aff'g 54 Ill. App. 180.

Not applicable, when. A legislative act forbidding any ordinance authorizing the erection of electric light appliances in the streets, except upon petition of property owners, and authorizing property owners to enjoin such use of streets if not so petitioned for, held not to apply to previously granted privileges. *McWethy v. Aurora Electric L. & P. Co.*, 202 Ill. 218, 67 N. E. 9, aff'g 104 Ill. App. 479.

Persons who may give consent include the owner and his authorized agents, *equitable owners* (*Gray v. Dallas Terminal R. Co.*, 13 Tex. Civ. App. 158, 36 S. W. 352); *purchasers in possession* (*Day v. Forest City R. Co.*, 27 Ohio Cir. Ct. 60), etc., but does not include *executors, parents or guardians of infants, tenants* (*Rapp v. Cincinnati R. Co.*, 9 Ohio Dec. 302) and *husbands of married women who hold the title* (*Simmons v. Toledo*, 8 Ohio Cir. Ct. 535); except that in New

New Jersey executors may consent if they have a present power of sale or hold the legal title (*Orton v. Metuchen*, 66 N. J. L. 572, 49 Atl. 814).

Consent by dedicator. Where streets are dedicated but not accepted by the municipality, the dedicator is the owner of the land within the statute requiring consent from the municipality and the abutting owners before a railroad company can lay down its tracks in a municipality. *Pease v. Paterson & State Line Trac-tion Co.*, 69 N. J. L. 165, 54 Atl. 524.

No consent—void. When it is necessary to the validity of an ordinance granting franchise rights that the permission of abutting property owners, or a majority thereof, be secured, an ordinance passed giving a right to use the streets for railroad purposes without such consent, is void. *People v. Decatur, etc. R. Co.*, 120 Ill. App. 229.

Duration. And where the power of a municipal corporation to grant franchise rights in its streets is conditioned on a petition of a majority of the abutting owners, it cannot grant a franchise for a longer term than is set out in the petition. *Chester v. Wabash, etc. R. O.*, 182 Ill. 382, 55 N. E. 524.

City as owner. Where the consent of abutting property owners must be secured and the city owns property abutting on the street for the use of which a franchise

obtain the right to use the streets, such consent must be

is sought, the city may act in the dual capacity of granting the franchise and giving its consent as an abutting owner. *Emerson v. Forest City Ry.*, 28 Ohio Cir. Ct. 683.

Number of consents required, see *People's Traction Co. v. Atlantic City*, 71 N. J. L. 134, 57 Atl. 972 (cross streets not counted where certain proportion of front feet must give consent); *Hutchinson v. Belmar*, 61 N. J. L. 443, 39 Atl. 643 (road in part outside city); *Fox v. New York City Interborough R. Co.*, 98 N. Y. S. 338, 112 App. Div. 832; *Sea Beach R. Co. v. Coney Island Electric R. Co.*, 47 N. Y. S. 981, 22 App. Div. 477; *Tiedemann v. Staten Island Midland R. Co.*, 46 N. Y. S. 64, 18 App. Div. 368.

Form and contents of consent. Must be in writing (*Simmons v. Toledo*, 8 Ohio Cir. Ct. 535); *sealed*, in New Jersey (*Mercer County Traction Co. v. United New Jersey R. Co.*, 64 N. J. Eq. 588, 54 Atl. 819) but not in New York (*Re Cortland R. Co.*, 31 Hun 72) signed, *acknowledged* (*Orton v. Metuchen*, 66 N. J. L. 572, 49 Atl. 814) and *recorded* (*Adee v. Nassau Electric R. Co.*, 72 N. Y. S. 992, 65 App. Div. 529; but see *Sanfleet v. Toledo*, 10 Ohio Cir. Ct. Rep. 460).

Consents given to individuals. In *Geneva & W. Ry. Co. v. N. Y. C. & H. R. R. Co.*, 163 N. Y. 228, 234, 57 N. E. 498, the owners of property abutting upon the line of the proposed street railroad had given to individuals the constitutional and statutory consents

for the construction of a street railroad in a highway. The validity of these consents was challenged on the express ground that they had been given to individuals. This court sustained their validity upon the opinion of Judge O'Brien, in which he said: "The reason urged for condemning these consents was that it would be contrary to public policy and to the spirit of the law to allow individuals to procure the consents to themselves and then, as they might, sell them to the highest bidder. We think that this is a remote danger at best; but in any event it should not be invoked to destroy consents given and acted upon without some proof that the parties who procured them contemplated their use for purely commercial purposes. * * * It is common practice, and perhaps common prudence, for the projectors of a railroad to employ parties in advance to procure rights of way, consents, or like privileges to be used after the incorporation. The fact that the railroad acquires such rights through an intermediary by assignment, instead of directly from the property owners themselves, does not affect their validity."

In New Jersey, an abutting owner may restrain the maintenance of poles and wires in front of his property to supply electricity for *private* lighting where his consent has not been obtained nor a designation of the streets to be used has been made by the municipality. *Taylor v. Public*

obtained without regard to whether the abutting owner has title to the center of the street.²³ The consent of abutters is not ordinarily required, however, except as to *original* construction.²⁴ Such consents, in some jurisdictions, are a *condition precedent* to the right of the municipality to grant a street railway franchise.²⁵ Of course, consent of abutters to use the street for a particular purpose does not include other uses.²⁶ In some states, the consent of abutters is held to be not a *property right* but merely a special statutory limitation on the authority of the municipality.²⁷

Service Corporation, 75 N. J. Eq. 371, 73 Atl. 118.

Estoppel. An abutter who signs a petition which results in the passage of an ordinance granting the right to lay tracks in the streets will be estopped from asserting that the petition was not sufficiently signed, in an action to enjoin the construction of the road. *Joyce v. East St. Louis Electric St. Ry. Co.*, 43 Ill. App. 157.

Injunction where consents not obtained. Any person or company whose interests are adversely affected by the construction of a street railway may sue to enjoin its construction where the necessary consents from abutters have not been obtained. *Pennsylvania R. Co. v. Parkersburg & C. St. R. Co.*, 26 Pa. Super. Ct. 159.

Effect of consent. Such consents preclude the abutter from thereafter enjoining the use of the streets in a proper manner by the public service company. See *Burkam v. Ohio & Mississippi R. Co.*, 122 Ind. 344, holding that "an abutting owner who expressly consents to the occupancy of a street

cannot afterward ask a court to enjoin the use of the street or award him damages."

23. *St. Columba's Church v. North Jersey Street R. Co.* (N. J. Eq.), 70 Atl. 692.

24. *Specht v. Central Pass. R. Co.* (N. J. Eq., 1911), 72 Atl. 356, rev'g 68 Atl. 785.

25. *Currie v. Atlantic City*, 66 N. J. L. 671, 50 Atl. 504; *Hamilton Traction Co. v. Parish*, 67 Ohio St. 181, 65 N. E. 1011; *Dempster v. United Traction Co.*, 205 Pa. 70, 54 Atl. 501; *Gray v. Dallas Terminal R. Co.*, 13 Tex. Civ. App. 158, 36 S. W. 352.

Contra, in Illinois, by express statute, *Venner v. Chicago City R. Co.*, 236 Ill. 349, 86 N. E. 266.

26. *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, 47 N. E. 810.

Consent to construction of surface road is not consent to elevated road. *Elder v. Long Island Electric R. Co.*, 51 N. Y. S. 186, 28 App. Div. 451, aff'd without opinion in 165 N. Y. 651, 59 N. E. 1122.

27. *Doane v. Lake St. El. R. Co.*, 165 Ill. 510, 46 N. E. 520, 56 Am.

In Illinois, the consent of the abutter cannot be purchased for money or for a consideration inuring to the exclusive benefit of the property owner,²⁸ and in New Jersey an option given by a street railway company in consideration of the consent of an abutter was held invalid as contrary to public policy.²⁹ In Ohio, however, the purchase of such consents from abutters has been held not against public policy,³⁰ and in New York the consents may be assigned by the promoters to whom given, to the company, after its incorporation.³¹

Use of consents a second time is not ordinarily allowable.³²

In New York, instead of the consent of property owners and where such consent cannot be obtained, commis-

St. Rep. 265, 36 L. R. A. 97, aff'g 60 Ill. App. 471; *Paterson Traction Co. v. Wostbrock* (N. J. Ch.), 56 Atl. 698.

Ohio. Such consents are held not *property rights* but merely personal privileges (*Hamilton, Glendale & C. T. Co. v. Parish*, 67 Ohio St. 181, 65 N. E. 1011, 60 L. R. A. 531), bestowed upon abutters as a check upon the power of municipal authorities to authorize street railways to be constructed and operated against the wishes of the owners of lots on such streets. *Id.*

28. *Doane v. Chicago City R. Co.*, 160 Ill. 22, 31, 45 N. E. 507, 35 L. R. A. 588.

29. *Montclair Military Academy v. North Jersey R. Co.*, 70 N. J. L. 229, 57 Atl. 1050.

30. *Hamilton, Glendale & C. T. Co. v. Parish*, 67 Ohio St. 181, 25 N. E. 1011.

31. *Geneva & W. R. Co. v. New York C. & H. R. R. Co.*, 163 N. Y. 228, 57 N. E. 498.

32. *Currie v. Atlantic City*, 66 N. J. L. 671, 50 Atl. 504.

But extension of switch, without new consents, held proper in *Taylor v. Erie City Pass. R. Co.*, 37 Pa. Super. Ct. 292.

Consent of abutters, once acted upon by giving or refusing municipal consent to construction of street railway, become *functus officio* and cannot be used on a second application. *Currie v. Atlantic City*, 66 N. J. L. 671, 50 Atl. 504.

In Ohio, former use of street for street railway purposes does not relieve new street railway company from necessity of securing consents of abutters. *Isom v. Low Fare Ry.*, 29 Ohio Cir. Ct. Rep. 583.

Consents granted to one company cannot be availed of by another company, which has no connection with the other company. *Isom v. Low Fare Ry.*, 29 Ohio Cir. Ct. Rep. 583.

sioners may be appointed to determine whether the road ought to be constructed and operated, and their decision, if properly reached, is final.³³

Conditions. Such consents may be based on *conditions* which are binding upon the municipality in granting the franchise and on the grantee of the franchise.³⁴ But it has been held in New Jersey that a condition in the consent that the track should be without a switch was invalid because for the exclusive personal benefit of the consenting abutter and because it substituted another will for that of the representative of the public interests, but that the invalidity of the condition did not nullify the consent.³⁵

So where the statute requires the franchise to be sold to the highest bidder who shall have previously obtained the consents of a majority of the abutters, a consent cannot be limited to a particular company or individual, and in such a case the limitation is void and the consent otherwise valid.³⁶ And conditional consents, where not accepted, are not binding on the company.³⁷

Withdrawal of consents. Consents may be withdrawn at any time before they are finally acted upon,³⁸ but not after they are acted upon.³⁹

33. See *Re Nassau Electric R. Co.*, 167 N. Y. 37, 60 N. E. 279; *Re Union Elevated R. Co.*, 112 N. Y. 61, 20 N. Y. St. Rep. 498.

34. See *Shaw v. New York El. R. R. Co.*, 187 N. Y. 186, 190, 79 N. E. 984.

35. *St. Columbia's Church v. Public Service R. Co.*, 80 N. J. L. 353, 78 Atl. 219.

36. *Forest City R. Co. v. Day*, 73 Ohio St. 83, 76 N. E. 396.

37. *Shaw v. New York Elevated R. Co.*, 187 N. Y. 186, 79 N. E. 984.

38. *People v. Decatur, S. & St. L. R. Co.*, 120 Ill. App. 229.

Notice of revocation must be given to company or municipality before passage of ordinance. *Hutchinson v. Belmar*, 61 N. J. L. 443, 39 Atl. 643.

39. *Currie v. Atlantic City*, 66 N. J. L. 140, 48 Atl. 615; *Paige v. Schenectady R. Co.*, 178 N. Y. 102, 112, 70 N. E. 213; *Taylor v. Erie City Pass. R. Co.*, 37 Pa. Super. Ct. 292.

Consent of abutters to street railway cannot be revoked at will and is not revoked by transfer of property. *Carswell v. Hudson Valley R. Co.*, 125 N. Y. S. 24, 68 Misc. Rep. 393.

§ 1641. Sale of franchises to highest bidder.

In order to remedy the notorious and often scandalous wrongs perpetrated by municipal boards and authorities in granting valuable franchises for the use of streets to individuals and corporations desiring to use them for private gain, without compensation and without adequate provision for the protection of the municipality, constitutional and statutory provisions have been enacted in many states, and like provisions are contained in many municipal charters, requiring all franchises to use the streets to be sold to the highest and best bidder after due advertisement and public award;⁴⁰

40. See *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61, holding 1897 statute unconstitutional as violating provision of constitution granting use of streets to all public service companies.

See *Wilcox, Municipal Franchises*, § 45.

Provision held mandatory. *Gill v. Lake Charles*, 122 La. 1019, 48 So. 440.

Excluding particular company as bidder. A city having power to award franchises to the highest bidder and to reject any and all bids, has the right to exclude a designated company from bidding at the sale of a franchise. *Stites v. Norton*, 31 Ky. L. Rep. 263, 101 S. W. 1189. And it has been held that the fact that an ordinance for the sale of a franchise eliminates the owner of another franchise as a bidder at the sale, does not make it repugnant to a constitutional provision prohibiting monopolies. *Louisville Home Tel. Co. v. Louisville*, 130 Ky. 611, 659, 113 S. W. 855, Judge Carroll dissenting in a lengthy opinion on this point and his dis-

senting opinion is concurred in by Judges Hobson and Nunn.

In California, the statute providing as to the sale of franchises and requiring advertisement, vests a discretion whether or not a franchise shall be granted at all, and such discretion cannot be controlled by mandamus. *McGinnis v. San Jose*, 153 Cal. 711, 96 Pac. 367.

In Kentucky, under the constitution, a city may sell franchises at public sale to the highest and best bidder for a term of not exceeding twenty years, and cannot grant franchises in any other way. *Moberly v. Richmond Tel. Co.*, 126 Ky. 369, 103 S. W. 714.

But constitutional provision is not retroactive (*Louisville & N. R. Co. v. Bowling Green R. Co.*, 110 Ky. 788, 63 S. W. 4), and does not apply to an interurban road carrying freight and passengers, since it is a *trunk railway* within an exception in the constitution (*Diebold v. Kentucky Traction Co.*, 117 Ky. 146, 77 S. W. 674, 63 L. R. A. 637, 111 Am. St. Rep. 230).

but in the absence of such a provision the municipality is not bound to grant the franchise to the company offer-

A resident of a municipality may institute *mandamus* proceedings to compel the executive board of the municipality to advertise and sell a telephone franchise as directed by the ordinance providing therefor. *Louisville Home Telephone Co. v. Louisville*, 130 Ky. 611, 659, 113 S. W. 855.

A constitutional provision requiring franchises for a "term of years" to be awarded to the highest and best bidder has been held to apply to a franchise for one year, where for a use intended to be permanent. *Hilliard v. George G. Fetter Lighting & Heating Co.*, 127 Ky. 95, 105 S. W. 115.

Missouri acts of April 9, 1895, as to sale of franchise or right of way for street railroads, was held to be void for uncertainty in *State ex inf. v. West Side Street Ry. Co.*, 146 Mo. 155, 47 S. W. 959.

In Louisiana, statute applies to street railroads but is not limited to the technical sense of such term (*New Orleans City & L. R. Co. v. Watkins*, 48 La. Ann. 1550, 21 So. 199), and a sale is not invalid because the purchaser was in a position to bid a price higher than another (*Johnson v. New Orleans*, 105 La. 149, 29 So. 355).

In Minnesota, statutory provisions as to advertising for proposals on sale of franchise are mandatory and the omission to advertise is not a mere irregularity. *Tri-State Telephone & Tele-*

graph Co. v. Thief River Falls, 183 Fed. 854, citing Minnesota statute.

In Ohio, slight irregularities in bid and bond should be disregarded. (*Compton v. Johnson*, 9 Ohio Cir. Ct. Rep. 532); bids are presumed to have been made in good faith (*Gallagher v. Johnson*, 30 Wkly. Law Bul. 139); the grant must be made to the lowest bidder without regard to his motives (*Knorr v. Miller*, 25 Wkly. Law Bul. 128); publication of the notice inviting bids is sufficient although not under direct authority of the council, where afterwards recognized and acted upon by them (*Sloane v. People's Electric R. Co.*, 7 Ohio Cir. Ct. Rep. 84); and bids not filed within the time required or accompanied by the necessary bond may be rejected (*Simmons v. Toledo*, 5 Ohio Cir. Ct. Rep. 124).

In Washington, under the rule that a general law is superior to and supersedes all freehold charter provisions inconsistent therewith, a municipality need not grant the franchise for a street railway to the highest bidder as required by its charter, where the statute authorizes the granting of such franchises without bidding. *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259.

Change of route. After a city has advertised for bids to lay tracks on certain designated streets and bids in pursuance of such advertisements are received, the city cannot without public no-

ing the highest price therefor,⁴¹ although it *may* grant a franchise to the best bidder, irrespective of any constitutional or statutory provision.⁴²

If such a sale is required, the granting of a franchise, without such procedure, is void.⁴³ And where the statute or charter requires the sale of franchises to the highest bidder, the sale may be enjoined where the franchise advertised to be sold can be used and operated and its conditions complied with only by the corporation which made application therefor, especially where there is no legitimate reason why certain provisions therein preventing competition should be contained in the notice of sale.⁴⁴

tice by which others may be permitted to bid, grant a route which includes a street not in the route as established and published. *Raynolds v. Cleveland*, 24 Ohio Cir. Ct. Rep. 215.

Preventing bids. A provision in an ordinance establishing a street railway route which determines the method in which differences between any street railway company constructing a road over such route and the employees thereof shall be settled held void, as tending to keep persons from bidding and to increase the rate of fare bid. *Raynolds v. Cleveland*, 24 Ohio Cir. Ct. Rep. 215.

41. *Adamson v. Nassau Electric R. Co.*, 34 N. Y. S. 1073, 89 Hun (N. Y.) 261.

42. *Plattsburg v. People's Tel. Co.*, 88 Mo. App. 306.

A municipality may let the right to put in a telephone system in the city to the one bidding the largest percentage of its gross receipts as compensa-

tion for the use of the streets. *California v. Bunceton Telephone Co.*, 112 Mo. App. 722, 87 S. W. 604.

43. *Nicholasville Water Co. v. Nicholasville (Ky.)*, 36 S. W. 549, 18 Ky. L. Rep. 592; *Merchants' Police & Dist. Tel. Co. v. Citizens' Tel. Co.*, 123 Ky. 90, 93 S. W. 642.

Amendment of proposal. Where a charter of a municipality required sealed proposals to be submitted for franchises but did not require the letting to be to the highest bidder, and a sealed proposal was submitted and accepted and no other proposal was received after advertisement, the fact that after the proposal had been advertised it was amended, with the consent of the bidder, by substituting a lower rate more favorable to consumers, does not make the franchise invalid. *Saginaw Power Co. v. Saginaw*, 193 Fed. 1008.

44. *Gage v. Conners*, 126 N. Y. S. 1041, 142 App. Div. 228.

Provisions requiring a sale have been held applicable to the enlargement of a franchise already granted,⁴⁵ and where the provision for sale of a franchise applies only to franchises for a term of years the requirement cannot be evaded by granting a franchise without limit as to its duration.⁴⁶

The franchise must be sold for *cash*, where there is no provision to the contrary,⁴⁷ and in such a case a franchise cannot be sold under an agreement to pay a certain percentage of the gross receipts.⁴⁸

An *individual* may be a bidder for a street railway franchise, in some jurisdictions, notwithstanding he cannot exercise the franchise himself, since he may transfer it unimpaired to a company which is capable of exercising the franchise.⁴⁹

In *New York*, a statute requires street railway franchises to be sold to the highest bidder,⁵⁰ and it is held

45. *People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.*, 116 Ky. 76, 75 S. W. 280, 25 Ky. L. Rep. 327.

In Ohio, extension of term of a franchise may be granted without competitive bidding. *Clement v. Cincinnati*, 16 Wkly. Law Bul. (Ohio) 355; *Haskins v. Cincinnati Consol. Street R. Co.*, 7 Ohio Dec. 713.

46. *Merchants' Police & District Telegraph Co. v. Citizens' Telephone Co.*, 123 Ky. 90, 93 S. W. 642, 29 Ky. L. Rep. 512.

47. *Cash*. Where the statute provides for the sale of franchises by cities to the highest bidder, without stating other terms and conditions of sale, it means, by implications, that they must be sold for cash. *Thompson v. Alameda County*, 111 Cal. 553, 44 Pac. 230.

Sale of street railroad fran-

chise to the highest bidder in "square yards of gravel pavement" is void. *Hart v. Buckner*, 54 Fed. 925, aff'g 52 Fed. 835.

But sale for specified sum *on credit* in part was held valid, under particular statute, in *Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N. E. 520.

48. *Thompson v. Alameda County*, 111 Cal. 553, 44 Pac. 230.

49. *Phoenix v. Gannon*, 195 N. Y. 471, 88 N. E. 1066; *Trojan R. Co. v. Troy*, 109 N. Y. S. 779, 125 App. Div. 362, following *Parker v. Elmira C. N. R. Co.*, 165 N. Y. 274, 281, 59 N. E. 81.

50. *Kuhn v. Knight*, 101 N. Y. S. 1, 115 App. Div. 837, holding statute not applicable to *extension* of a street railway line.

Where bond must be given by successful bidder to pay percentage of receipts, held that no condition other than for payment

thereunder that inasmuch as the statute provides that the sale shall be to the bidder agreeing to give the municipality the largest percentage per annum of the gross receipts of the company, the municipality cannot impose as a condition that the successful bidder shall pay a lump sum in addition to the percentage of gross receipts bid at the sale, and furthermore that a sale of more than one extension of an existing railroad cannot be made under one bid.⁵¹

If the highest bidder defaults, the next highest bidder may be granted the franchise where it is so provided by statute,⁵² but in the absence of a statute which so requires it would undoubtedly be held in some jurisdictions that new bids must be called for.⁵³

In the absence of specific direction in the particular law no good reason is apparent why the rules already laid down in a preceding volume⁵⁴ as to letting municipal contracts to the *lowest* bidder, should not apply to and govern the granting of franchises to the *highest* bidder, so far as the conditions are the same, and reference should be made thereto in construing provisions relating to the sale of franchises.

§ 1642. Particular body or officer who may grant franchise.

If the statute requires a grant or permit to be obtained from certain municipal officers, a permit obtained from other officers is invalid.⁵⁵ And where the statute re-

could be inserted therein. *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354.

Bid in excess of one hundred per cent of gross receipts is void. *Southern Boulevard R. Co. v. Peoples' Traction Co.*, 39 N. Y. S. 266, 5 App. Div. 330, 16 Misc. 263.

51. *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 47 N. E. 277.

52. *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 24

Sup. Ct. 586, 48 L. Ed. 896, aff'g 118 Fed. 746, construing California statutes.

53. § 1237 *ante*, vol. 3.

54. §§ 1183-1246 *ante*, vol. 3.

55. *Veazie v. Mayo*, 45 Me. 560; *Boyle v. Hazleton*, 171 Pa. 167, 33 Atl. 142.

See *Cincinnati v. Cincinnati Edison Electric Co.*, 11 Ohio Dec. 315, 26 Wkly. Law Bul. 104.

Permit from mayor insufficient where charter requires authority

quired the consent to use the streets to be given by the "municipal authorities," it was held that that term meant legislative body known as the municipal assembly.⁵⁶

Any delegation of power by the municipality to the municipal boards or administrative officers at any step in conferring the privilege or franchise will invalidate the grant.⁵⁷

to be obtained from mayor and assembly. *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S. W. 698, 43 Am. St. Rep. 547, 24 L. R. A. 516.

"Proper authorities of the city" do not include county court. *Union Depot Co. v. St. Louis*, 76 Mo. 393.

"Local authorities." "Corporate authorities." Where the right to construct a street railway in the street is prohibited except with the consent of the "local authorities," and a statute requires such permission to be obtained from the "corporate authorities," the two phrases were synonymous, and mean those representatives elected or appointed in some mode to which the people had given their assent. *Potter v. Calumet Electric St. Ry. Co.*, 158 Fed. 521.

In *New York City*, board of aldermen and not board of electrical control was proper body to grant consent of city to laying of electric wires in a subway. *People ex rel. v. Consolidated Telegraph & Electrical Subway Co.*, 187 N. Y. 58, 79 N. E. 892.

New York City Board of Rapid Transit Commissioners has authority to issue permits for occupation of cross streets by those engaged in constructing rapid

transit subways without securing a permit from the borough authorities. *Rapid Transit Subway Construction Co. v. Coler*, 105 N. Y. S. 824, 121 App. Div. 250.

56. *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 53 N. E. 692, rev'g on other grounds 56 N. Y. S. 450, 34 App. Div. 551.

57. *Illinois*. *St. Louis, etc. R. R. v. Belleville*, 122 Ill. 376, 12 N. E. 680, aff'g 20 Ill. App. 580; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110; *Hickey v. Chicago & W. I. R. Co.*, 6 Ill. App. 172.

Louisiana. *Board of Liquidation of City Debt v. New Orleans*, 32 La. Ann. 915.

New Jersey. *Trustees Presby. Ch. v. State Board, etc.*, 55 N. J. L. 436, 27 Atl. 809.

New York. *Central Crosstown R. Co. v. Metropolitan Street Ry. Co.*, 16 App. Div. 229.

Ohio. *State ex rel. v. Bell*, 34 Ohio St. 194.

United States. *Citizens' Street Ry. v. Jones*, 34 Fed. 579.

§§ 383-387 *ante*, vol. 1; § 1628 *ante*.

Permission granted to construct a railway in a public street is a legislative action and can only be exercised by the city legislative body, and a permit granted for that purpose by the board of public works is void.

County officers ordinarily have no power to grant a franchise over streets.⁵⁸

6. CONTENTS, CONDITIONS, ACCEPTANCE, CONSTRUCTION
AND ASSIGNMENT.

§ 1643. Contents of franchises.

A franchise granted by a municipality to an individual or to a public service company of the right to use the streets should clearly and in detail define the rights and liabilities, so far as possible, of both the municipality and the grantee of the franchise.⁵⁹

Schwede v. Henrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362.

Street and water commissioners of Newark, N. J., held to have sole power to grant use of streets for distribution of electricity. United Electric Co. v. Newark, 77 N. J. L. 104, 71 Atl. 237.

Park commissioner held not the proper officer to grant permit to open park way to lay conductors for supplying electricity but that consent of common council must be obtained. People ex rel. v. Coler, 190 N. Y. 268, 83 N. E. 18.

58. Verera v. Akron, B. & C. R. Co., 21 Ohio Cir. Ct. R. 769, 11 O. C. D. 664; Cuyahoga County Com'rs v. Akron, B. & C. R. Co., 21 Ohio Cir. Ct. R. 769, 11 O. C. D. 664.

59. Contents of franchise. Ordinance authorizing gas company to lay pipes in streets is not invalid because of failure to reserve right to city to determine what street shall be used. Kalamazoo v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74, 82 N. W. 811.

Ordinance of a township granting permission to a gas company to lay pipes in certain streets and roads of the township is not invalid in so far as it grants the right to transmit gas to other municipalities without limiting those municipalities to such as the company has lawful authority to lay or maintain pipes in. Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co., 75 N. J. L. 410, 67 Atl. 1005.

Designation of streets. Ordinance authorizing street railway to lay double tracks in streets, where it has single tracks, as it may from time to time deem proper to render efficient service, sufficiently designates the streets in which the company may lay the double tracks, and is not invalid because it leaves the question as to when double tracks shall be laid to the discretion of the company. Silvey v. Georgia Ry. & Electric Co. (Ga., 1912), 73 S. E. 629.

For instance, in a chapter in a recent work describing and considering the various franchises in a large number of American cities,⁶⁰ entitled "Elements of a Model Street Railway Franchise," attention is called to clauses relating to the building of extensions, the joint use of tracks and other fixtures; an indeterminate franchise subject to purchase by the city or its licensee; requirements as to the regularity, frequency, speed, etc., of the service; regulations as to cleanliness, ventilation, heating and lighting of cars; safety provisions relating to brakes, fenders and wheel guards; describing method of construction of the tracks in the street and of paving, etc.; specifying manner of cleaning the streets, sprinkling and removal of snow and ice; indemnity bond to protect the city from damage claims; permanent penalty fund to enforce company's obligation; fares, tickets, transfers, regulation of rates and free service; supplementary source of income, such as advertising, carrying mail, express and freight and chartered cars; publicity of the company's financial transactions; direct control of capitalization; disposition of earnings; supervising authority to approve plans, hear complaints, audit accounts, certify expenditures, inspect equipment, etc.

And it is a common thing to reserve in a franchise grant the right to purchase the property of the grantee either at the expiration of the grant, or at regular periodic intervals, or at the discretion of the city.⁶¹ So the ordinance granting a franchise is sometimes required to contain certain terms and conditions,⁶² such as "efficient

60. Wilcox, *Municipal Franchises*, §§ 288-311.

61. See Wilcox, *Municipal Franchises*, § 57.

62. *Ampt. v. Cincinnati*, 21 Ohio Cir. Ct. R. 300, 11 O. C. D. 805.

§ 1648 *post*.

— A statute providing that franchise ordinances must specify

terms upon which the water and light shall be supplied to the municipality and its inhabitants is complied with by a stipulation as to the maximum rate which may be charged, and need not fix the exact price to be charged therefor. *Hester v. Greenwood*, 172 Ind. 279, 88 N. E. 498.

provisions for the compulsory arbitration of all disputes" as to employment or wages of servants.⁶³

Where a municipality, in the exercise of an undoubted power, confers by ordinance privileges and franchises for a proper purpose clearly expressed in the ordinance, which contains provisions sufficient of themselves to accomplish the expressed purpose, the fact that the ordinance contains *separable, illegal or improper provisions* will not necessarily render the ordinance void *in toto*, when the elimination of the illegal portions will not cause results not intended, nor affect the integrity of the remaining portions for the purposes designated by the ordinance.⁶⁴

§ 1644. Imposing conditions on granting franchise.

If the consent of the municipality is necessary to the use of streets by a public service company, the municipality, on granting the right to use the streets, *may impose conditions* on the company which will be binding on the company if it accepts the right to use the streets.⁶⁵

63. *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

64. *State ex rel. v. Tampa Water Works Co.*, 56 Fla. 858, 47 So. 358, 362.

Construction where ordinance is void in part, see § 816 *ante*, vol. 2.

65. *May impose conditions. Arkansas. Little Rock Ry. & Electric Co. v. North Little Rock*, 76 Ark. 48, 88 S. W. 826, 1026 (condition that confirmation of right of way over bridge be obtained from county court).

Illinois. People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; *Chicago City Ry. Co. v. People*, 73 Ill. 541; *Chicago v. Chicago Terminal R. Co.*, 121 Ill. App. 197, 208.

Kentucky. Moberly v. Richmond Telephone Co., 126 Ky. 369, 31 Ky. L. Rep. 783, 103 S. W. 714.

Maryland. Northern Cent. Ry. Co. v. Baltimore, 21 Md. 93.

New York. See Re Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18.

Ohio. Cincinnati v. Cincinnati St. Ry. Co., 31 Ohio Wkly. Law Bul. 308.

Texas. Taylor v. Dunn, 80 Tex. 652, 16 S. W. 732; *Texarkana Gas & Electric Co. v. Texarkana* (Tex. Civ. App. 1909), 123 S. W. 213.

United States. Southern Pacific Co. v. Portland, 177 Fed. 958, 961; *Mercantile Trust & Deposit Co. v. Collins Park & D. R. Co.*, 101 Fed. 347; *Pacific R. Co. v.*

and the same rule applies where the rights have lapsed and there is a renewal of them;⁶⁶ *provided, however*, that such conditions are not forbidden by the constitution or statutes or inconsistent with conditions prescribed by the legislature.⁶⁷

Leavenworth, Fed. Cas. No. 10,649, 1 Dill. 393.

Conditions contained in vote at town meeting need not be followed by selectmen of town in granting location to street railway. Flood v. Leahy, 183 Mass. 232, 66 N. E. 787.

Conditions must be performed by company at its own expense. Re Topping Avenue, 187 Mo. 146, 86 S. W. 190.

Conditions are binding. New York & H. R. Co. v. New York, 1 Hilt. (N. Y.) 562; Blocki v. People, 220 Ill. 444, 77 N. E. 172; Cincinnati, L. & A. Electric Street R. Co. v. Stahle, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363; Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union R. Co., 115 Ia. 734, 87 N. W. 670; Rapid R. Co. v. Mt. Clemens, 118 Mich. 33, 76 N. W. 318; Chicago, St. L. & P. R. Co. v. Hamilton, 3 Ohio Cir. Ct. R. 455, 2 O. C. D. 259. Appeal of Philadelphia, G. & N. R. Co., 2 Walk. (Pa.) 291.

Unreasonable conditions should not be imposed. People v. Mutual Gaslight Co., 38 Mich. 154. Condition that railway tracks shall be used jointly held reasonable. Chicago & W. I. R. Co. v. Dunbar, 100 Ill. 110.

Conditions precedent in an ordinance granting the right to use city streets must be performed

by the grantee before he can claim the rights under the ordinance. Newark Gas. & Fuel Co. v. Newark, 8 Ohio S. & C. P. Dec. 418, 7 Ohio N. P. 76.

Statutes giving a municipal corporation power to grant original locations for street railways, with such "restrictions" as it may deem best for public interests, mean that it may impose "conditions" by way of restricting the full and unqualified enjoyment of the right to use the streets so granted. Blodgett v. Worcester Consol. St. Ry. Co., 192 Mass. 106, 78 N. E. 222.

Repeal of condition. Condition in franchise as to frequency of running street cars held abrogated by subsequent extension of franchise. People v. Detroit Citizens' Street R. Co., 116 Mich. 132, 74 N. W. 520.

In Massachusetts, restrictions imposed in granting location to street railway companies are not affected by the statute of 1898. Newcomb v. Norfolk W. Street R. Co., 179 Mass. 449, 61 N. E. 42.

66. Detroit v. Detroit City Ry. Co., 37 Mich. 558.

67. Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277.

See Bayonne v. Lord, 61 N. J. L. 136, 38 Atl. 752.

Conditions forbidden. In some jurisdictions, the right of a municipality to prescribe the terms

For example, under a public utility statute providing that if any public service company shall collect or receive from any person or corporation a less compensation for services rendered to it than is collected from others, it shall be a misdemeanor, a franchise provision requiring a telephone company to give the municipality *free telephone service* is invalid.⁶⁸

But a statement that "no city can impose any conditions or enforce any regulations other than those authorized by the legislature"⁶⁹ is misleading in so far as it warrants the inference that if the municipality is not prohibited by the legislature as to the conditions which may be imposed, it cannot impose conditions which are not expressly authorized by the legislature.

Furthermore, if a company is granted the right to use streets *by the state*, a municipality cannot impose conditions as to rates, free supply or service to the municipality, or the like, since such conditions are not proper police regulations and in such a case no other conditions can be imposed.⁷⁰ And if a corporation is authorized by the legislature, by charter or otherwise, to use the streets of a municipality, it has been held that the municipality cannot compel the company to sign a contract imposing stipulations as to the manner of using streets,⁷¹ although the municipality undoubtedly retains its power to regulate the use of the streets by the company, in the exercise of the police power.⁷²

and conditions under which a public utility may be permitted to use its streets is limited to such terms as are not inconsistent with the public utility statute. And condition cannot be imposed which conflicts with the exclusive jurisdiction conferred on state commissioners. *Re Central Ry. & Electric Co.*, 67 Conn. 197, 35 Atl. 32.

68. *Kenosha v. Kenosha Home Tel. Co.* (Wis., 1912), 135 N. W. 848.

69. *Missouri River Telephone Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67.

70. *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

§ 1677 *et seq.*, *post*.

71. *Frayser v. State*, 16 Lea. (84 Tenn.) 671.

72. § 1677 *post*.

Likewise, conditions in the grant of a franchise, on acceptance, cannot become a valid contract which will divest the municipality of its *police power*.⁷³

Except as already stated, no general rule can be laid down as to what conditions may be imposed.⁷⁴ Sometimes the condition is imposed that a *bond* must be filed by the grantee of the franchise,⁷⁵ and if the municipality has power to prescribe terms, it may take a *bond* conditioned that the plant of the company shall be complete and in operation by a specified date.⁷⁶

73. *Brooklyn v. Nassau Electric R. Co.*, 46 N. Y. S. 651, 20 App. Div. 31, in which it is said that it is doubtful whether the regulation of the rate of speed of cars could be the subject of contract.

§ 382 *ante*, vol. 1; § 1677 *post*.

74. Power in first instance to impose conditions is unlimited. *Monroe v. Detroit M. & P. Short Line Ry.*, 143 Mich. 315, 106 N. W. 704.

Proper conditions. Requiring company to pay incidental expense of franchise ordinance and also reasonable counsel fee is proper. *Hutchinson v. Belmar*, 62 N. J. L. 450, 45 Atl. 1092, *aff'g* 61 N. J. L. 443, 39 Atl. 643.

May reserve power to change by resolution the location of tracks and poles of a street railway company on its application. *Shepard v. East Orange*, 69 N. J. L. 133, 53 Atl. 1047.

May require street railway to reconstruct its tracks and roadbed by laying different material such as selectmen may thereafter determine the public safety and convenience require. *Dunbar v. Old Colony Street R. Co.*, 188 Mass. 180, 74 N. E. 352.

In Texas, however, it is held that "a city may annex to its consent for the use of its streets terms or conditions which require the performance by a railroad company of those things which are within the power of the municipal corporation to regulate and enforce against a corporation or individual occupying such streets with the city's consent, and that no other terms can be prescribed by the city under such circumstances." *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 412, 39 S. W. 96, 36 L. R. A. 33.

75. *Aberdeen v. Honey*, 8 Wash. 251, 35 Pac. 1097.

76. *Salem v. Anson*, 40 Ore. 339, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485.

§ 1646 *post*.

Liquidated damages. Bond for five thousand dollars required to be given, on granting franchise, to secure commencement of operation of plant within one year, providing the sum should be considered liquidated damages, should not be treated as a penalty rather than liquidated damages. *Grayson v. Marshall* (Tex. Civ. App., 1912), 145 S. W. 1034.

So, if conditions may be imposed, the municipality may retain the *right to revoke* the license or privilege at pleasure,⁷⁷ or for breach of condition;⁷⁸ or may *fix the rates* which may be charged by the company;⁷⁹ or may *limit the duration of the grant* to a certain number of years;⁸⁰ or may require a *street railway company* to keep the street in good condition and that portion lying between the ends of its ties in good repair;⁸¹ or water, between certain dates, the street over which the track is laid;⁸² or may, it seems, *limit the speed* of street cars;⁸³ or may limit a street railway to the carriage of passengers as distinguished from freight;⁸⁴ or may im-

A deposit of twenty-five hundred dollars on granting street railway franchises to be forfeited if the road is not completed within a certain time is liquidated damages. *Whitcomb v. Houston* (Tex. Civ. App., 1910), 130 S. W. 215.

77. *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495; *Southern Bell Tel. & Tel. Co. v. Richmond*, 103 Fed. 31, 44 C. C. A. 147.

§ 1661 *post*.

See § 1008 *ante*, vol. 3.

78. *Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *Union St. R. Co. v. Saginaw Circuit Judge*, 113 Mich. 694, 71 N. W. 1073.

§ 1663 *post*.

79. § 1736 *post*.

80. *Minnesota Telephone Co.*, 25 S. D. 409, 127 N. W. 582 (citing large number of cases); *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 234, *rev'g* on other grounds 73 Fed. 716.

§ 1654 *post*.

81. *Indianapolis & E. R. Co. v. New Castle*, 43 Ind. App. 467, 87

N. E. 1067; *Dunbar v. Old Colony Street R. Co.*, 188 Mass. 180, 74 N. E. 352.

See §§ 953-955 *ante*, vol. 3.

Paving, § 1647 *post*.

82. **Sprinkling streets.** A town having authority to grant a location in its streets for a street railway under such restrictions as the best interests of the public may require, may grant such a right on condition that the street railway company shall water the streets over which its tracks are laid, between certain dates. *Newcomb v. Norfolk & W. St. Ry. Co.*, 179 Mass. 449, 61 N. E. 42.

Requiring sprinkling as exercise of police power. § 955 *ante*, vol. 3; § 1682 *post*.

83. *Chouquette v. Southern Electric R. Co.*, 152 Mo. 257, 53 S. W. 897.

See § 954 *ante*, vol. 3.

Compare *ante*, this section.

84. *St. Louis & M. R. R. Co. v. Kirkwood*, 159 Mo. 229, 60 S. W. 110, 53 L. R. A. 300.

However, it has been held that a condition that the company shall not exercise one of its cor-

pose the condition that other companies doing a like business may use the tracks, poles, or the like, on payment of just compensation.⁸⁵

So where franchises are to be sold by competitive bidding, the condition may be contained that the successful bidder must give for each fare collected *transfers* to enable the passenger to reach his destination.⁸⁶

And a municipality may impose the condition that a street railway company carry passengers to and from

porate powers, such as the carriage of freight, is void. *State v. Dayton Traction Co.*, 18 Ohio Cir. Ct. Rep. 490.

85. A railroad right of way may be conditioned on allowing other roads the use of its tracks within its corporate limits. *Chicago, St. P. & K. C. Ry. Co. v. Kansas City St. J. C. B. R. Co.*, 52 Fed. 178.

Granting right to maintain proper appliances for furnishing electricity may be granted on condition that other companies may be permitted to use the poles for a like purpose. However, in granting the latter privilege the limits of such use must be fixed, otherwise the latter grant will be unreasonable and void. *Citizens' Electric Light and Power Co. v. Sands*, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411.

§ 1682 *post*.

Where railroad company is granted right to use streets, municipality may stipulate that two other companies shall jointly use the main tracks. *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110.

Permission to a street car company to lay rails in the streets on condition that another

street car company named should be permitted to use the tracks on terms to be settled by the municipal council, held not a contract with the latter company but a contract between the first and the municipal corporation. Where the latter company declines to accept the terms prescribed, held in a particular case that the city could not revive the contract. *Jersey City & B. R. Co. v. Jersey & H. Horse R. Co.*, 20 N. J. Eq. 61.

In Pennsylvania, however, a statute giving a street railway a right to use a certain number of feet of the track of another street railway on paying therefor is held unconstitutional as an exercise of the right of eminent domain. *Re Philadelphia M. & S. St. R. Co.*, 203 Pa. St. 354, 53 Atl. 191, followed in *Commonwealth ex rel. v. Bond*, 214 Pa. St. 307, 63 Atl. 741, 112 Am. St. Rep. 745, holding that second company could not be required by borough to lay its tracks so as to straddle tracks of other company.

86. *Raynolds v. Cleveland*, 28 Ohio Cir. Ct. Rep. 463, *aff'd* without opinion in 76 Ohio St. 619, 81 N. E. 1182.

points beyond one of its *termini*, the performance of such an act not being an impossibility;⁸⁷ or that the company agree to observe and be subject to all ordinances of the city then in force or subsequently passed in relation to passenger railways.⁸⁸

§ 1645. Same—requiring compensation for use of streets.

A municipal corporation, having entire control of its streets and power to impose conditions on granting a franchise to use the streets, may require compensation for their use by public service companies, as a condition of the grant of the right to use them,⁸⁹ unless forbidden

87. *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354, rev'g on this point 48 Hun (N. Y.) 57.

88. *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St. 144, 22 Atl. 695.

89. *Venner v. Chicago City R. Co.*, 236 Ill. 349, 86 N. E. 266; *Chicago General R. Co. v. Chicago*, 176 Ill. 253, 256, 52 N. E. 880, 66 L. R. A. 959, 68 Am. St. Rep. 188; *Covington St. R. Co. v. Covington*, 9 Bush (Ky.) 127; *Lancaster v. Briggs*, 118 Mo. App. 570, 96 S. W. 314; *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810; *Memphis v. Postal Telegraph-Cable Co.*, 145 Fed. 602, 76 C. C. A. 292, rev'g 139 Fed. 707.

See *Re Central Ry. & Electric Co.*, 67 Conn. 197, 199, 35 Atl. 32.

Compare *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 413, 130 N. W. 530.

License fees after grant of franchise, § 1683 *et seq.*, *post*.

Street railway franchises granted for compensation, description of, see Wilcox, *Municipal Franchises*, §§ 389-400.

Compensation as condition. Municipality, as a condition of granting the use of its streets to a public service company, may require it to pay annually to the municipality a fixed sum to compensate for the city's necessary supervision of the work as well after as during its installation; and if the grant is accepted, the company is liable for the annual payment, by reason of a valid contract, and cannot contend that the sum is exacted for the purpose of general revenue so as to impose an additional tax on the company. *Columbus v. Columbus Gas Co.*, 76 Ohio St. 309, 81 N. E. 440, where gas company was required to pay eight thousand dollars annually.

The charter of a horse railroad company provided that the construction and use of its tracks in a city should be at the "assent of the city council, upon such terms and conditions as said city council may impose." This was held sufficient authority for the city to impose a money payment for the use of its streets.

by statute,⁹⁰ as by requiring the company to pay a certain portion of its receipts as compensation for the use

Providence v. Union R. Co., 12 R. I. 473.

Agreement by interurban railway to pay nine thousand dollars for franchise to use streets—payment held due. *Olathe v. Edison*, 84 Kan. 408, 114 Pac. 228.

License fee. Where the local corporation is given power to grant franchises to street railroad companies and to stipulate the conditions upon which they may exercise the privilege, it has authority to impose a license fee as a condition to the granting of the franchise. *New York v. Eighth Avenue Ry. Co.*, 118 N. Y. 389, 23 N. E. 550; *New York v. Broadway & Seventh Ave. Ry. Co.*, 97 N. Y. 275.

Monopoly. Where consideration of franchise is agreement of company to pay three hundred dollars annually to the city, the further provision in the contract that payments are to continue only so long as the company enjoys its franchise without competition, is not contrary to public policy as tending to create a monopoly. *Richardson Gas & Oil Co. v. Altoona*, 79 Kan. 466, 100 Pac. 50.

The smallness of a charge made by city authorities for the granting of a franchise to a railway company to construct and operate a switch connection, will not invalidate the franchise. *Dulaney v. United Railways & El. Co.*, 104 Md. 423, 65 Atl. 45.

Defenses to action to collect.

In an action by a city against a gas company to collect a sum alleged to be due as an annual payment for the use of the streets, it is no defense that when the ordinance imposing such liability was passed the city knew that the only means the company had for making the payments was its receipts from the sale of gas and that to meet such annual payments it must retain its business, but that with such knowledge the city thereafter permitted another gas company to use the streets to supply natural gas and that it did supply such gas at a much lower price than defendant could supply artificial gas, where the first franchise was not exclusive. *Columbus v. Columbus Gas Co.*, 76 Ohio St. 309, 81 N. E. 440.

90. In Ohio, the statute as to telegraph and telephone companies provides that no municipal corporation can "demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness;" and hence a municipality has no power to exact or receive compensation by way of free telephone service for themselves or for citizens, or to fix rates for telephone charges. *Farmer & Getz v. Columbiana County Telephone Co.*, 72 Ohio St. 526, 74 N. E. 1078.

of streets,⁹¹ or a certain per cent of the dividends declared,⁹² or exacting a license fee of a certain sum for each car to be paid annually to the city,⁹³ or an annual

91. *Asbury Park & S. G. R. Co. v. Neptune*, 73 N. J. Eq. 323, 67 Atl. 790; *Mitchell v. Dakota Central Telephone Co.*, 25 S. D. 409, 127 N. W. 582, holding that such condition was not a tax or a license, but was in the nature of rental or compensation for the use of streets, and that the fact that the state provided that a portion of the taxes assessed upon telephone corporation should be paid to the city, did not affect the right of the city to insist upon the fulfillment of the condition.

Power to prevent telephone company from using streets includes power to require it to pay a certain per cent of its gross earnings for the use of the streets. *Jamestown v. Home Telephone Co.*, 109 N. Y. S. 297, 125 App. Div. 1.

Net income, meaning of word in connection with legislation requiring certain per cent of net income of elevated railroad to be paid to the municipality. *New York v. Manhattan R. Co.*, 192 N. Y. 90, 84 N. E. 745, aff'g 104 N. Y. S. 609, 119 App. Div. 240.

Payment of certain per cent of gross receipts of business cannot be evaded in part because territory of municipality has been subdivided, and new municipalities thereby created have exacted other sums for the privilege of laying an additional track through them. *Asbury Park &*

S. G. R. Co. v. Neptune Tp., 75 N. J. Eq. 562, 74 Atl. 998.

Condition as creating partnership. Grant by municipality to a street railway company of the right to use its streets is not invalid as the formation of the partnership between the municipality and the company to operate a street railway system, because it requires the company to pay to the municipality fifty-five per cent of its net earnings. *Venner v. Chicago City R. Co.*, 236 Ill. 349, 86 N. E. 266.

Laches as precluding collection. It has been held that the failure of the city for several years to take steps to enforce provisions claimed to require payment by a public service company to the municipality of a certain per cent of its gross receipts, estopped the municipality to sue for their collection. *St. Louis v. Laclede Gaslight Co.*, 155 Mo. 1, 55 S. W. 1003.

92. *Allegheny v. Millvale E. & S. St. R. Co.*, 159 Pa. St. 411, 28 Atl. 202.

93. *Byrne v. Chicago Gen. R. Co.*, 169 Ill. 75, 48 N. E. 703, aff'g 63 Ill. App. 438 (holding it immaterial that other corporations operating cars in the city are required to pay less fees); *Jersey City v. North Jersey Street R. Co.*, 78 N. J. L. 72, 73 Atl. 609 (holding that failure to collect fees did not bar the claim, that the lessee of the line was

tax on each mile of its tracks.⁹⁴ So where a municipality may impose conditions on granting a franchise to use the streets, it may stipulate for a free supply for certain public purposes.⁹⁵ And the fact that the company is engaged in interstate commerce does not affect this right of the city.⁹⁶

So if the grant of the right to use streets is conditioned on the payment of a certain sum per year, the fact that such charge is called a license tax does not make it such, within the rule that license taxes must be imposed equally on all persons engaged in the same business.⁹⁷

liable for the fees, and that the stipulated sum must be paid for each car regardless of the route over which it runs); *Jersey City v. Jersey City & B. R. Co.*, 70 N. J. L. 360, 57 Atl. 445.

Such condition not a tax. *Newport v. South Covington & C. St. R. Co.*, 89 Ky. 29, 11 S. W. 954, 11 Ky. L. Rep. 319.

94. *Chicago Gen. Ry. Co. v. Chicago*, 176 Ill. 253, 52 N. E. 880, 66 L. R. A. 959, 68 Am. St. Rep. 188.

95. *Henderson Water Co. v. Trustees of Henderson Graded Schools*, 151 N. C. 171, 65 S. E. 927.

Free supply. Where water is to be furnished free for "*city purposes*," furnishing water to board of education for public schools is not a "*city purpose*." *Water supply Co. of Albuquerque v. Albuquerque*, 9 N. M. 441, 54 Pac. 969.

Construction of ordinance requiring water to be furnished free to city. *Kemble v. Millville*, 69 N. J. L. 637, 56 Atl. 311; *Methodist Episcopal Church v. Ash-*

tabula Water Co., 20 Ohio Cir. Ct. 578, 10 O. C. D. 648.

A grant by a municipal corporation of a franchise for a water system, which established maximum rates for hotels, boarding houses, water closets, etc., provided for furnishing water free of charge to schools and churches. At the time the grant was made there was no sewer system in the city, but one was subsequently constructed. It was held that the company was compelled to furnish water for the sewers at the rates fixed in the grant, and to furnish water free for water closets in the schools. *Independent School Dist. v. La Mars City W. & L. Co.*, 131 Ia. 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859.

96. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, rev'g 39 Fed. 59.

97. *Postal Telegraph-Cable Co. v. Newport*, 25 Ky. L. Rep. 635, 76 S. W. 159.

Compensation as license fee. The fact that the word "*license*" appears in the title of an ordi-

Furthermore, in some jurisdictions, the grant by a municipal corporation of privileges in its streets *must be for a consideration*.⁹⁸

nance granting the use of streets on payment of certain sum, where there is no statutory requirement as to the title of an ordinance, does not show that the charge is a license fee rather than a rental. *Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, 97 N. E. 672.

The sum required to be paid for the use of streets, as a condition of granting the right to use them, is not a tax, and the name given to such charge is wholly immaterial. *Plattsburg v. Peoples' Telephone Co.*, 88 Mo. App. 306.

98. Board of Liquidation of City Debt v. New Orleans, 32 La. Ann. 915; *Gage v. Connors*, 126 N. Y. S. 1041, 142 App. Div. 228; *Stuyvesant v. Pearsoll*, 15 Barb. (N. Y.) 244.

See *Daly v. Georgia*, S. & F. R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; *Tri-State Telephone & Telegraph Co. v. Thief River Falls*, 183 Fed. 854, citing Minnesota statute.

"Fair and reasonable compensation paid in money into the city treasury." *Daly v. Georgia, etc.* R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286.

Necessity for consideration. Sometimes municipalities have no power to give away or make an improvident grant of public property, including franchises, and in such instances grants of franchises are subject to the principles of the common law applicable to grants made by trustees to whom

the management of private property is confided. *Milhau v. Sharp*, 15 Barb. (N. Y.) 193, 231.

Under a law which required the city council of New Orleans to turn over to the board of liquidation all property of the city to be by said board sold or disposed of, and the proceeds applied to the payment of the city debt, the council could not grant a right of way through any of the city's streets to a railway company, unless it was for a consideration in cash or otherwise, which could be realized and turned over to the board of liquidation and by them applied to the payment of the city debt. *Board of Liquidation v. New Orleans*, 32 La. Ann. 915.

Under a statute which authorized a municipal corporation to permit encroachments on its streets for a "fair and reasonable compensation paid in money into the city treasury," the mayor and council donated ten acres of city commons to a railroad company, and afterwards in consideration of the return of the ten acres, granted the railroad large encroachments in the streets. Held, such was not a money compensation as required by the statute and the mayor and council had no power to make the grant. *Daly v. Georgia, etc. R. Co.*, 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286.

The consideration must be one of profit to the municipality, and where a grant is made upon a consideration moving from the

If the public service company accepts an ordinance granting it the right to use streets on consideration of a fixed annual payment, it cannot thereafter attack the reasonableness of such charge.⁹⁹ And the fact that other companies are given like rights in the streets of the city without charge is no excuse for the refusal of a company which has agreed to make certain payment in consideration of the use of the streets, to pay such sums.¹

§ 1646. Same—requiring plant or road to be completed within fixed time.

If conditions may be imposed, the municipality may impose the condition that the plant or road be completed within a fixed time,² even though such period of time is less than that fixed by a statute.³ So the municipality may reserve the right to tear up the tracks of a street railway if it is not completed within one year, and may enforce the condition where there is no excuse for the

grantee to private individuals, it will be declared void as contrary to public policy. *New Haven v. New Haven, etc. R. Co.*, 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256.

99. *Postal Telegraph-Cable Co. v. Newport*, 25 Ky. L. Rep. 635, 76 S. W. 159.

1. *California v. Bunceton Telephone Co.*, 112 Mo. App. 722, 87 S. W. 604.

2. *Minersville v. Schuylkill Electric R. Co.*, 205 Pa. St. 394, 401, 54 Atl. 1050; *Plymouth Tp. v. Chestnut Hill R. Co.*, 168 Pa. St. 181, 32 Atl. 19; *Keystone State Tel. & Tel. Co. v. Ridley Park Borough*, 28 Pa. Super. Ct. 635.

Conditions—time. Where grant to street railroad company of right to use highways was conditioned on the completion of at

least one track within two years, the right ceases to exist at the end of the two years where the condition is not complied with. *Manton v. South Shore Traction Co.*, 106 N. Y. S. 82, 121 App. Div. 410, rev'g on this point 104 N. Y. S. 612.

Provision in bond for two thousand dollars (\$2000) given to insure completion of street railway within certain time held liquidated damages and not penalty. *Whiting v. New Baltimore*, 127 Mich. 66, 86 N. W. 403.

Forfeiture of franchise for failure to comply with conditions, see § 1664 *post*.

3. *Plymouth v. Chestnut Hill & N. R. Co.*, 168 Pa. St. 181, 32 Atl. 19.

delay, notwithstanding prompt action was not taken at the end of the year, if there was no change in the situation so as to be prejudicial to the company.⁴

It is held, however, that where a municipality is authorized by statute to permit the laying of street railroad tracks on such conditions as deemed proper, it cannot impose the condition that the road shall be completed *between outlying towns* and through the city within a certain time, because in the opinion of the court the provision as to construction outside the city is void as an attempt to regulate matters beyond the corporate limits, and the condition is not severable so that it can be held good as to the part of the road running through the city.⁵

If the condition is in fact a regulation of matters outside of the municipality, the decision appears sound; but if it is merely the imposition of a condition that a public utility company shall not be entitled to certain rights within the corporate boundaries unless it not only complies with certain conditions as to its property within such limits, but also complies with the same conditions as to its property outside of the municipality, it is clear the action is not beyond municipal jurisdiction. Moreover such a provision is a proper one to protect the interests of the local corporation and in many cases would be of little benefit if restricted to the building of the road within the municipality.

In regard to these provisions, it is generally held that they are *conditions subsequent*, in which no one has any legal interest but the grantee of the franchise and the

4. *Spring City v. Montgomery & C. E. R. Co.*, 35 Pa. Super. Ct. 533.

5. *Arcata v. Green*, 156 Cal. 759, 106 Pac. 86, holding that the power to impose conditions is legislative in its character and not referable for its support to the power of making contracts.

In Texas, condition as to time within which railway was required to be constructed to point outside city limits was held invalid. *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 412, 39 S. W. 96, 36 L. R. A. 33, explaining *Indianola v. Gulf, W. T. & P. Ry.*, 56 Tex. 594.

municipality;⁶ that a competing company cannot collaterally attack the franchise because of failure to comply with such terms;⁷ and that the failure to comply with the ordinance may be waived by the municipality.⁸

§ 1647. Same—requiring railway company to pave.

The requirement is general that, as a condition to the grant of the franchise to maintain tracks and operate cars in the public streets, the grantee or its successor shall pave the streets between the rails of its tracks and for a certain distance outside of its tracks and also between its tracks, where double tracks are laid.⁹ So the

6. *Knight v. Kansas City, St. J. & C. B. Ry. Co.*, 70 Mo. 231.

§ 1770 *post*.

7. *Hook v. Bowden*, 144 Mo. App. 331, 128 S. W. 261.

§ 1686 *post*.

Forfeiture of a grant of a right to use a street because of the failure of the company to comply with the condition as to the time for completion of the work cannot be had except by a direct proceeding on the part of the municipality for that purpose. *McCammon & Lang Lumber Co. v. Trinity & B. V. Ry. Co.* (Tex. Civ. App., 1910), 131 S. W. 85, *rev'd* on other grounds in 133 S. W. 247; and see § 1666 *post*.

8. *Hook v. Bowden*, 144 Mo. App. 331, 128 S. W. 261.

§ 1687 *post*.

Extension of time. In *Pennsylvania*, an extension of the time allowed to construct a lighting plant, fixed by the ordinance granting the right to use the streets, can only be made by the passage of another ordinance in a formal way, and cannot be by resolution. *United Electric Light Co. v. East*

Pittsburg Borough, 230 Pa. St. 65, 79 Atl. 229.

9. *Florida*. *State v. Jacksonville, St. R. R.*, 29 Fla. 590, 10 So. 590.

Iowa. *Des Moines City R. Co. v. Des Moines* (Iowa, 1911), 131 N. W. 43.

Missouri. *Re Topping Avenue*, 187 Mo. 146, 86 S. W. 190 (holding certain conditions reasonable).

New Jersey. *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, 63 Atl. 84.

New York. *Conway v. Rochester*, 157 N. Y. 33, 51 N. E. 395.

Pennsylvania. *Marcoz v. Wilmerding Borough*, 37 Pa. Super. Ct. 185, 189.

The obligation to pave imposed as a condition to the grant of a street railway location may be greater than that prescribed by statute. *Blodgett v. Worcester Consol. Street R. Co.*, 192 Mass. 106, 78 N. E. 222.

Where electric motors could not be used instead of horses except by consent of the municipality, it may confer the right to use elec-

franchise may reserve the right to forfeit it for any failure to pay the costs of paving between the tracks.¹⁰ Sometimes the whole street from curb to curb is required to be paved and kept in repair by the railroad company.¹¹ But the extent of this obligation will depend upon the proper construction of the law applicable and the language of the charter of the company and the law or ordinance granting the franchise or privilege.¹²

tric motors on the condition that the company pave certain parts of streets. *Trenton v. Trenton Street R. Co.*, 72 N. J. L. 317, 63 Atl. 1.

Where right to use street already paved actually exists, cost of paving cannot be imposed. *Oskaloosa Street Ry. & Land Co. v. Oskaloosa*, 99 Ia. 496, 68 N. W. 808.

Express stipulation that no charge for paving should be made against the company is binding on the municipality. *Atlanta Consol. Street R. Co. v. Atlanta*, 111 Ga. 255, 36 S. E. 667.

Construction of franchise ordinances requiring paving, see *Danville Street R. & L. Co. v. Mater*, 116 Ill. App. 519; *West Chester v. West Chester Street R. Co.*, 203 Pa. 201, 52 Atl. 252; *McKeesport v. Pittsburg M. & C. Ry.*, 213 Pa. 542, 62 Atl. 1075.

10. *Union Street R. Co. v. Saginaw Circuit Judge*, 113 Mich. 694, 71 N. W. 1073.

11. *Philadelphia v. Thirteenth, etc.*, Ry. Co., 169 Pa. St. 269, 33 Atl. 126; *Philadelphia v. Spring Garden, etc.*, R. Co., 161 Pa. St. 522, 29 Atl. 286; *Leake v. Philadelphia*, 150 Pa. St. 643, 24 Atl. 351; *Philadelphia v. Ridge Ave. Pass.*

Ry. Co., 143 Pa. St. 444, 22 Atl. 695.

12. The ordinance granting the right to lay tracks and operate cars may exempt the company from paving, where the law does not forbid. *Lacey v. Marshalltown*, 99 Ia. 367, 68 N. W. 726.

The requirement as to paving may be modified by the municipality and company. An abutting property owner cannot complain. *Barber Asphalt Pav. Co. v. New Orleans, etc.*, R. R. Co., 49 La. Ann. 1608, 22 So. 955.

The company cannot be charged with the cost of paving prior to its occupancy of the street. *Gulf City St. Ry. v. Galveston*, 69 Tex. 660, 7 S. W. 520; *District of Columbia v. Washington, etc. R. R.*, 4 Mackey (15 D. C.) 214; *Philadelphia v. Empire Pass. Ry.*, 3 Brewst. (Pa.) 547.

A street railroad company was authorized to lay its tracks in certain streets, one condition being that it should pave the streets in and about the rails. Subsequently, it was duly authorized to extend its tracks, but the law did not expressly impose the condition that it should pave the street; held that as provision in former grant respecting paving

In a case determined by the Supreme Court of the United States, the ordinance granted the street railway company the right to operate a street railway; one condition being that it should pave the streets between the rails. Subsequently an ordinance was passed requiring the company also to pave the street for one foot outside of the rails. This ordinance was declared valid by virtue of the reserved power to amend, etc. The court remarked: "The company took its franchise subject to such legislation as the state might enact. * * * The general assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company." ¹³

did not apply to the extension, the company need not pave streets on extension. *New York v. New York & H. R. Co.*, 19 N. Y. S. 67.

A reasonable time must be allowed the company in which to do the paving. Ten days was held too short. *People ex rel. v. Coffey*, 66 Hun 160, 21 N. Y. S. 34.

If the company fails, the municipality may do the work and collect from the company. *Columbus v. Columbus St. R. R. Co.*, 45 Ohio St. 98, 12 N. E. 651; *Philadelphia v. Thirteenth St. Ry. Co.*, 3 Pa. Dis. Ct. Rep. 468.

Mandamus will lie to compel the company to pave. *State v. Jacksonville St. R. R. Co.*, 29 Fla. 590, 10 So. 590.

Mandamus to compel paving as required by ordinance denied, where it appeared the company

was out of funds and could not raise them. *Benton Harbor v. St. Joseph, etc. St. Ry. Co.*, 102 Mich. 386, 60 N. W. 758.

Court will not compel road to operate where it is out of funds. *State ex rel. v. Dodge City, etc. Ry. Co.*, 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564 and note.

Failure on the part of the company to pave, as required, was held no ground of forfeiture of its charter in *State ex rel. v. Omaha & C. B. Ry. & B. Co.*, 91 Ia. 517, 60 N. W. 121.

Acts involving special facts. *Farmers' Loan and Trust Co. v. Ansonia*, 61 Conn. 76, 23 Atl. 705.

13. *Sioux City Street Ry. Co. v. Sioux City*, 138 U. S. 98, 107, 11 Sup. Ct. 226, aff'g 78 Ia. 367, 43 N. W. 224.

A new corporation formed by the merger of old ones is subject to the condition as to paving imposed on the latter.¹⁴ The requirement is general that the paving by the company shall be of the same material as used on other parts of the street, and if the street should be repaved with different material the company must adopt the new material.¹⁵

The obligation to repair has been held to require repaving.¹⁶ But the weight of authority appears to support the contrary rule.¹⁷

14. *Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. St. 444, 22 Atl. 695.

15. *Mandamus* will lie to compel the company to comply. *Lansing v. Lansing City Elec. Ry. Co.*, 109 Mich. 123, 66 N. W. 949.

Paving material, kind of. *Philadelphia v. Hestonville R. R. Co.*, 177 Pa. St. 371, 35 Atl. 718; *Philadelphia v. Philadelphia, etc. Ry. Co.*, 177 Pa. St. 379, 35 Atl. 720; *Philadelphia v. Empire Pass. Ry. Co.*, 177 Pa. St. 382, 35 Atl. 721; *McKeesport v. McKeesport Pass. Ry.*, 158 Pa. St. 447, 27 Atl. 1006; *Norristown v. Norristown Pass. Ry.*, 148 Pa. St. 87, 23 Atl. 1060; *Philadelphia v. Empire, etc. Ry. 3 Brewst. (Pa.)* 570.

16. Liability to keep "in good order and repair," includes paving. This was assumed. *People ex rel. Detroit v. Fort Street & E. Ry. Co.*, 41 Mich. 413, 2 N. W. 188. *S. P. Ridge Ave. Ry. Co. v. Philadelphia*, 124 Pa. St. 219, 16 Atl. 741. *Huggans v. Riley*, 125 N. Y. 88, 25 N. E. 993.

No sound distinction can be made between needful repairs and such improvements as are required for the public good. *Mid-*

dlex R. R. Co. v. Wakefield, 103 Mass. 261, 266.

17. Repair does not include repaving. The obligation imposed upon a railroad company to repair a street is not an obligation to construct thereon a *new pavement*. *State ex rel. v. Corrigan Consolidated Ry. Co.*, 85 Mo. 263; *Baltimore v. Scharf*, 54 Md. 499, 525; *Western Paving & Supply Co. v. Citizens Street Ry. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88; *In re Repaving Fulton Street*, 29 How. Pr. (N. Y.) 429.

In one case, the condition of the franchise was that the company should "keep the surface of said streets and highways within the rails, and for one foot outside thereof, and to the extent of the ties, in good and proper order and repair." The street in issue had never been paved. The council ordered the street to be paved with asphalt, having a concrete foundation. As the company refused to pave, the city did the work and assessed the expense against the company and brought action to recover. No evidence was offered to show that the street was not in good repair or

In some jurisdictions, statutes require every street railway to pave and keep in repair the pavements between and alongside of its tracks.¹⁸

§ 1648. Same—duty to include conditions.

Statutes sometimes require certain conditions to be contained in the grant to use the streets.¹⁹ However, the fact that a statute provides that the municipality shall not confer the right to construct tracks on any street, except on condition that the company pay all damages to abutters, does not necessarily require that such condi-

that the pavement was necessary to keep the street in such condition. In denying the right to recover, it was held:

1. That the franchise obligation to keep the surface in good repair did not include repaving.

2. That the council resolution directing an asphalt pavement to be laid was not presumptive evidence that such pavement was necessary and proper (*Distinguishing Tingle v. Port Chester*, 101 N. Y. 294, 4 N. E. 625 and *New York v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905).

3. That the city could not construe the legislative act granting the franchise to its own advantage. *Gilmore v. Utica*, 121 N. Y. 561, 24 N. E. 1009.

4. That as the rights of the company had been fixed by the state act, the city could not impose additional burdens. *Binghamton v. Binghamton & Port Dickinson Ry. Co.*, 61 Hun 479, 16 N. Y. S. 225.

Paving defined. *Burnham v. Chicago*, 24 Ill. 496; *Warren v. Henly*, 31 Ia. 31.

Macadamizing, held not paving. *State v. Ramsey Co. Dist. Ct.*, 33 Minn. 164, 22 N. W. 295. Condition to pave with macadam does not include asphalt. *Shamokin v. Shamokin St. Ry. Co.*, 178 Pa. St. 128, 35 Atl. 862.

Repairing. Grading is not. *Galveston v. Galveston City Ry. Co.*, 46 Tex. 435.

Duty to repair includes the removal of deposits from the street caused by extraordinary rains, etc., *Pittsburgh & B. Pass. Ry. Co. v. Pittsburgh*, 80 Pa. St. 72.

18. *Pennsylvania Steel Co. v. New York Central R. Co.*, 191 Fed. 216, construing New York statute.

Under New York statute, street railroad companies must keep pavement of portions of streets occupied by them in repair, without any demand by the municipal authorities. *Schuster v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 192 N. Y. 403, 85 N. E. 670.

19. Requiring payment for use of streets, § 1645 *ante*.

§ 1643 *ante*.

tion be inserted in the grant of a franchise to a street railway company.²⁰

§ 1649. Same—construction and effect of conditions.

Conditions in a franchise, accepted by the company, cannot afterwards be repudiated,²¹ since they then constitute a contract;²² and the use of the street by a public service company constitutes an acceptance of the conditions.²³ But it seems that if the restrictions imposed are unlawful ones, either because requiring the performance of a forbidden act or because wholly beyond the scope of the municipal officers who imposed the conditions, they are not binding.²⁴ So, in Wisconsin, the terms

20. *General Electric R. Co. v. Chicago City R. Co.*, 66 Ill. App. 362.

21. *Murphy v. Worcester Consol. Street R. Co.*, 199 Mass. 279, 85 N. E. 507.

Tracks laid since the granting of the franchise, beyond the right of way granted thereby, are not bound by the conditions. *Chicago, St. P. & K. C. Ry. Co. v. Kansas City, St. J. & C. B. R. Co.*, 52 Fed. 178.

Right of third persons to enforce conditions in franchise. Provision in a franchise granted a street car company for free transportation of mail carriers does not vest in them a right which they can insist upon being continued during the life of the franchise. *Little Rock Ry. & Electric Co. v. Dowell* (Ark., 1911), 142 S. W. 165.

Effect of absence of conditions. It has been held that where a railroad company is granted the right to maintain its tracks over a bridge owned by the municipality, and there is no reservation

in regard to tolls or other charges, the municipality cannot thereafter impose such charges. *Des Moines v. Chicago, R. I. & P. R. Co.*, 41 Ia. 569.

22. *Barr v. New Brunswick*, 58 N. J. L. 255, 33 Atl. 477; *Troy v. Troy & L. R. Co.*, 49 N. Y. 657.

§ 1672 *post*.

Conditions as contract. The grant of a franchise on conditions which are accepted by the grantee and acted upon by both the grantee and the municipality, constitutes a contract which prevents the municipality from imposing additional burdens as conditions. *St. Louis v. Western Union Tel. Co.*, 63 Fed. 68; *New Orleans v. Great Southern Tel. etc. Co.*, 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502.

23. *Columbus v. Columbus St. R. Co.*, 45 Ohio St. 98, 12 N. E. 651.

§ 1650 *post*.

24. *Murphy v. Worcester Consol. Street R. Co.*, 199 Mass. 279, 85 N. E. 507.

of a franchise, accepted by the public service corporation, are not binding, where the franchise is voluntarily surrendered by the company and an *indeterminate permit* is granted in place thereof.²⁵

Stipulations in a franchise may be *conditions precedent* to the continuing right to the franchise,²⁶ and a municipality may remove the structures of a company in a street where the company has failed to comply with valid conditions precedent in the permit to use the streets.²⁷ So if the condition imposed becomes *impossible of execution*, the grant is at an end, and the municipality may require the removal of the property of the company from the street.²⁸

If the right to use the streets is based on the condition that the grantee of the franchise allow other companies to use its tracks, poles, or pipes, this condition does not confer any right on other companies,²⁹ unless permission to so use such tracks, poles or pipes is obtained from the municipality.³⁰ If such permission is granted other companies, the first grantee cannot claim

Condition repugnant to the statute which governs and to conditions imposed by state commissioners is invalid. *Re Kings County Elv. R. Co.*, 105 N. Y. 97, 13 N. E. 18.

25. *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530, in which case the terms of the franchise of an electric company required it to pay into the treasury of the city two per cent of its gross earnings, but thereafter the company duly surrendered the franchise, pursuant to the statute of 1907, and received in lieu thereof an indeterminate permit under which it thereafter conducted its business and it was held that the two per

cent tax was not thereafter recoverable.

26. *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573, aff'g *Galesburg v. Galesburg Water Co.*, 34 Fed. 675.

27. *Keystone State Tel. & Tel. Co. v. Ridley Park Borough*, 28 Pa. Super. Ct. 635.

§ 1763 *post*.

28. *Southern Ry. Co. v. Memphis*, 97 Fed. 819, 38 C. C. A. 498.

29. *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 20 N. J. Eq. 61.

30. *Hauss Electric Lighting Power Co. v. Jones Bros. Electric Co.*, 10 Ohio Dec. 709, 23 Wkly. Law Bul. 137.

that the other companies were not authorized by their charter to furnish electric light and to use the poles.³¹

Furthermore, a municipality has power to discharge the grantee of the franchise from such conditions, and if it does so it cannot again subject the company to such conditions.³² Likewise, if the second company named in the franchise, refuses to accept the terms prescribed for the use of tracks of the first company, the condition is discharged and the city cannot revive the contract.³³

If a second company is allowed to use the poles of another company, the municipality must fix the limits of such use or regulate the manner in which each must string its wires.³⁴ Conditions are construed the same as other municipal contracts.³⁵

The provision in a consent given by a city to the construction of a street railway that the rate of speed "shall in no instance exceed ten miles per hour" does not constitute a contract that the company shall always

31. *Brush Electric Light Co. v. Jones Bros. Electric Co.*, 5 Ohio Cir. Ct. R. 340, *aff'd* in 29 Wkly. Law Bul. 72.

32. *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 20 N. J. Eq. 61.

33. *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 20 N. J. Eq. 61.

34. *Citizens' Electric Light & Power Co. v. Sands*, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411.

35. See §§ 1652, 1721 *post*.

Reservation in franchise of power to make such further regulations as deemed necessary to protect the public, includes authority to require street cars to be equipped with air or electric brakes. *People v. Detroit United Ry.*, 134 Mich. 682, 97 N. W. 36,

63 L. R. A. 746, 104 Am. St. Rep. 626.

Where grant of street railway across a parkway was made subject to such reasonable rules as should be prescribed by the officers having charge of the parkway, they cannot impose the condition that the cars should not be run in trains operated by steam, electricity or other power. *People ex rel. v. Kennedy*, 89 N. Y. S. 603, 97 App. Div. 103.

Exempting street railway from payment of any license for franchise, for fixed number of years, does not estop the municipality from exacting from the company a reasonable license fee imposed merely as a police regulation. *McKeesport v. McKeesport & R. Pass. R. Co.*, 2 Pa. Super. Ct. 242.

thereafter have the right to operate its cars at the rate of ten miles an hour.³⁶

§ 1650. Acceptance of franchises.

An ordinance granting a franchise confers no rights and imposes no obligations on the grantee unless it is accepted.³⁷ Acceptance of the franchise ordinance by the grantee is usually evidenced in a formal manner by entry upon the municipal records. However, "no formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company;"³⁸ and the use of a franchise constitutes an acceptance.³⁹

"Where no obligations are imposed on the grantee, the acceptance of the thing granted may be inferred from slight circumstances."⁴⁰ Sometimes, however, an ordinance granting a franchise requires the grantee to file his acceptance thereof.⁴¹ But where the grant of a

36. *Brooklyn v. Nassau Electric R. Co.*, 46 N. Y. S. 651, 20 App. Div. 31.

37. *Cumberland Telephone & Telegraph Co. v. Mt. Vernon (Ind., 1911)*, 94 N. E. 714.

Acceptance as contract, § 1672 *post*.

38. "We are also of the opinion that an acceptance may be presumed from the fact that the amendment (to the ordinance) was beneficial to the corporation," and from the further fact that it issued bonds, as was contemplated when the ordinance was applied for, and made them fall due at the expiration of the enlarged franchise. Per Mr. Justice Brown in *City Ry. Co. v. Citizens' Street Ry. Co.*, 166 U. S. 557, 568, 17 Sup. Ct. 653.

Acceptance of franchise may be by board of directors of public

service company. *Venner v. Chicago City R. Co.*, 236 Ill. 349, 86 N. E. 266.

39. *Metropolitan Gas Co. v. Hyde Park*, 27 Ill. App. 361; *Superior v. Douglas County Tel. Co. (Wis.)*, 122 N. W. 1023.

Franchise may be accepted by acts. *Western Union Telegraph Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557.

40. *Cumberland Telephone & Telegraph Co. v. Mt. Vernon (Ind., 1911)*, 94 N. E. 714.

41. Where ordinance required acceptance to be filed with city clerk or board of aldermen a memorandum signed at the bottom of the ordinance in the journal as follows: "Accepted this July 2, 1908," and signed by the grantee of the franchise, was sufficient. *Hook v. Bowden*, 144 Mo. App. 331, 128 S. W. 261.

franchise requires an acceptance in writing, the municipality may waive such acceptance, and the act of the company in using the streets may be sufficient as an acceptance.⁴²

The acceptance of a franchise is an acceptance of the conditions therein.⁴³ If a company has no right to act except under the conditions of an ordinance granting permission, full acceptance of the conditions is implied in going ahead and using the streets pursuant to such municipal permission.⁴⁴

Where a company accepts a franchise from a city but the franchise is invalid because of want of power in the city to grant it, the acceptance *estops* the company, after complying with the conditions of the franchise, to deny that it is exercising such franchise.⁴⁵

§ 1651. Amendment or modification of franchise.

Unless the power to do so is reserved,⁴⁶ the municipality cannot modify or amend the franchise after it is

42. *Postal Telegraph-Cable Co. v. Newport*, 25 Ky. Law Rep. 635, 76 S. W. 159.

43. *Jamestown v. Home Telephone Co.*, 109 N. Y. S. 297, 125 App. Div. 1.

Qualified acceptance to the effect that the company would only be bound by the terms of the ordinance in so far as its provisions were held reasonable and legal; held that the city, never having consented to the qualification, and the company having enjoyed the privilege conferred by the ordinance, it could not refuse to comply with certain conditions thereof on the ground that the acceptance was illegal. *Allegheny v. People's Natural Gas and Pipeage Co.*, 172 Pa. St. 632, 33 Atl. 704, 37 Wkly. Notes Cas. 442.

The fact that the instrument of acceptance of an ordinance authorizing a railroad company to extend its lines contains a declaration to the effect that the company waives none of its vested rights under the charter does not render the acceptance void. *Trenton v. Trenton Horse R. Co.* (N. J., 1890), 19 Atl. 263.

44. *Detroit v. Detroit City Ry. Co.*, 37 Mich. 558.

45. *State ex rel. v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108 (and see concurring opinion of Judge Winslow in 114 N. W. 315).

§ 1688 *post*.

46. *Denver v. Denver City Cable R. Co.*, 22 Colo. 565, 45 Pac. 439; *Sioux City St. R. Co. v. Sioux City*, 78 Ia. 742, 39 N. W. 498.

granted, where thereby it lessens the rights and privileges of the company or imposes additional burdens on it.⁴⁷

§ 1652. Construction of franchises.

Franchises granted by municipal corporations, being considered in derogation of the right of the public in free and unobstructed use of the streets, are strictly construed,⁴⁸ and must be given the construction most favorable to the public when susceptible of two or more constructions.⁴⁹ And a franchise is not to be construed more strongly against the municipality than the public

47. *Burlington v. Burlington St. R. Co.*, 49 Ia. 144, 31 Am. Rep. 145; *Grand Rapids Electric R. Co. v. Grand Rapids*, 84 Mich. 257, 47 N. W. 567; *Minneapolis St. R. Co. v. Minneapolis*, 155 Fed. 989, aff'd in 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259.

48. *Illinois. Chicago v. Mutual Electric Light, etc. Co.*, 55 Ill. App. 429.

Kentucky. People's Electric Light, etc. Co. v. Capital Gas, etc. Co., 116 Ky. 76, 25 Ky. L. Rep. 327, 75 S. W. 280.

Maryland. Baltimore v. Chesapeake, etc. Tel. Co., 92 Md. 692, 48 Atl. 465.

Missouri. Ransom v. Citizens' Ry. Co., 104 Mo. 375, 16 S. W. 416.

Ohio. Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89.

United States. Water, Light & Gas Co. of Hutchinson v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257; *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

Construction of conditions, § 1649 *ante*.

Construction as to exclusiveness, § 1635 *ante*.

Construction as to duration, § 1656 *post*.

"It is a rule of construction that, if the terms of the franchise are doubtful, they are to be construed strictly against the grantee and liberally in favor of the public."

Resolution of municipality construed to grant consent of city to telephone company to place a local exchange in its streets. *Vermilion v. Northwestern Telephone Exchange Co.*, 189 Fed. 289.

49. *Rogers Park Water Co. v. Chicago*, 131 Ill. App. 35; *Baltimore v. Chesapeake & P. Tel. Co.*, 92 Md. 692, 48 Atl. 465.

Strict construction of franchise. An ordinance granting the right to use the city's streets for a street railway system is to be construed most strongly against the grantee in favor of the public, and is to be interpreted according to the language used and in light

service company because it was prepared with care and leisure by the former, and accepted by the latter without like opportunity to consider its provisions.⁵⁰

As stated by Mr. Justice Harlan in a noted case in the supreme court of the United States: "It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be *liberally construed in favor of the public*, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its powers."⁵¹

Nothing passes by grant unless it is clearly stated or necessarily implied.⁵² And it is said that "the rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. But the obvious intention of the parties, when expressed in plain language, cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended, should be avoided in a grant as well as in a statute."⁵³

A grant to use the streets is not to be frittered away by construction. It is to be held up by the four corners

50. Valparaiso City Water Co. v. Valparaiso, 33 Ind. App. 193; 197, 69 N. E. 1018.

51. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353.

52. Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801.

53. People ex rel. v. Deehan, 153 N. Y. 528, 532, 47 N. E. 787.

of all surrounding facts and circumstances. Blocki v. People, 220 Ill. 444, 77 N. E. 172.

In a franchise to construct a railroad, the specific mention of certain turnouts, switches, and constructions would be interpreted to exclude others. If there is any doubt as to the extent of the grant, the doubt is resolved in favor of the public. Galveston Wharf Co. v. Gulf, etc. R. Co., 81 Tex. 494, 17 S. W. 57.

and examined, and given a fair construction,⁵⁴ *i. e.*, a reasonable construction consistent with common sense.⁵⁵ And in case of doubt, a grant will be presumed to be for a public as distinguished from a private purpose.⁵⁶

Construction of particular provisions in franchises,⁵⁷

54. *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854, 862; *Omaha Water Co. v. Omaha*, 147 Fed. 1.

55. Thus, a grant to use the streets for telephone purposes will not justify the erection of broken and unsightly poles. *Forsythe v. B. & O. Telegraph Co.*, 12 Mo. App. 494.

And a right granted to a street railway company to lay its tracks in the streets intends that they shall be laid to conform with the grade of the street. *Cross v. St. Louis, etc. R. Co.*, 77 Mo. 318.

So, too, the granting of a franchise to use the streets for street railway purposes does not carry with it the right to erect a signal tower in a street to be used in connection with the operation of the railway. *Williams v. Los Angeles, R. Co.*, 150 Cal. 592, 89 Pac. 330.

56. *Levis v. Newton*, 75 Fed. 884, *aff'd* in *Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 161, holding that if grant of use of streets for gas or electric lighting does not show whether use is for public or private purposes, it will be presumed that use is for public purposes.

57. See *Quincy v. Bull*, 106 Ill. 337, *aff'g* *Bull v. Quincy*, 9 Ill. App. (9 Bradw.) 127.

Electricity other than for light-

ing. A franchise granting the right to use streets for a "general electric light business," where passed in 1884 when the application of electric power to stationary machinery was not much understood or developed, did not grant to the company authority for the transmission of an electrical current for purposes other than lighting. *Omaha Electric Light & Power Co. v. Omaha*, 172 Fed. 494, 496.

Use under sidewalks. Grant to electric light company of right to use streets for conduits gives it the right to lay them under the sidewalks. *Allegheny County Light Co. v. Booth*, 216 Pa. St. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404.

Number of tracks. Under an ordinance granting a railway company the right to construct its "track or tracks" in a street, and which did not limit the number of tracks, the company after constructing, and using for a time a single track has a right to construct a second track therein, and the council having granted the company the use of the street as might be necessary for the company's business, the council could not determine what was a necessary use. *Workman v. Southern Pac. R. Co.*, 129 Cal. 536, 62 Pac. 185.

such as the right of the municipality to purchase,⁵⁸ the rates to be charged by the company,⁵⁹ the depth at which pipes shall be laid,⁶⁰ etc., depend largely on the particu-

The construction by a railway company of a single track in a street under authority from a municipal corporation to construct a double track, does not exhaust the power of the grant, and the company may later change to a double track under such authority. *Ransom v. Citizens R. Co.*, 104 Mo. 375, 16 S. W. 416.

Where a street railway company was granted the right to build a single or double track railway provided it was built and in operation on or before certain time, and the company built and put in operation within that time a single track road, it cannot, after the lapse of the specified time convert its line wholly or partially into a double track line, because, having the option to build either kind of road, it elected to construct the single track. *Eastern Wisconsin R. & L. Co. v. Winnebago Tr. Co.*, 126 Wis. 179, 105 N. W. 571.

Light franchise. Where a grant was made before electric lighting was heard of, to distribute gas and any substance thereafter used as a substitute therefor, no right was conferred to adopt any method for distributing electricity for lighting. *State ex rel. v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798.

The grant of the right to use streets for laying gas pipes does not include the right to erect poles and stretch wires for the con-

veyance of electricity. *Newport v. Newport Light Co.*, 89 Ky. 454, 12 S. W. 1040.

So right to lay gas pipes in the streets does not include the right to erect lamp posts at the street crossings when it has no contract with the city to furnish it with light. *New Orleans Gaslight Co. v. Hart*, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544.

Free gas. Where a franchise providing that the grantee shall furnish gas free to the municipality so long as he shall have the exclusive right to the use of the streets for its pipes, another ordinance granting to another company the use of the streets for a similar purpose renders such condition inoperative. *Newark Gas & Fuel Co. v. Newark*, 8 Ohio S. & C. P. Dec. 418, 7 Ohio N. P. 76.

Territorial limits. The charter of a company authorized it to furnish electricity within the limits of the village in which it was located. Subsequently the village was taken into a city. Held, the company had no authority to contract to supply electricity outside of that part of the city within the limits of the village in which it was originally located. *Chicago v. Mutual Light & Power Co.*, 55 Ill. App. 429.

58. See Chapter 35 *post*.

59. § 1732 *post*.

60. *Montgomery v. Capital City Water Co.*, 92 Ala. 361, 9 So. 339.

lar wording of the franchise in question.⁶¹ Ordinarily the grant of the right to string wires in a street does not authorize the company to cut off overhanging branches of trees or otherwise interfere therewith.⁶² A grant to a telegraph or telephone company of the right to run and maintain wires "over and through" the streets does not authorize the laying of wires underground.⁶³

An ordinance granting a franchise to a gas company to use the streets for supplying gas to the municipality and inhabitants, and which provides that the municipal council shall determine the amount of gas to be used by the city, does not require the local corporation to continue to use such gas.⁶⁴

Inasmuch as a franchise to use the streets, when accepted, becomes a contract,⁶⁵ the rules relating to construction of municipal contracts in general,⁶⁶ especially contracts between a municipality and a public service

61. Permit by municipality to street car company to string electric wires along a street does not give it the right to use the wires to distribute power to private consumers. *Chicago General St. Ry. Co. v. Ellicott*, 88 Fed. 941.

Construction of grant of right to use streets for purpose of conducting electricity to operate street cars, see *Beaumont Traction Co. v. Brock*, 48 Tex. Civ. App. 41, 106 S. W. 460.

Permission to erect poles in street, obtained in 1888, does not warrant such erection in 1900. *McWethy v. Aurora Electric Light & Power Co.*, 202 Ill. 218, 67 N. E. 9, aff'g 104 Ill. App. 479.

Business extension telephone or residence extension telephone as telephones in estimating the number of telephones required by

franchise to have installed before it increased rates for service, see *Panhandle Telephone & Telegraph Co. v. Amarillo* (Tex. Civ. App., 1911), 142 S. W. 638.

62. *Van Siclen v. Jamaica Electric Light Co.*, 168 N. Y. 650, 61 N. E. 1135.

§ 1328 *ante*, vol. 3.

Trees. But in New Jersey it is held that the right to erect trolley wires gives right to top the branches of trees when it is reasonably necessary for the passage of wires. *Dodd v. Consolidated Traction Co.*, 57 N. J. L. 482, 31 Atl. 980.

63. *Commonwealth v. Warwick*, 185 Pa. St. 623, 40 Atl. 93.

64. *Gaslight & Coke Co. v. New Albany*, 156 Ind. 406, 59 N. E. 176.

65. § 1672 *post*.

66. § 1268 *ante*, vol. 3.

company,⁶⁷ are applicable in so far as conditions are the same.

§ 1653. Assignment of franchises.

In considering the question of the assignment of franchises,⁶⁸ it is necessary to keep in mind the difference previously noted between franchises to be a corporation and the franchise to use the streets.⁶⁹ The franchise to be a corporation, as distinguished from the grant to use streets, cannot be transferred by any corporate body of its own will, unless expressly authorized by statute or the charter of the company.⁷⁰

On the other hand, the franchise to use the streets, where its assignment is not forbidden by constitution or statute,⁷¹ or the grant of the franchise it-

67. § 1721 *post*.

68. Assignment of contracts, § 1273 *ante*, vol. 3.

Right of purchaser at receiver's sale of property of street railway to remove and sell the rails, see *French v. Jones*, 191 Mass. 522, 78 N. E. 118, 7 L. R. A. (N. S.) 525.

Mortgage as including franchise, see *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782, 10 C. C. A. 60.

Assignment as creating monopoly. A company accepted an ordinance granting to any company complying with its terms, the right to operate an electric plant and use the streets therefor. After operating over twenty years it sold its property to another company, which had a short time before secured a special franchise to construct or acquire a plant for a thirty year term. One of the conditions under which the first company obtained its franchise was that it should not enter into

any combination with nor sell its franchise to any other company and that if it did, the franchise should be forfeited. The first company sold its plant to the second company and it was contended by the municipality that thereby an unlawful monopoly was created, but the contrary was held and also that the municipality could not order the poles of the second company removed from the streets. *Saginaw Power Co. v. Saginaw*, 193 Fed. 1008.

69. § 1615 *ante*.

70. *Memphis & L. R. R. Co. v. Railroad Com'rs*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837; *Central Crosstown R. Co. v. Metropolitan St. R. Co.*, 44 N. Y. S. 752, 16 App. Div. 229.

71. See *Marlborough Gas Light Co. v. Neal*, 166 Mass. 217, 44 N. E. 139.

In Missouri, the assignment of the grant to use streets for street railways is forbidden by the con-

self,⁷² is generally held to be assignable,⁷³ although there

stitution, without the consent of the municipal authorities. *Moorshead v. United Rys. Co.*, 119 Mo. App. 541, 96 S. W. 261, *aff'd* in 203 Mo. 121, 100 S. W. 611.

In *New York*, the public service commission statute forbids the transfer of any franchise to operate a railroad unless it is approved by the public service commission, but it has been held that such statute does not apply to a reorganized street railroad company formed on the reorganization of a foreclosed railroad. *People ex rel. v. Public Service Commission*, 203 N. Y. 299, 96 N. E. 1011, *aff'g* 130 N. Y. S. 97, 145 App. Div. 318.

72. *Taylor v. Dunn*, 80 Tex. 652, 16 S. W. 732.

Assignment of franchise. But statute forbidding corporation from transferring its franchise does not apply to transfers by an individual. *Re Long Acre Electric Light & Power Co.*, 101 N. Y. S. 460, 51 Misc. Rep. 407.

So provision in grant of right to use streets that it "shall never in any way or manner authorize any other railroad company, * * * to use the franchise herein above granted" was held not to prohibit the assignment of the franchise. *Chicago & South Side R. T. R. Co. v. Northern Trust Co.*, 90 Ill. App. 460, 483.

73. *California*. See *People v. Stanford*, 77 Cal. 360, 19 Pac. 693, 2 L. R. A. 92.

Michigan. See *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502,

80 N. W. 383, 47 L. R. A. 87, 80 Am. St. Rep. 520.

Missouri. *Lawrence v. Hennessy*, 165 Mo. 659, 65 S. W. 717.

Nebraska. *State ex rel. v. Citizens' Street R. Co.*, 80 Neb. 357, 361, 114 N. W. 429.

New York. *Re Long Acre Electric Light & Power Co.*, 101 N. Y. S. 460, 51 Misc. Rep. 407.

Vermont. *Barre v. McFarland*, 82 Vt. 310, 73 Atl. 577.

United States. *New Orleans, Spanish Fort & Lake R. Co. v. Delamore*, 114 U. S. 501, 508, 5 Sup. Ct. 1009, 29 L. Ed. 244 (holding franchise to use streets to be assignable in Louisiana); *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334 (*dicta*).

Power to assign franchise. "A right of way upon a public street, whether granted by act of the legislature, or ordinance of city council, or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts." *Knoxville v. Africa*, 77 Fed. 501, 507; *Detroit v. Detroit Citizens' St. R. Co.*, 64 Fed. 628, 12 C. C. A. 365.

Franchise to use the streets may be exercised by another company which succeeds to all the grantee's rights, property and franchises, where the law in force expressly authorizes the acquisition by one company of the property and franchises of another company.

are a considerable number of decisions directly or indirectly to the contrary where no statute authorizes it,⁷⁴

Quincy v. Chicago, B. & Q. R. Co., 94 Ill. 537.

Right to use streets conferred on lessor passes as incident of lease of road to another company. *Conschohocken Borough v. Conschohocken R. Co.*, 206 Pa. St. 75, 55 Atl. 855.

Exclusive franchise may be assigned. *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075.

In New York, it is said that "the general rule that a special or secondary franchise is unalienable without any express legislative assent has lost practically all its authority in this state." *Re Long Acre Light & Power Co.*, 102 N. Y. S. 242, 117 App. Div. 80, aff'd in 188 N. Y. 361, 80 N. E. 1101.

In Wisconsin, where it has been held that a franchise may be conferred on a corporation already created, it is said that "if this be true, then no good reason is apparent why a franchise might not be assigned to such a corporation assuming that the scope of its articles of incorporation was such as to permit it to take the assignment." *Per Judge Barnes, in Re Southern Wisconsin Power Co.*, 140 Wis. 245, 122 N. W. 801.

Michigan. The doctrine of non-alienability without legislative sanction was questioned in *Joy v. Jackson & M. Pl. Road Co.*, 11 Mich. 155, and apparently repudiated in *Detroit v. Mutual Gas Co.*, 43 Mich. 594, 5 N. W. 1039, a case involving the rights of a purchaser under foreclosure of a

mortgage on the property and franchises of a gas company. The court says that a corporation regularly organized under the laws of Michigan may mortgage and convey its property or franchises as though it were a private individual subject only to such restrictions as the legislature may have imposed. It is not entirely clear whether the court intended to decide in favor of alienability without legislative sanction or merely that such sanction had been granted in Michigan.

In Missouri, it was held that under a statute, which provides "that every corporation as such * * * has power to hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation may require, * * * and also to take hold and convey such other property, real, personal and mixed, as shall be necessary for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability belonging to the corporation," a street railway company within that state may mortgage its right of way. *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

74. *California.* *Visalia Gas & E. L. Co. v. Sims*, 104 Cal. 326, 330, 37 Pac. 1042.

Maine. *Brunswick Gas Light Co. v. United Gas, Fuel & E. L. Co.*, 85 Me. 582, 27 Atl. 525.

Missouri. *Kavanaugh v. St. Louis*, 220 Mo. 496, 119 S. W. 552.

without the consent of the municipality,⁷⁵ and statutes oftentimes expressly authorize the assignment of such franchises.⁷⁶

Where a statute provides that a company formed by the consolidation of two other companies shall be vested with all the "property" etc., of the constituent com-

New York. Bath Gaslight Co. v. Claffy, 26 N. Y. S. 287, 74 Hun (N. Y.) 638; Brooklyn v. Fulton Municipal Gas Co., 7 Abb. N. C. (N. Y.) 19.

Wisconsin. State ex rel. v. Anderson, 90 Wis. 550, 558, 63 N. W. 746; State ex rel. v. Anderson, 97 Wis. 114, 72 N. W. 386.

The power of a street railroad company to mortgage its franchise to occupy its streets, in the absence of legislative authority, is denied in Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; and Middlesex R. Co. v. Boston & C. R. Co., 115 Mass. 347.

A telegraph company cannot alien its franchise to maintain its line in the streets without express power from the legislature. Philadelphia v. Western Union Tel. Co., 11 Phila. (Pa.) 327.

In New Jersey, under the statute establishing a mode of procedure when the property and franchises of a gas company are sold pursuant to a process or decree of a court, the purchaser has no power as an individual to convey the franchise to another person. McCarter v. Vineland Light & Power Co., 73 N. J. Eq. 703, 70 Atl. 177.

Consent of municipality necessary. See Western Union Tel. Co. v. Toledo, 103 Fed. 746.

However, the consent of the municipality to the transfer of a franchise does not authorize the company holding it to transfer it where it possesses no such power. New Albany Waterworks v. Louisville Banking Co., 122 Fed. 776, 58 C. C. A. 576.

An ordinance consenting to the assignment of a franchise on condition that the assignee shall give a bond in a certain sum does not become effective where the bond is not given by the assignee, although one is filed by the assignor. Salem v. Home Tel. & Tel. Co. (Ore., 1912), 122 Pac. 290.

75. Commercial Electric Light & Power Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592.

76. South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 Pac. 490; Hey v. Springfield Water Co., 207 Pa. 38, 56 Atl. 265; Re Southern Wisconsin Power Co., 140 Wis. 245, 122 N. W. 801; Wright v. Milwaukee Electric R. & L. Co., 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47.

Statute authorizing corporations to alienate their property confers power to sell a franchise to use the streets for telephone wires to another company organized for the same purpose, without first obtaining the consent of the municipality. Michi-

panies, a franchise to use the streets possessed by one of the companies passes to the consolidated company.⁷⁷

So a grant to a company, "*its successors and assigns*" is assignable,⁷⁸ as is a grant of a franchise to a company *or* its assigns;⁷⁹ but a franchise granted to one and assigns cannot be assigned so as to permit the grantee of the franchise the right to enjoy it equally with the assignee,⁸⁰ although the contrary has been held where the grant was to a company "*or*" its assigns.⁸¹

However, a franchise to use the streets cannot be transferred independently of the property to a company which desires to use the streets for a different purpose.⁸² And of course if the grant to use the streets is invalid, an assignment thereof is ineffective.⁸³ At any event it seems that an assignment of the franchise to use streets is not void, as distinguished from voidable, and hence the state or municipality is the only one which can raise the objection to the assignment.⁸⁴

gan Tel. Co. v. St. Joseph, 121 Mich. 502, 509, 80 N. W. 383, 47 L. R. A. 87.

77. Louisville v. Cumberland Tel. & Tel. Co., 224 U. S. 649, 32 Sup. Ct. 572.

78. People v. Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; Old Colony Trust Co. v. Wichita, 123 Fed. 762.

A grant of an exclusive privilege or franchise to an individual and his assignees may be purchased and held by a corporation. California State Telephone Co. v. Alta Telephone Co., 22 Cal. 398.

79. Ft. Smith Light & Traction Co. v. Kelley, 94 Ark. 461, 127 S. W. 975; Newman v. Avondale, 31 Wkly. Law Bul. (Ohio) 123.

80. Ft. Smith Light & Traction Co. v. Kelley, 94 Ark. 461, 127 S. W. 975.

81. Newman v. Avondale, 31 Wkly. Law Bul. (Ohio) 123.

82. A franchise right of electric street railway to occupy street with poles, wires, etc. cannot be transferred to another company for the purpose of electric lighting. Carthage v. Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936.

83. Wilder v. Aurora & Rockford Elec. T. Co., 216 Ill. 493, 75 N. E. 194.

84. Re Long Acre Electric Light & Power Co., 188 N. Y. 361, 80 N. E. 1101, aff'g 102 N. Y. S. 242, 117 App. Div. 80, which aff'd 101 N. Y. S. 460.

City may question validity of transfer of franchise to use its streets. Cumberland Tel. & Tel. Co. v. Evansville, 127 Fed. 187.

and hence the question cannot be raised by a rival company.⁸⁵

So the right to question the validity of an assignment may be lost by *laches* on the part of the municipality.⁸⁶ Thus, where the assignee of a permit to use the streets had acted upon it for more than twenty years without objection from the municipality, it was held that it was estopped to assert that the right was not assignable.⁸⁷

The assignee of a franchise takes it burdened with the obligations and conditions imposed upon the assignor.⁸⁸ But the assignee of a franchise does not ordinarily acquire a privilege of exemption from regulation of rates possessed by the assignor.⁸⁹

7. DURATION, TERMINATION, REVOCATION AND FORFEITURE.

§ 1654. Power of municipality as to fixing duration of franchise.

The legislative body of a municipal corporation has power to make a grant which is binding on its successors,⁹⁰ and for a term longer than that of the members

85. *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 13 Am. Rep. 181.

86. *Austin v. Bartholomew*, 107 Fed. 349, 46 C. C. A. 327.

87. *East Tennessee Telephone Co. v. Frankfort*, 141 Ky. 588, 133 S. W. 564.

88. *California. Reynolds v. Pacific Electric R. Co.*, 146 Cal. 261, 80 Pac. 77.

Connecticut. State v. New York, N. H. & H. R. Co., 81 Conn. 645, 71 Atl. 942.

Michigan. Grosse Pointe v. Detroit & L. St. C. Ry., 130 Mich. 363, 90 N. W. 42.

New Jersey. Rutherford v. Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84.

Pennsylvania. Sandy Lake
4 McQ.—30

Borough v. Sandy Lake & S. Gas Co., 16 Pa. Super. Ct. 234.

Texas. Citizens Ry. & Light Co. v. Johns (Tex. Civ. App.), 116 S. W. 62.

Wisconsin. Compare Stafford v. Chippewa Val. Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

89. *Peoples' Gaslight & Coke Co. v. Chicago*, 194 U. S. 1, 24 Sup. Ct. 520, 48 L. Ed. 851; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 569. But see *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451.

90. *Rock Island v. Central Union Tel. Co.*, 132 Ill. App. 248, 264.

Duration of contract, § 1253
ante, vol. 3.

of the council granting the franchise or making the contract.⁹¹

The power conferred on a municipality to fix the terms and conditions upon which a public service corporation shall occupy its streets, includes power to fix the term of such occupation,⁹² as by limiting the duration to a certain number of years,⁹³ except that a *perpetual* franchise cannot be granted unless the power so to do has been delegated,⁹⁴ and that the franchise can-

91. *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

92. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334.

Power to limit duration. However, there is some authority for holding that although the constitution and statutes of the state requires the consent of a city to construct the system of a public service company within its limits, yet such consent is not a franchise and that the act of the municipality in limiting the term of the franchise to a certain number of years is of no effect. *Dakota Central Telephone Co. v. Huron*, 165 Fed. 226.

93. Fact that corporate life of company is for an unlimited term does not preclude it accepting a franchise for a shorter term of years. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334.

94. *Alabama. Birmingham & P. M. St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

New York. State v. New York, 3 Duer (10 N. Y. Super. Ct.) 119.

Oregon. Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. 864.

Pennsylvania. Philadelphia, W. & B. R. Co. v. Chester, 3 Del. Co. R. (Pa.) 18.

Vermont. Barre v. Perry & Scribner, 82 Vt. 301, 73 Atl. 574.

United States. Boise City v. Boise Artesian Hot & Cold Water Co., 186 Fed. 705; *Logansport Ry. Co. v. Logansport*, 114 Fed. 688;

But see *Woodbridge Tp. v. Middlesex Water Co.* (N. J. Eq.), 68 Atl. 464.

Power to grant perpetual franchise. Where a statute requires the consent of the municipality before a railroad shall be constructed through the streets, "under such regulations and upon such terms and conditions as said (municipal) authorities may from time to time prescribe," the quoted clause does not by implication confer power on the municipality to grant an *exclusive* privilege to occupy the street for railway purposes, nor authorize the grant of a *perpetual* privilege. *Detroit Citizens' Street R. Co. v. Detroit Ry.*, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67; *Logansport*

not be granted for an unreasonably long period of

R. Co. v. Logansport, 114 Fed. 688, 693.

Power by implication. "Mr. Justice Jackson, in *Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & F. G. Co.*, 33 Fed. 659, says * * * 'That municipal corporations possess and can exercise only such powers as are granted in *express words* or those *necessarily or fairly implied, in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.*' The italics are his. This would make 'necessarily implied' mean inevitably implied. The court of appeals of the Sixth circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in *Wilkinson v. Adam*, 1 Ves. & B. 422, 466, that 'a necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.' If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark, or, if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough—would have been natural under

any constitution not prohibiting it—and the power to prescribe the terms and regulations of the occupation derive very little, if any breadth, from the expression of it." *Detroit Citizens' Street R. Co. v. Detroit Ry.*, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67.

Conferring power on municipality to "provide for lighting the streets" or "to care for and control the streets" is not specific enough to warrant a perpetual grant to use the streets for the purpose of conducting a general lighting business. *Omaha Electric Light & Power Co. v. Omaha*, 179 Fed. 455, 459, 102 C. C. A. 601.

"Judge Cooley adopts the view that a municipal corporation cannot, 'without explicit legislative consent,' permit the construction of a street railway in its streets, and confer on the projectors 'privileges exclusive in their character, and designed to be perpetual in duration.' * * * No reason is perceived why this principle is not entirely sound, and in strict conformity to every rule pertaining to the true functions of municipal corporations. * * * They have no implied power to barter away today, as a monopoly to one, that which the public necessities of a growing city may require to be reserved, in order that it may be exercised for the public benefit on tomorrow." *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 472, 58 Am. Rep. 615.

Constitutional prohibition. If the state constitution forbids the

time.⁹⁵ However, the invalidity of the provision that the franchise shall be perpetual does not otherwise affect the grant,⁹⁶ since the municipality may always resort to the power of eminent domain.⁹⁷

As stated by Mr. Justice Day of the supreme court of the United States, where, by the charter and statute, a railroad company must be "authorized" by the municipal council before it can lay tracks or operate railways in the streets, this power of the city, "in the absence of language in the statute excluding the authority and reserving its exercise to the state, necessarily includes the right to fix the time for which the streets may be used."⁹⁸ And it is stated by Mr. Justice Lurton in a

passage of any law "making any irrevocable grant of special privileges or immunities," a city cannot be authorized to grant an exclusive franchise in perpetuity to run a street railway on certain streets. *Birmingham & P. M. St. Ry. Co. v. Birmingham Street Ry. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

95. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Ia. 234, 241, 91 N. W. 1081.

But in *Houston v. Houston City St. Ry. Co.*, 83 Tex. 548, 19 S. W. 127, 29 Am. St. Rep. 679, it was held that the duration of a franchise is a matter for the exclusive determination of the common council, except that it cannot create a perpetuity.

Water franchise for twenty years, where in reality merely an extension of former franchise for about nine years, is not for an unreasonable period. *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 96 S. W. 622.

Twenty-one years. A contract or franchise for twenty-one years is not unreasonable. *Illinois*

Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

Term of twenty-five years is not an unreasonable one for a city to grant the use of its streets for water mains, to pay hydrant rentals and to agree upon water rates for its inhabitants in consideration of the construction of waterworks and a supply of water to itself and its inhabitants during that term. *Omaha Water Co. v. Omaha*, 147 Fed. 1, 7, 8, 77 C. C. A. 267.

Thirty years. Granting a franchise for thirty years has been held not unreasonable. *Gadsden v. Mitchell*, 145 Ala. 137, 40 So. 557, 6 L. R. A. (N. S.) 781, 117 Am. St. Rep. 20.

96. *Levis v. Newton*, 75 Fed. 884, aff'd in *Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 161.

97. *Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, 33 Pac. 1048.

98. *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, rev'g *Govin v. Chicago*, 132 Fed. 848.

federal decision that "this right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant."⁹⁹

The grant may be for a term *beyond the limit of the corporate life of the company* to whom the grant is made, where the interest granted is assignable.¹ So the grant may be made for a specified term or whenever after a fixed number of years the municipality shall elect to purchase the plant and property of the company at an appraised valuation.²

99. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 308, 22 C. C. A. 334, 346.

1. *State ex rel. v. Laclede Gas-light Co.*, 102 Mo. 472, 14 S. W. 974, 22 Am. St. Rep. 789; *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, aff'g 155 Fed. 989; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *Detroit Citizens' St. Ry. Co. v. Detroit*, 64 Fed. 628, 12 C. C. A. 365, 22 U. S. App. 570, 26 L. R. A. 667.

Franchise extending beyond corporate life of grantee. The fact that a corporation is organized for a limited period by the terms of its charter does not prevent it receiving a grant which will inure to the benefit of those lawfully entitled to succeed to the right of the corporation, although for a period of years beyond the corporate life. *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 395, 22 Sup. Ct. 410, 46 L. Ed. 592.

A city ordinance, granting to a gas company, its successors and assigns the privilege of furnishing gas to the city and to private consumers for a named period, is not void because the time extends beyond the termination of the company's chartered existence, the ordinance providing that it might transfer all of its rights and privileges, property and franchises, given by the ordinance, to any organized gas company of the state which would, within twenty days after the transfer, file its written acceptance of the ordinance and give bond to perform all the agreements required of the original company. *State ex rel. St. Louis v. Laclede Gas Light Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789.

2. *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640, 75 C. C. A. 442.

See chapter 35 *post*.

§ 1655. Duration as limited by statute or charter.

Municipal charters or general laws usually limit the time for which franchises or privileges for using the streets by public or *quasi* public service companies may be granted. While many franchises, especially in the Eastern states, were originally granted without time limit and in some jurisdictions are, therefore, considered to be perpetual, in recent years there has been a strong tendency to limit franchises to periods of from twenty to fifty years,³ and many municipalities are prohibited by their charter or statute from granting a franchise, or certain franchises, for a period exceeding a specified number of years,⁴ and in such case a municipality can-

3. Wilcox, *Municipal Franchises*, § 43.

4. *Gusthal v. New York*, 48 N. Y. S. 652, 23 App. Div. 315; *Norris v. Wurster*, 48 N. Y. S. 656, 23 App. Div. 124.

Duration limited by statute. Provision that no grant can be made for a term exceeding fifty years does not mean that no grant can be made for a shorter period than fifty years. *Boise City v. Boise Artesian Hot & Cold Water Co.*, 186 Fed. 705, 709.

If time limited by statute to twenty years, ordinance granting franchise for twenty years from date of its taking effect is not invalid because passed several months before such date. *State v. Excelsior Coke & Gas Co.*, 69 Kan. 45, 76 Pac. 447.

In *Kentucky*, the constitution provides that no municipal corporation shall grant any franchise or privilege for a term exceeding twenty years. *Hilliard v. George G. Fetter Lighting & Heating Co.*, 127 Ky. 95, 105 S. W. 115.

Where city was prohibited from

granting franchise for more than twenty years, and gas franchise was sold under provision that gas should not be furnished until about two years later, franchise began from date of contract rather than date the bidder was required to furnish gas. *Truesdale v. Newport*, 28 Ky. L. Rep. 840, 90 S. W. 589.

Indiana statute construed as authority to grant water and light franchise for a longer term than twenty-five years, where the municipality does not elect to take a specified number of lines or hydrants and to pay a stipulated rental therefor. *Hester v. Greenwood*, 172 Ind. 279, 88 S. E. 498.

Constitutional provision that no franchise shall be granted for a longer period than a specified number of years is self-executing. *Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353.

In *New York City*, the 1897 charter limits grants to use streets to twenty-five years. *Blaschko v. Wurster*, 156 N. Y. 437, 51 N. E. 303.

not grant a franchise for the use of its streets for a longer period;⁵ and in some jurisdictions a grant of a franchise for a period exceeding that limited by the charter or a statute is invalid *in toto* and cannot be sustained as a grant for the period fixed by the charter or statute as the limit.⁶ Generally, however, where a statute forbids the grant of a franchise for more than a certain number of years, a grant for a longer period is not invalid *in toto* but only as to the time in excess of the statutory period.⁷

§ 1656. Construction of grant as to duration.

So far as the duration of the franchise is concerned, an ordinance granting a right to use a street or streets is either (a) perpetual, or (b) for a reasonable time, or (c) for a definite period of years, or (d) is a license revocable at the will of the municipality at any time.

In some jurisdictions, franchises are not granted for definitely limited periods, on the theory that no municipality can foresee, even for the comparatively short period of twenty years, the vicissitudes of any particular utility, and hence *indeterminate* franchises are provided for, as in Massachusetts and Wisconsin.⁸

But where indeterminate franchises are not provided for, there is considerable conflict of opinion as to the duration of a grant of the right to use the streets of a municipality where the ordinance granting the right does not fix the number of years the right shall continue

5. *Sullivan v. Bailey*, 125 Mich. 104, 83 N. W. 996.

6. *Blaschko v. Wurster*, 156 N. Y. 437, 51 N. E. 303.

7. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Ia. 234, 91 N. W. 1081; *Sommers v. Cincinnati*, 6 Ohio Dec. 887.

Where grant for more than twenty years prohibited, ordinance granting right for twenty years and providing for its extension for

twenty years, if the plant was not purchased by the municipality, is valid as to the first term. *Neosho City Water Co. v. Neosho*, 136 Mo. 498, 38 S. W. 89.

8. See *Wilcox, Municipal Franchises*, § 44.

Indeterminate franchises. Street railway franchises that are indeterminate, description of, see *Wilcox, Municipal Franchises*, §§ 366-376.

in force.⁹ At any event, such a franchise continues at least during the corporate life of the grantee,¹⁰ and ordinarily where a grant of the right to use a street or streets for public utility purposes does not fix the term of the grant, the grant will be construed as limited to the life of the corporation,¹¹ where the duration of such franchise is not otherwise limited by law;¹² but in some jurisdictions such a grant is construed as a perpetual one,¹³ or for a reasonable time.¹⁴

Where no limit was fixed to the corporate existence of a telephone company, and the consent of the city to

9. See *Washburn v. Washburn Waterworks Co.*, 120 Wis. 575, 98 N. W. 539; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 716.

Perpetual. An ordinance reserving to the city the right to require light and power company to remove its poles and wires from the streets within sixty days after the city council has declared the necessity therefor by ordinance, is repugnant to any claim of a perpetual franchise. *Omaha Electric Light & Power Co. v. Omaha*, 179 Fed. 455, 459, 102 C. C. A. 601.

10. The view adopted by the Federal Supreme Court and in some of the state courts is that if the grant of the right to use streets contains no express provision as to its duration, but the grantee of the franchise is limited in its corporate life, the grantee takes an interest only during its corporate life. *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, aff'g 82 Ill. 174.

11. *People ex rel. v. Central Union Telephone Co.*, 232 Ill. 260, 83 N. E. 829; *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43, 47, 82 N. W. 821; *S. P. St. Clair*

County Turnpike Co. v. Illinois, 96 U. S. 63, 68, 24 L. Ed. 651; *Omaha Electric Light & Power Co. v. Omaha*, 179 Fed. 455, 459, 102 C. C. A. 601.

12. § 1658 *ante*.

13. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; *Re Consolidated Gas Co.*, 106 N. Y. S. 407, 56 Misc. Rep. 49; *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854, rev'd on other grounds in 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958; *National Waterworks Co. v. Kansas City*, 65 Fed. 691.

Contra. Fact that no term of years is mentioned in grant does not show an intent to grant a perpetual franchise, where other grants for the same railway system are limited to twenty-five years. *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, rev'g 132 Fed. 848.

Street railway franchises that are perpetual, description of, see *Wilcox*, *Municipal Franchises*, §§ 348-365.

14. *Barre v. Perry & Scribner*, 82 Vt. 301, 73 Atl. 574.

use its streets contained no provision as to the duration of such right, it was held that the franchise was not revocable at the will of the municipality, and that it did not expire when the municipality was made a city of the first class, with new and enlarged municipal powers.¹⁵ It is also held that if a municipality grants the right to use streets without limiting the duration thereof, and *thereafter it is annexed to another municipality*, the right becomes extinguished on such annexation, since it does not extend beyond the life of the municipality granting it.¹⁶

So, in some jurisdictions a revocable franchise is held to terminate at the same *time that the public easement in the street terminates*, where the fee of the street is in the abutting owners, and hence where a revocable franchise is granted and thereafter the street is vacated the grantee of the franchise cannot recover compensation because of the vacation.¹⁷

If the franchise to use the streets is granted for a term of years, and thereafter unless the right to purchase the plant after such term is exercised, the franchise remains in the grantee after such term and until the conditions, on which the purchase may be made, have been fulfilled.¹⁸

Where a franchise was granted to a public service company "during the term of its charter" and the company was incorporated for fifty years, but could lawfully incorporate for only thirty years, yet has continued to act as a corporation since the expiration of the thirty

15. *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U. S. 649, 32 Sup. Ct. 572.

16. *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, following *People ex rel. v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245.

17. *New England Telegraph & Telephone Co. v. Boston Terminal Co.*, 182 Mass. 397, 399, 65 N. E. 85.

18. *Stein v. McGrath*, 128 Ala. 175, 30 So. 792.

years, the franchise will be construed as a grant for fifty years.¹⁹ So where a franchise is granted a street railway, but it is to terminate with the grant to the main line, the franchise is to be measured by the grant as it then exists and not by any subsequent extension of the term which may be granted.²⁰

Other decisions construing grants as to their duration are set forth in the note below.²¹

§ 1657. Termination of franchise.

If the franchise is for a fixed time, it terminates at the expiration of such time.²² The failure of the mu-

19. *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, aff'g 155 Fed. 989.

20. *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

21. **Construction of ordinance.** If an ordinance in one section grants a water company a perpetual franchise and in another section limits the right to fifteen years, it will be construed as a franchise for fifteen years, where the municipality had no power to grant a perpetual franchise, in which case it cannot be presumed that it intended to do so. *Joseph v. Joseph Water Works Co.*, 57 Ore. 586, 111 Pac. 864.

Franchise for twenty years and until plant redeemed, does not terminate at end of twenty years. *Stein v. Bienville Water Supply Co.*, 34 Fed. 145, aff'd in 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622.

22. *City R. Co. v. Citizens' St. R. Co. (Ind.)*, 52 N. E. 157; *Keokuk Gaslight, etc. Co. v. Keokuk*, 80 Ia. 137, 45 N. W. 555; *Canal, etc.*

Street R. Co. v. New Orleans, 39 La. Ann. 709, 2 So. 388; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 716.

Where grant is for term of charter of company, it expires when original charter of company expires. *Augusta & S. R. Co. v. Augusta*, 100 Ga. 701, 28 S. E. 126.

Termination of franchise. A railway company was granted the right to cross certain streets by a municipal corporation for a term of twenty years. The company had the power to condemn a right of way across such streets but never took advantage of its power so to do. Held, at the end of the twenty years its right to cross such streets terminated, although it owned in fee the balance of its right of way and its charter existence was in perpetuity. *Louisville Trust Co. v. Cincinnati*, 73 Fed. 716.

A grant by a municipal corporation to a corporation aggregate, limited as to the duration of its existence, without words of per-

municipality to exercise its option to buy,²³ or a violation by the city of its contract to purchase the grantee's plant at or before the expiration of the franchise,²⁴ will not prolong the duration of the franchise.

Where a company violates a provision in its franchise to sell to the city upon the city's election to purchase, the city may treat the franchise as abrogated, and grant the privilege to others.²⁵

§ 1658. Rights on termination of franchise.

After the expiration of a franchise to use the streets, the right of the company to use the streets ceases and also the right of the municipality to demand the service.²⁶ However, where a public service company continues to furnish a supply after the expiration of its franchise to use the streets and its contract with the municipality, and the municipality continues to take the supply as theretofore, the company, while so acting, is subject to the obligation growing out of such assumed *quasi* public service, to the extent that it is required to supply a sufficient amount, to its reasonable capacity, and at reasonable rates, and to this extent become subject to

petuity being annexed to the grant, only creates an estate for the life of the corporation. *Rock Island v. Central Union Tel. Co.*, 132 Ill. App. 248, 255; *Snell v. Chicago*, 133 Ill. 413, 432, 24 N. E. 532; *Turnpike Co. v. Illinois*, 96 U. S. 63.

Rule where city had no authority to grant franchise. A railroad company having power from the legislature to build and operate its road in certain streets of a city, obtained an ordinance from the city authorizing such use for a term of years. Held, that the ordinance being unnecessary and the city having no authority to

enact the same, the company was not estopped from continuing the use of the streets after the expiration of the ordinance. *Atlantic, etc. R. Co. v. St. Louis*, 66 Mo. 228, rev'g 3 Mo. App. 315.

23. *Keokuk Gaslight, etc. Co. v. Keokuk*, 80 Ia. 137, 45 N. W. 555.

24. *Canal, etc. Street R. Co. v. New Orleans*, 39 La. Ann. 709, 2 So. 388.

25. *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

26. *Lighton v. Carthage*, 175 Fed. 145, 148.

the jurisdiction and supervision of the courts to enforce such implied undertaking.²⁷

After the expiration of a franchise to use the streets, the public service company should be allowed a reasonable length of time to negotiate an extension or renewal of the franchise or close out its business;²⁸ and it has the right to enter upon the streets of the municipality to remove its plant, without let or hindrance.²⁹

If a company is granted the right to use streets, and accepts the grant and uses the streets until the expiration of the time specified in the ordinance, it is not estopped from thereafter claiming the right to use the streets under its general powers, the municipality having had no power to authorize the use of streets, for the particular purpose.³⁰

27. *Laighton v. Carthage*, 175 Fed. 145, 149.

28. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Ia. 234, 91 N. W. 1081.

Where an ordinance under which a telephone company is using the streets of a city for its poles and wires, provides that it shall expire on and after a certain date named therein, the mayor of such city has no right to cut down and remove the company's poles and wires of his own motion at the expiration of such time. But the company cannot replace them when they were so removed, although the mayor was liable as a trespasser. *Mutual Union Tel. Co. v. Chicago*, 16 Fed. 309, 11 Bis. 539.

In Ohio, if agreements as to mode of use of streets have expired, municipality cannot at once oust company from use of streets, there being no showing of inability to agree or unreasonable delay

thereafter in applying to the probate court to fix the mode of use. *State v. Central Union Tel. Co.*, 14 Ohio Cir. Ct. Rep. 273.

29. *Laighton v. Carthage*, 175 Fed. 145, 151.

"In the absence of any provision to that effect in the original franchise, the city granting a franchise to a street railway company cannot, on the expiration of the franchise, take possession of the rails, poles, and operating appliances; they are property belonging to the original owner, and an ordinance granting that property to another company on payment to the owner of a sum to be adjudicated as its value is void as depriving the owner of its property without due process of law." *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

30. *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228, rev'g 3 Mo. App. 315.

§ 1659. Extension of franchise.

Subject to any statutory or charter restrictions which may exist, a municipality may extend a franchise for a reasonable time,³¹ not in excess of the period, if any, fixed by statute;³² and such extension may be granted long before its expiration.³³ So the company may rely on an extension by implication, after the termination of the franchise, from the acts and conduct of the municipality.³⁴

31. *Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, 26 Sup. Ct. 513, 50 L. Ed. 854, aff'g 135 Fed. 368, holding right to extend not precluded by statute forbidding releasing grantee from any obligation or liability imposed.

Extension in excess of the corporate life of the grantee held invalid. *Detroit v. Detroit City R. Co.*, 60 Fed. 161.

Where mode of renewal fixed by statute, no implied renewal from grant authorizing substitution of electricity for horses as motive power of railway. *Cincinnati Inclined Plane R. Co. v. Cincinnati*, 52 Ohio St. 609, 44 N. E. 327.

Illinois statute of 1865 extending from twenty-five to ninety-nine years the corporate life of certain street railway companies held not to extend the right to use the streets of Chicago for ninety-nine years. *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801.

32. *Haskins v. Cincinnati Consol. St. R. Co.*, 7 Ohio Dec. 713.

Statutory limit, on renewal,

twenty-five years. *Belle v. Glenville*, 27 Ohio Cir. Ct. Rep. 181.

33. *Linden Land Co. v. Milwaukee Electric Ry. & Lighting Co.*, 107 Wis. 493, 83 N. W. 851; *City Railway Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114.

Where some of franchises of street railway company expired in 1924 and some later, ordinance extending such franchises until 1934 is not so unreasonable as to be void. *Linden Land Co. v. Milwaukee Electric Ry. & Lighting Co.*, 107 Wis. 493, 83 N. W. 851.

In Washington, extension forbidden by statute until within three years of expiration of franchise. *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

34. An agreement granting the right to use a street for poles for electric lights for a village for a term of five years continues in force after the five years although there is no renewal of the agreement where the business is carried on in the same way for several years and the municipality acquiesces in the improvement of the lighting plant; and the village cannot compel the re-

But municipal consent to the consolidation of several street car companies, the franchises of which expired at different times, does not extend the franchise of any line beyond the term of the original grant to that line.³⁵ In some jurisdictions, however, the *extension* of a franchise is forbidden without a vote of the people and compensation to the municipality.³⁶

§ 1660. Surrender of franchise and withdrawal from public employment.

It is undoubtedly the law that a public service company may withdraw altogether from public employment, where its charter is not mandatory, and thereby surrender its franchise to use the streets, at its option.³⁷ Thus, an incorporated gas company which has obtained a franchise from a municipality, which does not fix its duration, may voluntarily forfeit its right to exercise its privileges within the municipality and may wholly withdraw therefrom, and in such case the municipality cannot prevent the company from removing its property, nor can the municipality take possession of and make use of it, nor grant the right to use it to another company.³⁸

removal of the poles, where there has been no violation of the franchise, to remove competition with a new municipal lighting plant. *Wakefield v. Theresa*, 109 N. Y. S. 414, 125 App. Div. 38.

35. *Central Trust Co. v. Municipal Traction Co.*, 169 Fed. 308.

36. *Poppleton v. Moores*, 62 Neb. 851, 88 N. W. 128, *aff'd* in 67 Neb. 388, 93 N. W. 747.

37. See *dicta* in *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. 137, and see *Asher v. Hutchinson Water, L. & P. Co.*, 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52.

Compare *State ex rel. v. Connersville Natural Gas Co.*, 163 Ind. 563, 71 N. E. 483.

Surrender of franchise by the owners thereof may be accepted by the city, if the charter does not forbid. *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135.

Right of street railway to run over a portion of a certain avenue may be abandoned without the consent of the state. *Thompson v. Schenectady R. Co.*, 124 Fed. 274, 279.

38. *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 90 N. E. 40, holding also that the abandonment of the franchise and the act of the company in seeking its fortune elsewhere do not constitute unlawful discrimination.

So, with the consent of the municipality, a public service company may remove its mains from certain streets, where, in the judgment of the municipality, public necessity no longer requires their continuance, to other portions of the city where public necessity requires that mains should be laid, notwithstanding the objection of a landowner whose property will be greatly decreased in value thereby.³⁹

And a street railway company, where neither the statutes nor ordinances impose on it the duty to continue the operation of any portion of its system of railways, cannot be compelled to operate a portion of its line,⁴⁰ but the remedy in such a case is to forfeit the franchise.⁴¹

Likewise, in Massachusetts, it is held that rival public service companies may enter into an agreement whereby one serves one section of the municipality, and the other serves the balance, and a patron formerly served by the former company but who, after such agreement, was served by the latter, can not complain.⁴²

39. *Asher v. Hutchinson, Water, L. & P. Co.*, 66 Kan. 496, 500, 71 Pac. 813, 61 L. R. A. 52.

40. *State ex rel. v. Helena Power & Light Co.*, 22 Mont. 391, 56 Pac. 685; *San Antonio St. R. Co. v. State*, 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, rev'g on this point, 10 Tex. Civ. App. 12, 30 S. W. 266.

Contra, see *State v. Spokane Street R. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739.

41. *Id.*

42. In Massachusetts, while an electric light company, without legislative authority, cannot sell its property and franchise to another party, in such a way as to take away its power to perform

its public duties, yet an electric light or gas company, having a franchise covering a city or town in which another company has a like franchise, may, if the public interest is not thereby affected arrange with the other company to extend its lines into one part of the territory that is being newly developed, and leave the other company to extend its lines into another part of the territory, so that neither company will duplicate lines in streets where the other is serving the public; and a consumer who is being furnished electricity by the second company, pursuant to an agreement between the two, cannot compel the other company, which has given up such territory to the

If a public service company surrenders its franchise by action of the directors without objection by the stockholders, creditors, or the state, those supplied by the company cannot question such act.⁴³

A public service company which has surrendered its franchise to use the streets is estopped from claiming that the surrender was not permanent, where it has acquiesced in the improvement of the street by the municipality and the grant of a franchise to another like company, for many years.⁴⁴

On the other hand, it was held in New York that the city of New York which operated ferries between that city and Brooklyn could be compelled to continue the operation of such ferries, at the suit of a private citizen, notwithstanding the construction of bridges and the subway has rendered the operation unprofitable.⁴⁵

§ 1661. Revocation of franchise.

If a grant to a public service company of the right to use the streets for tracks, poles, pipes, and the like, is considered a franchise, as it usually is,⁴⁶ the general rule is that it cannot be revoked, during its term, at the mere pleasure of the municipality.⁴⁷

second company, to furnish him with electricity. *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556, 84 N. E. 101.

43. If neither the stockholders, creditors, nor the state objects to a surrender by a gas company of its franchise over certain territory, the owners of land within such territory cannot attack the surrender. *Germania Refining Co. v. Alum Rock Gas Co.*, 226 Pa. St. 433, 75 Atl. 715.

44. *West Philadelphia Pass. R. Co. v. Philadelphia & W. Turnpike Road Co.*, 186 Pa. St. 459, 40 Atl. 787.

45. *Re Wheeler*, 115 N. Y. S. 605, 62 Misc. Rep. 37.

46. § 1617 *ante*.

47. *California. Arcata v. Arcata & M. R. Co.*, 92 Cal. 639, 28 Pac. 676.

Illinois. London Mills v. White, 208 Ill. 289, 70 N. E. 313, aff'g 105 Ill. App. 146; *People v. Central Union Tel. Co.*, 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338.

Maryland. Chesapeake & P. Tel. Co. v. Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

New York. Brooklyn City R. Co. v. Brooklyn Cent. R. Co., 32 Barb. (N. Y.) 358.

Pennsylvania. Avoca v. Pittston, J. & A. St. Ry. Co., 7 Kulp (Pa.) 470.

in an arbitrary and unreasonable manner without just

United States. Old Colony Trust Co. v. Wichita, 123 Fed. 762, modified in Wichita v. Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19; Abbott v. Duluth, 104 Fed. 833.

Right of municipality to revoke permits to use the streets other than franchises, § 1319 *ante*, vol. 3.

Revocation. Where consent of municipal authorities is necessary to authorize construction of telephone line within a municipality, such consent, when once given, cannot be revoked. Missouri River Tel. Co. v. Mitchell, 22 S. D. 191, 116 N. W. 67.

The fact that conditions are imposed which the municipality had no power to impose does not authorize it to revoke the franchise. Re Kings County El. Ry. Co., 105 N. Y. 97, 13 N. E. 18.

An ordinance providing for a telephone company placing its wires underground and containing certain privileges and conditions, when accepted, is not a mere license revocable by repeal of the ordinance, but is a contract. Chesapeake & P. Tel. Co. v. Baltimore, 89 Md. 689, 43 Atl. 784.

If conditions imposed by the franchise are accepted by the company, a contract is created which the municipality cannot revoke as to an amendatory resolution even though such resolution was void and inoperative to change the term of the original grant. Morristown v. East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

Repeal of ordinance does not render railway a nuisance. Ingram v. Chicago, D. & M. R. Co., 38 Ia. 669.

Reincorporation of municipality. Where a township has granted a franchise which has been accepted, and later is incorporated as a borough, it cannot pass an ordinance annulling such franchise. Jersey City H. & P. St. R. Co. v. Garfield, 68 N. J. 587, 53 Atl. 11.

Where a town legally grants a franchise to use its streets and such town is subsequently annexed to another municipal corporation, the latter is powerless to repeal by resolution the ordinance granting the permit. People v. Blocki, 203 Ill. 363, 67 N. E. 809.

What constitutes revocation. A franchise to continue, by its terms, for five years is not revoked by a resolution of the city legislative body directing the city clerk to notify the holder of the franchise, "when their present franchise would expire." Wichita v. Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19.

If the right to use streets is granted by the state, the municipality cannot require the removal of telephone poles from the streets, where not demanded by public convenience, but merely in the interests of a rival company or to compel payment for the use of the street. Duluth v. Duluth Tel. Co., 84 Minn. 486, 87 N. W. 1127; Abbott v. Duluth, 104 Fed. 833, *aff'd* in 117 Fed. 137, 55 C. C. A. 153.

cause,⁴⁸ if it has been acted upon,⁴⁹ unless the power to revoke has been reserved in the grant,⁵⁰ and especially

In Massachusetts, the 1864 statute gave the selectmen authority to revoke the location of the track of a street railroad in any of the streets of the city, and their adjudication after a hearing is final, and it is immaterial that the street railroad was incorporated to extend beyond the limits of the town. *Medford & C. R. Co. v. Somerville*, 111 Mass. 232.

In Chicago, an ordinance providing for the removal of the tracks of any railroad company which are lying parallel with the tracks of any elevated steam road and within fifteen feet of the end of any abutment wall supporting the bridge or bridges which carry the elevated tracks over any intersecting street, is not one requiring track elevation, but is an attempt to revoke the franchise of a street railway within the rule that the right of a municipality by the exercise of its police power to regulate any business or the use of any property does not give the power to prohibit the conduct of a lawful business or to suppress entirely the use of property. *Chicago v. Chicago & O. P. Elv. R. Co.*, 250 Ill. 486, 95 N. E. 456.

48. *Wakefield v. Theresa*, 109 N. Y. S. 414, 125 App. Div. 38.

49. *Suburban Electric Light & Power Co. v. East Orange Tp.* (N. J.), 41 Atl. 865, *aff'd* in 59 N. J. Eq. 563, 44 Atl. 628.

50. {1644 *ante*.

Reserved power to revoke.

But proviso in the ordinance granting the right to use streets, that the acts of the company under the ordinance shall be subject to any future ordinance, does not make the grant a mere revocable permit. *New Orleans v. Great Southern Tel. & Tel. Co.*, 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502.

Where a franchise granted by a municipal corporation to an individual to build a street railway provided that if the grantee failed to perform certain conditions the city might remove the tracks and fixtures from the streets, the city was justified in removing the same with as little damage as possible when it had been conclusively adjudged between the parties that he had not performed such conditions. *Stewart v. Ash-tabula*, 98 Fed. 516.

Revocation by legislature. Where city authorities reserved the right, in permits and ordinances conferring the right on a company to use the streets for laying electric wire conduits, to revoke such right, the legislature may supersede the city authorities and revoke the right. The city authorities reserved the privilege of revoking the right as representatives of the public, and not to themselves or the city in a narrow or individual sense. *Boston Electric Light Co. v. Boston Terminal Co.*, 184 Mass. 566, 69 N. E. 346.

Necessity for cause. Reserving, in the grant of a franchise,

is this true where the public service corporation has expended considerable money in reliance on such grant.⁵¹

Furthermore, even in those jurisdictions where the grant of the right to use streets is considered a mere *license* rather than a franchise, it is held that after the grant has been accepted and work done in pursuance thereof, it is not revocable but is binding as a contract.⁵²

the right to repeal the grant in case of a breach of its conditions by the company, does not authorize a revocation of the grant without cause. *Missouri & K. I. R. Co. v. Olathe*, 156 Fed. 624.

Review by courts. If the ordinance granting the right to use the streets expressly reserves the power of repeal, courts cannot inquire into the reason for the passage of a repealing ordinance.

Southern Bell Telephone & Telegraph Co. v. Richmond, 98 Fed. 671, *aff'd* in 103 Fed. 31, 44 C. C. A. 147. In other words, if a municipality has a *right* to terminate the grant, the motives which impelled its officers in so doing cannot be considered. *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495.

When repeal takes effect. If municipal consent is necessary to use the streets, and the franchise granted by the municipality reserves to it the power of repeal at any time, the repeal to take effect within twelve months from its date, the right to use the streets terminates a year from the passage of a repealing ordinance. *Southern Bell Telephone & Telegraph Co. v. Richmond*, 98 Fed. 671, *aff'd* in 103 Fed. 31, 44 C. C. A. 147.

51. *Hudson Telephone Co. v.*

Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88.

52. *Quincy v. Bull*, 106 Ill. 337, *aff'g Bull v. Quincy*, 9 Ill. App. 127; *Chicago v. Chicago & O. P. Elev. R. Co.*, 250 Ill. 486, 95 N. E. 456; *Harvey v. Aurora & G. R. Co.*, 186 Ill. 283, 57 N. E. 857.

In Illinois, the rule is that a grant of the right to use a street in connection with the operation of a public service company is a mere license and not a franchise; but that if the grant is for an adequate consideration and is accepted by the grantee, or if the license is acted upon in some substantial manner so that thereafter to revoke it would be inequitable and unjust, the grant ceases to be a mere license but becomes a valid and binding contract. *Chicago Municipal Gaslight & Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616, *aff'g* 27 Ill. App. 346.

The right granted to a telephone company to erect its poles and string its wires in certain streets cannot be revoked by the municipal corporation except for cause, since the company acquires a vested right to use the designated streets so long as it conforms to the conditions of the license. *London Mills v. Fairview-London Telephone Circuit*, 105 Ill. App. 146,

But it has been held that a grant of the right to use the streets for double tracks may be revoked, as an *exercise of police power*, even after a railroad track has been laid, so as to restrict the company to the use of a single track, where it is deemed necessary for the public safety and convenience.⁵³ There is some authority, however, in conflict with what has been just stated. Thus, in some decisions, the grant of the right to use streets has been held a *license*, and revocable.⁵⁴

And in at least one case, in relation to a grant of a right to a public service company to use the streets, where no term was fixed for the duration of the privilege and no contract was in terms made between the municipality and the grantee of the privilege, it was held that the ordinance was either the grant of a license revocable at the will of the grantor or, after its acceptance by the grantee, was an irrevocable and perpetual contract; and that inasmuch as the constitution forbade exclusive or perpetual franchises, that the municipality had no power to make a perpetual contract,

53. § 1682 *post*.

54. *Kevil v. Princeton* (Ky.), 118 S. W. 363 (holding that on revocation of license from city to use streets to deliver water to one's customers by pipes, the licensee could not recover damages from the municipality for not allowing him to carry on a business which it had power to stop); *Boise City v. Boise Artesian Hot & Cold Water Co.*, 186 Fed. 705, 710; *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 123 Fed. 232, 59 C. C. A. 236.

In *Kentucky*, permission was granted to a telephone company to erect poles on different streets of the city without any other provision in regard thereto, and it was held that the company was a

mere licensee and not the grantee of a franchise and although it had spent money in its plant in the erection of poles, etc., the municipality could revoke the license, upon reasonable notice to enable the grantee opportunity to remove his property from the premises or to acquire a new franchise (*East Tennessee Telephone Co. v. Frankfort*, 141 Ky. 588, 133 S. W. 564), but it is evident that this case goes to the extreme and is supported by little or no authority, since even if the permit was a mere license, it should be held to be a contract where it has been acted upon and moneys expended by the licensee so that it becomes a contract.

and that, therefore, the ordinance should be construed as granting a mere license which could be revoke at any time.⁵⁵ This decision, however, is subject to criticism in that the privilege in such a case should not be construed to be perpetual but instead, a grant for a reasonable time, so that after its acceptance by the grantee it could not be revoked except for cause during the charter life of the grantee.

It is generally held that an ordinance granting the right to use streets may be revoked *before it has been accepted*.⁵⁶ However, the right to revoke has been extended by some recent decisions by holding, as was done by the court of appeals of New York, that the mere granting of a permit by a municipality to a corporation to use the streets is a license merely, revocable at the pleasure of the city, unless it has been accepted *and some substantial part of the work performed contemplated by the permission sufficient to create a right of property and thus form a consideration for the contract*;⁵⁷ and this holding is supported by a decision of

55. *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 123 Fed. 232, 59 C. C. A. 236.

56. *Gregsten v. Chicago*, 40 Ill. App. 607, rev'd on other grounds in 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496; *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475, 53 N. W. 675.

57. *Re New York Electric Lines Co.*, 201 N. Y. 321, 94 N. E. 1056, aff'g 125 N. Y. S. 1133, which affirmed 126 N. Y. S. 331, 69 Misc. Rep. 200, and in which Justice Haight, delivering the opinion of the Court of Appeals, said: "Should a public service corporation be permitted to acquire an irrevocable franchise by mere acceptance without spending a dollar

by way of performance, and then hold up the public in its enjoyment of the privileges contemplated by the grant indefinitely, or until they can be bartered away for a fortune? Should the municipalities to whom the legislature has delegated the right to grant permits for the use of their streets for public service purposes be denied the power to revoke licenses granted in case of failure of the grantees to render substantial performance? We think not. No reasons for the deprival of the municipalities of such power are suggested and none are apparent to our minds."

People ex rel. v. Ellison, 101 N. Y. S. 55, 115 App. Div. 254, in which case Judge Ingraham said:

the supreme court of the United States.⁵⁸ It is no *ground for revoking* the franchise that the common council may have been misled in passing the ordinance granting it,⁵⁹ nor that the municipality could obtain a larger payment therefor,⁶⁰ nor that the officers, managers and stockholders of the company are different individuals from those who were stockholders when the permission was granted.⁶¹

Moreover, it has been held that if a municipality grants to a public service company the right to use the

"But it cannot be that a municipal corporation, having given its permission, is bound hand and foot, so that the permission can never be revoked, although the corporation neglects to act under it and construct its lines for such a period as would divest a person of real property by adverse possession. All of the elements of a contract are wanting. The relator assumed no obligation whatever in relation to the construction of the subway. All it ever agreed to do was that, when it built the subway, it would comply with the conditions imposed. Until the permission granted was accepted by some act of the corporation under it, I think there was no contract. If the relator had agreed to construct these subways within a specified time, a different question would have been presented; but in all the cases where these grants of franchises have been held irrevocable it was because there was an obligation to construct the thing granted, or the grantee had acted under the grant and had constructed it. In those cases a consideration would be apparent. The relator had

not acted under the permission granted by the common council. No subway has been built, and, as I view it, no right was acquired that was not subject to legislative control."

58. In *Capital City Light & Fuel Co. v. Tallahassee*, 186 U. S. 401, 411, 22 Sup. Ct. 866, 870, 46 L. Ed. 1219, Mr. Justice Peckham, in speaking for the court with reference to the privilege granted by the city of Tallahassee of the use of its streets for lighting purposes, says that "such grant does not become a contract or a vested right so as to be protected by the constitution of the state or the United States, until the company has, to say the least, begun to do the thing required by the charter as a consideration for the grant of such privilege."

59. *Phillipsburg Electric Light, Heating & Power Co. v. Phillipsburg*, 66 N. J. L. 505, 49 Atl. 445.

60. *Chesapeake & P. Telephone Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

61. *Phillipsburg Electric Light, Heating & Power Co. v. Phillipsburg*, 66 N. J. L. 505, 49 Atl. 445.

streets without designating any particular streets, and the company constructs and puts in operation certain lines for a street car system, but in contemplation of their extension and the building of branch lines, the municipality cannot, without cause, repeal the grant except as to tracks already constructed.⁶²

If there is *no power to grant*, there is no power to revoke;⁶³ and hence if the legislature confers the right to use streets, the right so to do cannot be taken away by the municipality.⁶⁴ Of course, if the municipality has no power to revoke or terminate a franchise, its attempt to do so is ineffective to release the company

62. *Mercantile Trust Co. v. Denver*, 161 Fed. 769, in which Judge Lewis, in delivering the opinion, said: "The repealing ordinance was passed without any reason assigned or now claimed. It was and is, professedly, the mere exercise of a naked power, which the city asserts the street car company and the complainant have no right to challenge. The company appears to have planned, almost in the inception of its efforts, a system radiating from a central point in the business section of the city from which its cars start, extending in different directions, and to which they return. From its main lines in the central part branches have been, and from time to time as public demand requires, necessarily will be taken off, and lines have been, and will be, as it was intended, extended to meet the city's growth. Can it be said, that after this system was partly built, under large expenditures, extending but a few blocks in either direction, and branches taken off here and there

but a short distance, the other party to the contract may then terminate it without cause? Is not this a violation of the whole purpose and intent of the agreement? Is not the exercise of the power to repeal the ordinance of 1885 nothing short of an attempt to destroy the company's property? If such repeal is a valid exercise of power, the company could not thereafter make extensions in any direction. Its whole purpose and plan is thereby thwarted. The foundation of its system has been laid, but it cannot proceed. It is left with a useless trunk covering but a few blocks in the central part of the city. Its usefulness, both to the public and the company, has been destroyed without cause and without its being heard."

63. *Delaware, L. & W. R. Co. v. Buffalo*, 65 Hun (N. Y.) 464, 20 N. Y. S. 448.

64. *Philadelphia Steam Supply Co. v. Philadelphia*, 41 Leg. Int. (Pa.) 252.

granted the right from conditions imposed by the grant, which have been accepted.⁶⁵

§ 1662. Same—recovery of damages where municipality wrongfully revokes franchise.

A question of some importance, which has been recently decided, is whether a municipality is liable in damages where it repeals an ordinance granting a franchise to a public service company. It was contended that in granting a franchise, municipal corporations exercise *quasi* private power conferred by law and not legislative or governmental powers and in such matters are governed by the same rules that apply to an individual or a private corporation, but this contention was overruled and it was held that where the municipality is not bound by the grant of the franchise in any private proprietary capacity, an action to recover damages does not lie because of a wrongful revocation of the franchise but the remedy is to sue to restrain the passage or execution of the repealing ordinance.⁶⁶

§ 1663. Forfeiture of franchises.

The forfeiture of the *charter* of a public service company, i. e., its *corporate franchise*, is outside the scope of this work. What is considered in this connection is

65. *Cincinnati & S. Ry. Co. v. Carthage*, 36 Ohio St. 631.

66. *Edson v. Olathe*, 81 Kan. 328, 105 Pac. 521, 36 L. R. A. (N. S.) 861.

In support of the rule stated above in the text, it has been held that one granted the right to lay a sewer in certain streets and to connect it with the premises of abutting owners for the private gain of the one constructing the sewer, cannot recover damages

from the municipality, where it prohibits by ordinance, after the construction of such sewer, connections with any private sewer laid in the streets without first obtaining permission from the common council. *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.

To same effect, see *Wood v. Hinton*, 47 W. Va. 645, 35 S. E. 824.

the revocation or forfeiture of the right to use the streets, where *for cause*.⁶⁷

§ 1664. Same—grounds for forfeiture.

A franchise or license to use the streets, where acted upon, cannot be revoked or forfeited without cause.⁶⁸ And the right of a public service company to use the streets, granted by a municipality, will not be declared forfeited by a court because of a mere technicality, or where there are other remedies.⁶⁹

67. Revocation without cause, § 1661 *ante*.

Where a city grants a right to a corporation to construct a cable railway and the company constructs a horse railway, the city should proceed to compel the company to build the cable railway and not to suppress the horse road as a nuisance. *Spokane St. R. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072.

68. § 1661 *ante*.

Failure of street car company to comply with extension orders of municipality—only remedy to grant franchise to some other company to operate cars on streets on which extensions ordered. *Minneapolis St. R. Co. v. Minneapolis*, 189 Fed. 445, 449.

Grounds for forfeiture. Furnishing gas to persons outside the city held not ground for forfeiture of franchise. *Newport v. Municipal Light Co. (Ky., 1912)*, 145 S. W. 1107.

Grounds for forfeiting charter of water company, see *State v. Galena Water Co.*, 63 Kan. 317, 65 Pac. 257.

Cannot be revoked merely because the corporation is violating its charters or the laws of the state. In such a case it is liable to forfeit its charter in a proceeding brought for that purpose. *Phillipsburg Electric L., H. & P. Co. v. Phillipsburg*, 66 N. J. L. 505, 49 Atl. 445.

69. *Olathe v. Missouri & K. Interurban R. Co.*, 78 Kan. 193, 96 Pac. 42.

"Courts are extremely reluctant to adjudge forfeiture of corporate privileges and franchises, and, being vested with some discretion in proceedings brought for that purpose, will ordinarily do so only where no other adequate remedy is available." *Topeka v. Water Co.*, 58 Kan. 349, 49 Pac. 79.

Franchise of street railway company cannot be forfeited merely because it carried freight which was not authorized and charged excessive fares. *Attorney General ex rel. v. Toledo & M. Ry.*, 151 Mich. 473, 115 N. W. 422.

The franchise to use the streets may, however, be revoked for cause,⁷⁰ such as *non-user*⁷¹ or breach of the conditions contained in the franchise,⁷² especially where

70. A telephone company having a franchise to use the streets of a city for its lines cannot, by virtue of such franchise, confer a right on another company to use the streets for a similar purpose, and an attempt to do so will justify the city in revoking its franchise. *Western Union Tel. Co. v. Toledo*, 103 Fed. 746.

71. *Kavanaugh v. St. Louis*, 220 Mo. 496, 516, 119 S. W. 552; *State ex rel. v. East Fifth St. R. Co.*, 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742 (failure to run street cars for three years); *People v. Broadway R. Co.*, 126 N. Y. 29, 26 N. E. 961 (failure to lay tracks on proposed lines for twelve years).

Nonuser. Laying single track, in the place of double track, followed by ten years user, is no ground for forfeiture for non-user. *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210.

Street railway franchise presumed abandoned from nonuser for twenty years. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334.

But the grant of a franchise by a municipality in its streets, does not become extinguished through the failure of those claiming under it to exercise privileges which they are not required by the terms of the grant to exercise. *Cincinnati v. Covington, etc. Bridge Co.*, 20 Ohio Cir. Ct. 396, 10 Ohio Cir. Dec. 792.

One car a day over tracks on a certain avenue in New York City, held not to show abandonment of route over that avenue. *Forty-Second St., M. & St. N. Ave. R. Co. v. Cantor*, 93 N. Y. S. 943, 104 App. Div. 476. But running one car a day, not to accommodate public or carry passengers, but to hold the franchise, was held to warrant forfeiture in *People ex rel. v. Sutter St. R. Co.*, 117 Cal. 604, 49 Pac. 736.

72. *Pacific R. Co. v. Leavenworth*, Fed. Cas. No. 10,649.

Forfeiture for breach of conditions. If a franchise is granted the continued exercise of which depends upon the performance of certain conditions, it may be revoked for a failure to perform such conditions. *Arcata v. Arcata, etc. R. Co.*, 92 Cal. 639, 28 Pac. 676; *Edwards v. Plattsburg, etc. R. Co.*, 215 Pa. St. 597, 64 Atl. 798; *Minersville Borough v. Schuylkill Electric R. Co.*, 205 Pa. St. 394, 54 Atl. 1050; *Wheeling, etc. R. Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321.

Where a franchise to a railroad company is granted on condition that the work of building the road be done in a certain time, time is of the essence of such grant, and if the company does not complete the work within the stipulated time and the city revokes the grant on that account, equity will prevent the company

made a ground of revocation or forfeiture by the grant of the franchise.⁷³ But it is not every non-performance of a condition of a franchise that will work a forfeiture;⁷⁴ and if there is no agreement that a breach shall discharge the grant, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the grant.⁷⁵ Thus, a municipality cannot forfeit a franchise of a street railway because of inability to agree in the choice of arbitrators, where difficulties with other street railway companies were required by the franchise to be submitted to arbitration.⁷⁶ And failure to construct works within the specified

constructing the road. *Plymouth Twp. v. Chestnut Hill & N. R. Co.*, 168 Pa. St. 181, 32 Atl. 19.

Repealing ordinance invalid in part. If the ordinance repealing the franchise for breach of condition contains an invalid provision as to confiscation of the property of the company, it is not necessarily invalid as a revocation of the franchise because thereof. *Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681.

What constitutes compliance with condition as to commencement of service within a specified time. *Chicago Municipal Gas-light & Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616, aff'g 27 Ill. App. 346.

What constitutes construction of track. *Houston v. Houston, B. & M. P. R. Co.*, 84 Tex. 581, 19 S. W. 786.

A grant by a municipal corporation to a gas company of the right to use the streets for its pipes imposed the condition that the company commence furnish-

ing gas within one year. Held, that the building of gas apparatus under cover and withholding knowledge of the same from those who were to receive its advantages until the year had elapsed, was not a compliance with the condition. *Chicago Mun. G. L. & F. Co. v. Lake*, 27 Ill. App. 346, aff'd in 130 Ill. 42, 22 N. E. 616.

73. *Citizens' Horse Ry. Co. v. Belleville*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *Wheeling & E. G. R. Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321; *Stewart v. Ash-tabula*, 98 Fed. 516.

74. *Chicago City R. Co. v. People*, 73 Ill. 541 (citing *People v. Kingston, etc. Road Co.*, 23 Wend. (N. Y.) 193; *People v. Bristol, etc. Turnpike Road*, 23 Wend. (N. Y.) 222).

75. *Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681.

§ 1665 *post*.

76. *Chester City v. Union R. Co.*, 218 Pa. St. 24, 66 Atl. 1107.

time is excused where the company was prevented from so doing by an injunction,⁷⁷ or other good reason.⁷⁸

However, if the right to use the streets is granted for a term of years on condition that the municipality shall have the right to purchase the plant at a certain time, the refusal of the company to sell at that time warrants the municipality in treating the franchise as terminated.⁷⁹

§ 1665. Same—necessity for declaration of forfeiture or resort to courts.

Whether a breach of conditions, by the grantee of a franchise, works a forfeiture *ipso facto* depends on the language of the grant or the governing statute.⁸⁰ For instance, if the statute provides that failure to complete the work within the time specified by the municipality "*works a forfeiture*," the statute is self-executing, and failure to complete the work within the time

77. *State ex rel. v. Cockrem*, 25 La. Ann. 356; *Newport News & O. P. Ry. & E. Co. v. Hampton Roads Ry. & E. Co.*, 102 Va. 795, 47 S. E. 839; *Chicago v. Chicago & W. I. R. Co.*, 105 Ill. 73.

78. *North Jersey St. R. Co. v. South Orange*, 58 N. J. Eq. 83, 43 Atl. 53.

Refusal of another town to grant permit no excuse for not constructing ten miles of road. *West Springfield & A. St. R. Co. v. Boduptha*, 181 Mass. 583, 64 N. E. 414.

Insolvency of street car company no excuse, as against forfeiture for failure to comply with conditions as to paving. *Union St. R. Co. v. Saginaw Circuit Judge*, 113 Mich. 694, 71 N. W. 1073, where company was refused a preliminary injunction.

79. *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

Compare *Keokuk Gaslight & Coke Co. v. Keokuk*, 80 Ia. 137, 45 N. W. 555.

80. *Union St. R. Co. v. Snow*, 113 Mich. 694, 71 N. W. 1073; *Re Brooklyn, Q. C. & S. R. Co.*, 185 N. Y. 171, 77 N. E. 994; *Coney Island, etc. R. Co. v. Kennedy*, 44 N. Y. S. 825, 15 App. Div. 588; *Millcreek Twp. v. Erie Rapid Transit St. R. Co.*, 209 Pa. St. 300, 58 Atl. 613.

But where franchise to use streets provided that it should be void if certain sum not expended within specified time in improving the system, failure to make the improvements does not *ipso facto* annul the contract. *Daly v. Carthage*, 143 Mo. App. 564, 128 S. W. 265.

specified by the municipality *ipso facto* forfeits its franchise, at least as to the uncompleted portion.⁸¹ And if the condition is that the franchise shall "be terminated" or shall cease, on a certain occurrence, no judicial declaration is necessary to constitute a forfeiture.⁸²

Generally, however, these conditions are conditions subsequent,⁸³ and where there is a breach, the municipality is not entitled to abate the construction as a nuisance, because thereof.⁸⁴

If the statute or grant does not expressly declare that the breach of conditions or other cause shall work a forfeiture, the municipality must declare the forfeiture,⁸⁵

81. *Los Angeles R. Co. v. Los Angeles*, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. Rep. 54.

82. *Re Brooklyn, Winfield & Newton Ry. Co.*, 72 N. Y. 245; *Oakland R. R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 13 Am. Rep. 181; *Atchison Street Ry. Co. v. Nave*, 38 Kan. 744, 17 Pac. 587; *Street Ry. Co. of Grand Rapids v. West Side Street Ry. Co.*, 48 Mich. 433, 12 N. W. 643; *Ft. Worth Street Ry. Co. v. Rosedale St. Ry. Co.*, 68 Tex. 169, 4 S. W. 534.

Contra. A contract between a municipal corporation and a water company for the construction and operation of a waterworks provided that, "in case of failure of the party of the first part to construct or maintain said waterworks as herein agreed, the rights and franchises hereby granted to him shall cease and determine." Held, the contract could not be rescinded by *ex parte* action of the municipal corporation *e. g.*, by resolution of the council, without judicial proceedings. *Foster v. Joliet*, 27 Fed. 899.

A provision in a grant that it should become void on a certain occurrence does not cause an immediate termination of the right of way on the happening of such event. *Knight v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 231.

83. *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

84. *Spokane St. Ry. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072.

Even though the franchise provides for a resumption by the municipality of control of the streets, on breach of conditions, it cannot *forcibly* take possession. *Iron Mt. R. Co. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410.

85. *Archibald Borough v. Carbondale T. Co.*, 3 Pa. Dist. R. 751.

The mere expiration of the time limited for the completion of a plant, as fixed in the franchise, does not of itself work a forfeiture, in the absence of an express statute to that effect. *Re Kings County Elevated R. Co.*, 105 N. Y. 97, 119, 13 N. E. 18

and generally even that is insufficient and it must resort to the courts to obtain a judicial determination of the forfeiture.⁸⁶ And a municipality cannot itself adjudge a franchise forfeited by nonuser.⁸⁷ But if the franchise provides that on breach of condition the municipality may forfeit the franchise, a judicial determination that the *breach warrants* a forfeiture is held not necessary.⁸⁸

On the other hand it has been held that the fact that a municipality is expressly given power to forfeit the franchise for breach of conditions does not preclude the public service company from suing, after the municipality has declared a forfeiture, to prevent the municipality from destroying the property of the company, where no cause of forfeiture in fact existed.⁸⁹

§ 1666. Same—who may assert forfeiture.

Inasmuch as a franchise granted by a municipality is in fact granted by it as an agent of the state, the *state*

86. *Nebraska Tel. Co. v. Fremont*, 72 Neb. 25, 99 N. W. 811; *Re Brooklyn Elevated R. R. Co.*, 125 N. Y. 434, 26 N. E. 474; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *Spencer v. Palestine*, 54 Tex. Civ. App. 392, 116 S. W. 857; *Knickerbocker Trust Co. v. Kalamazoo*, 182 Fed. 865; *Foster v. Joliet*, 27 Fed. 899.

A franchise is considered to be in existence until declared forfeited in a direct proceeding in the name of the state or municipality for that purpose. *Dorr v. Board, etc., for Yazoo-Mississippi Delta* (Miss.), 28 So. 938.

Modification of rule. If power is reserved to the municipality in the franchise, it may terminate the contract by repealing the franchise for failure to perform acts required therein, without any

previous judicial determination. *Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171, 187, 188, 38 N. E. 584, 26 L. R. A. 681.

87. *Seaboard Tel. & Tel. Co. v. Kearney*, 74 N. Y. S. 15, 68 App. Div. 283.

But where a street railroad company to whom right to use streets has been given by municipality, thereafter abandoned its road, municipality need not procure a decree of forfeiture before conferring right on another company. *G. C. Ry. Co. v. G. C. S. Ry. Co.*, 63 Tex. 529.

88. *Union St. R. Co. v. Snow*, 113 Mich. 694, 71 N. W. 1073.

89. *Wheeling & E. G. R. Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321 (note).

may always, unless forbidden by the constitution or statute, assert a forfeiture of the franchise to use the streets, for cause, and sometimes it is held that a forfeiture cannot be asserted by any other body or person.⁹⁰ At any event, the ground of forfeiture cannot be set up and relied on by a private citizen,⁹¹ or abutting owners,⁹² or a competitor.⁹³

§ 1667. Same—waiver of forfeiture and estoppel to assert.

Municipal authorities may waive the performance of conditions imposed by them and the right to enforce a

90. § 1764 *post*.

Nonuser. A municipality cannot compel a removal of the tracks of a street railway merely because of non-user, since the right to revoke the franchise on such ground rests in the state. *New York v. Montague*, 124 N. Y. S. 959, 68 Misc. Rep. 176.

Right to claim a forfeiture of a franchise can only be asserted by the municipality. *Joliet Gas Light Co. v. Sutherland*, 68 Ill. App. 230, 235.

91. **Private citizen cannot maintain action.** Right of way to build tracks in certain streets granted, provided that road should be completed within twelve months from date of company's acceptance of grant, and that in event of failure the franchise might be taken away. Held, that this provision was a condition subsequent and that acceptance vested right of way at once subject to be defeated at election of city for breach of conditions, but not at instance of private citizens. *Hovelman v. Kansas City H. R. R. Co.*, 79 Mo. 632. See *A. & P. R. R. Co. v. St. Louis*, 66 Mo. 228.

So a like ruling was made where the condition was that the franchise should become null and void if the company should ever remove its machine shops from the city. *Knight v. Kansas City, St. J. & C. B. R. R.*, 70 Mo. 231.

92. *French v. Robb*, 67 N. J. L. 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433; *Kent v. Binghampton*, 88 N. Y. S. 34, 94 App. Div. 522.

§ 1777 *post*.

A breach of conditions of a franchise can only be taken advantage of by the city and it does not *ipso facto* terminate the same so as to give a property owner on the street occupied a right of action for damages for an unlawful occupation of the street. *Knight v. Kansas City, etc. R. Co.*, 70 Mo. 231. See also *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

93. *New Orleans City & L. R. Co. v. New Orleans*, 44 La. Ann. 748, 11 So. 77; *Newport News & O. P. Ry. & E. Co. v. Hampton Roads Ry. & E. Co.*, 102 Va. 795, 47 S. E. 839.

§ 1771 *post*.

forfeiture for failure to comply with such conditions.⁹⁴ For example, provisions in a franchise requiring certain acts to be done by the grantee of the franchise, and providing that if they are not done the franchise shall be void, are waived by the municipality by long acquiescence without taking any steps to secure an annulment of the franchise.⁹⁵ But a short delay of the municipality in commencing proceedings against a public service company to declare its right to use the streets forfeited for failure to comply with conditions in the grant, where the delay leads to no change in the situation to the prejudice of the company, is no estoppel against the municipality to enforce the forfeiture.⁹⁶

94. *California*. Santa Rosa City R. Co. v. Central St. R. Co. (Cal.), 38 Pac. 986.

Illinois. Chicago City Ry. Co. v. People, 73 Ill. 541.

Kentucky. Newport v. Municipal Light Co. (Ky., 1912), 145 S. W. 1107.

Louisiana. New Orleans City & L. R. Co. v. New Orleans, 44 La. Ann. 748, 11 So. 77.

Maryland. Hodges v. Baltimore Union Pass. R. Co., 58 Md. 603.

Utah. Dern v. Salt Lake City R. Co., 19 Utah 46, 56 Pac. 556.

Washington. Commercial Electric Light & Power Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592.

See also City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. 157.

§ 1687 *post*.

Waiver not the granting of a new right. Newport News & O. P. Ry. & E. Co. v. Hampton Roads Ry. & E. Co., 102 Va. 795, 47 S. E. 839.

Waiver may result from subsequent ordinance renewing rights

and franchise. Akron v. Northern Ohio Traction & L. Co., 27 Ohio Cir. Ct. 536.

Forfeiture of franchise from failure to construct works within time limited, held inequitable where municipality had not insisted upon strict compliance with the ordinance as to time. United Electric Light Co. v. East Pittsburgh Borough, 230 Pa. St. 65, 79 Atl. 229.

95. Daly v. Carthage, 143 Mo. App. 664, 128 S. W. 265.

Where a city and its inhabitants would not be injured by a change of location of a railroad company's depot, and the city had acquiesced for seventeen years in such change, the city was estopped to claim that the change operated as a forfeiture of the company's rights in certain streets vacated for depot sites of the company. Columbus v. Union Pac. R. Co., 137 Fed. 869, 70 C. C. A. 207.

96. Minersville Borough v. Schuylkill Electric Ry. Co., 205

Likewise, submitting to the voters the question of city ownership of waterworks, which proposition is defeated, does not estop the municipality to assert its right to a forfeiture of the franchise of the waterworks company.⁹⁷ In California, however, it has been held that if a franchise has become forfeited by failure to perform the conditions on which it was granted, and the power to institute a suit to declare forfeitures rests with the attorney general of the state, the municipality which has granted the franchise cannot waive the forfeiture or be estopped to claim it.⁹⁸ And in Missouri the right of the state to proceed by *quo warranto* on the ground of the forfeiture of the franchise of a street car company cannot be taken away by an agreement between the municipality and the company that a delay of six months after the accruing of a forfeiture shall constitute a waiver of the right to rely thereon.⁹⁹

§ 1668. Same—procedure to forfeit franchise.

A direct proceeding by *quo warranto* is generally the appropriate remedy to forfeit the franchise to use the streets.¹ The forfeiture of a franchise cannot be urged collaterally,² although it may be set up by the municipality as a defense to *mandamus* proceedings by the company to compel the granting of a permit.³

Courts of equity do not as a rule declare or determine forfeitures, and a proceeding in equity is generally not

Pa. St. 394, 54 Atl. 1050; Spring City v. Chester Electric R. Co., 35 Pa. Super. Ct. 533, 541.

97. Palestine Water & Power Co. v. Palestine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203, aff'g 41 S. W. 659.

98. People v. Sutter Street R. Co., 117 Cal. 604, 49 Pac. 736.

99. State ex rel. v. East Fifth

St. Ry. Co., 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742.

1. § 1764 *post*.

2. Hodges v. Baltimore Union Pass. R. Co., 58 Md. 603.
§ 1686 *post*.

3. State v. Latrobe, 81 Md. 222, 31 Atl. 788.

the proper remedy to enforce a forfeiture.⁴ *A fortiori*, a forfeiture cannot be declared in an equity suit, upon the cross bill of the municipality, in a suit to enjoin it from removing the tracks and poles of the company.⁵ But a municipality may sue in equity, at least in some jurisdictions, to annul the franchise and cancel the contract with the public service company, where it has refused to comply with material provisions of the franchise and contract.⁶

Of course, if the statute fixes the procedure, the statute must be closely followed. At any event a right to use a street granted for value cannot be revoked without granting the company a hearing,⁷ nor can a sum-

4. *State ex rel. v. East Fifth Street R. Co.*, 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742.

If the franchise has been irregularly or fraudulently granted, the remedy is by *quo warranto* or *scire facias* at the suit of the state rather than by suit in equity by private persons. *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57.

5. *Kavanaugh v. St. Louis*, 220 Mo. 496, 517, 119 S. W. 552.

6. *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329, 92 N. W. 1112 (failure of water company to furnish pure water to a city); *Palestine Water & Power Co. v. Palestine* (Tex. Civ. App.), 41 S. W. 659, *aff'd* in 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203, holding state need not be made a party.

Where a water company failed to comply with its contract in that the water was not in compliance with the franchise contract either as to amount or quality, it was held by the supreme court of the United States that the municipality had a right to treat the contract

as terminated and sue in equity to enforce its rescission and cancel the franchise. *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 179, 10 Sup. Ct. 316, 33 L. Ed. 573.

7. *Vicksburg, S. & P. R. Co. v. Monroe*, 48 La. Ann. 1102, 20 So. 664.

Notice of intent to revoke must be given where revocation would destroy property rights. *Newark & H. Traction Co. v. North Arlington*, 67 N. J. L. 161, 50 Atl. 345; *United Electric Co. v. Bayonne*, 73 N. J. L. 410, 63 Atl. 996.

"If the claim of the city is that the defendants have done that which causes a forfeiture of their privilege, either by erecting poles of an undue size, or projecting the use of a current of an undue amount, or otherwise constructing or maintaining their plant in a manner violative of the privilege, they must give the defendants notice and an opportunity to be heard, and take action, *quasi* judicial in character, declaring the forfeiture." *Passaic v. Public*

mary removal of the property of the company be ordered without notice or hearing.⁸

§ 1669. Same—extent and effect of forfeiture.

Only so much of the franchise as is clearly forfeited will be so adjudged, and hence forfeiture of a separable part of the franchise will not work a forfeiture as to the balance.⁹ So a forfeiture of a franchise does not include the physical property,¹⁰ unless it so agreed in the grant of the right to use the streets.¹¹

In case the franchise is forfeited, it would seem that a deposit in the hands of the municipality, to pay for any paving displaced, where no paving was displaced, may be recovered back by the company.¹²

8. EFFECT OF GRANT, AND RIGHTS AND DUTIES OF GRANTEE.

a. *In general.*

§ 1670. Effect of grant of franchise in general.

So far as the municipality is concerned, the grant of a franchise to use the streets is not binding on it until the grant has been accepted.¹³ When accepted, the

Service Corporation, 75 N. J. Eq. 579, 73 Atl. 122.

A franchise cannot be revoked without giving reasonable notice and an opportunity to remove the plant or to obtain a new franchise. East Tennessee Telephone Co. v. Frankfort, 141 Ky. 588, 133 S. W. 564.

8. Cape May, etc. R. Co. v. Cape May, 58 N. J. L. 565, 34 Atl. 397.

9. People v. Broadway R. Co., 9 N. Y. S. 6, 56 Hun (N. Y.) 45, rev'd on other grounds in 126 N. Y. 29, 26 N. E. 961; Houston v. Houston, etc. R. Co., 84 Tex. 581, 19 S. W. 786.

But municipal corporation cannot enforce part and repudiate part of a franchise. New Orleans, etc. R. Co. v. New Orleans (La.), 33 So. 192.

10. Saginaw Power Co. v. Saginaw, 193 Fed. 1008.

11. Tower v. Tower & S. St. R. Co., 68 Minn. 500, 71 N. W. 691, 38 L. R. A. 541, 64 Am. St. Rep. 493.

12. Crawford County St. R. Co. v. Meadville, 228 Pa. 606, 77 Atl. 928.

13. § 1650 *ante*

proper use of the streets by the grantee is not of itself a nuisance,¹⁴ and the franchise precludes any claim by the municipality for damages through the resulting inconvenience to the general public, and also precludes any action by any one on the ground that such occupancy and use, where limited to proper and legitimate purposes, constitutes a nuisance.¹⁵

However, the granting of a franchise does not necessarily defeat a recovery of damages by *abutting owners*,¹⁶ and does not prevent a proper exercise of the

14. *Lambert v. Westchester Electric R. Co.*, 191 N. Y. 248, 83 N. E. 977.

Railroad tracks. It is well established that railroad tracks in public streets laid by authority of law, pursuant to grant lawfully made, are not public nuisances.

Florida. *Geiger v. Filor*, 8 Fla. 325.

Illinois. *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307.

Indiana. *New Albany & S. R. Co. v. O'Daily*, 12 Ind. 551; *State v. Louisville, N. A. & C. R. Co.*, 86 Ind. 114.

Michigan. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

New York. *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186.

Pennsylvania. *Easton S. E. & W. E. Pass. R. Co. v. Easton*, 133 Pa. St. 505, 19 Atl. 486.

North Carolina. *Ridley v. Seaboard & R. R. Co.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708.

15. *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122, 95 Pac. 343.

Effect of grant. A grant to a railway or other public utility company by the legislative de-

partment of the state, or by a municipal corporation, of authority to construct its tracks, erect its poles, lay its pipes, or whatever use of the street is necessary, on the streets of the municipality, is not authority to the company to violate private rights, but on the other hand merely relieves the company from liability to suit, civil or criminal, at the instance of the government. *McKay v. Enid*, 26 Okla. 275, 109 Pac. 520.

16. *Lambert v. Westchester Electric R. Co.*, 191 N. Y. 248, 83 N. E. 977.

§ 1700 *et seq.*, *post*.

Does not confer power to create a nuisance. A grant by a city to a street railway company of the right to construct poles for supporting trolley wires in the streets, does not authorize the company to set the poles so that they will unreasonably obstruct ordinary and proper traffic on the street. It is held to the exercise of a reasonable degree of care in placing the poles. *Lambert v. Westchester Electric R. Co.*, 100 N. Y. S. 665, 115 App. Div. 78, *aff'd* in 191 N. Y. 248, 83 N. E. 977.

police power on the part of the municipality.¹⁷

So the municipality may exercise any powers in relation to the franchise which have been reserved to it by the franchise itself.¹⁸ Thus, a street railway company, which has been granted a franchise to use the streets, may be required, by a subsequent ordinance, to construct new lines according to a contract made between the municipality and the company.¹⁹ So the grantee of the right to use the surface of the street takes it subject to the rights of the public to use the streets and also subject to the rights of any other grantee of the use of the street.

The rights which the grantee of a franchise to use the streets acquires,²⁰ includes the right to use the streets

17. § 1677 *post*.

18. §§ 1644 *et seq.*, *ante*.

19. State ex rel. v. St. Paul City R. Co. (Minn., 1912), 135 N. W. 976.

Street railways: ordering new lines. Where a franchise granted to a street railway reserved to the municipality the right to direct new lines and extensions to be constructed when demanded by public necessities, it was held that an ordinance directing the construction of tracks nine miles long in Minneapolis was not arbitrary or unreasonable. Minneapolis Street Ry. v. Minneapolis, 189 Fed. 445, 452.

20. Authority conferred on gaslight company to use streets does not authorize it to lay electric wires. State v. Murphy, 170 U. S. 78, 18 Sup. Ct. 505, 42 L. Ed. 955.

Power to lay pipes in streets held not to give right to supply water in the city. Rochester &

L. O. Water Co. v. Rochester, 82 N. Y. S. 455, 84 App. Div. 71, *aff'd* in 176 N. Y. 36, 68 N. E. 117.

Mere acquiescence on the part of city authorities in the act of a company in establishing its possession of and using the city telegraph as an adjunct of its business does not support a license by the municipality to operate a private fire alarm system. National Automatic Fire Alarm Co. v. Portland, 59 Ore. 409, 117 Pac. 285.

Street car franchise does not authorize erection of signal power in the street. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 Pac. 330.

Elevated railroad. Where use of a street is granted for elevated street railroad, city need not consult convenience of railroad company in making use of street for proper purposes. Interborough Rapid Transit Co. v. Gallagher, 90 N. Y. S. 104, 44 Misc. Rep. 536.

in a reasonable manner for the purpose for which it is incorporated (in case of a corporation),²¹ within the terms of the grant to use the streets, and subject to any conditions imposed by the municipality.²²

The franchise, when accepted, being a contract, the grantee is also entitled to demand that it be not revoked during its life without cause,²³ and that the conditions therein binding on the municipality be complied with by the municipality, and that the franchise contract be not impaired, as forbidden by the federal constitution, by any act of the municipality or the state.²⁴

If the company is granted an *exclusive franchise*, it has the right to demand that no like franchise be granted to any other company,²⁵ and that the municipality shall not erect a competing plant during the life of the franchise.²⁶

On the other hand, the grantee of a franchise to use the streets, after accepting it, becomes burdened with certain duties which he or it must fulfill, such as the duty to furnish service or a supply to all willing to pay

Effect of laying new pavement. The fact that after the acceptance of an ordinance granting the right to lay pipes in a street a new pavement is laid therein does not restrict the use of the street as provided in the franchise ordinance. *Indianapolis v. Consumers Gas Co.*, 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

21. Charter limitations. Franchise granted by the city to use the streets to furnish gas and "other illuminating light" is void as to the latter where charter of the company merely authorized it to furnish gas. *Peoples' Electric Light & Power Co. v. Capital Gas & Electric Light Co.*, 116 Ky. 76, 75 S. W. 280, 25 Ky. L. Rep. 327.

22. Conditions, see § 1644 *et seq.*, *ante*.

23. Revocation, see § 1661 *ante*.

24. § 1672 post.

See § 759 *et seq.*, *ante*, vol. 2.

25. § 1636 ante.

Exclusive franchise. A company granted an exclusive franchise to supply the municipality is not precluded thereby from furnishing a supply to the inhabitants of another city in the vicinity, through the mains and pipes originally laid. *Duluth v. Duluth Gas & Water Co.*, 45 Minn. 210, 47 N. W. 781.

See § 761 *ante*, vol. 2.

26. See chapter 35 post.

and abide by the reasonable regulations of the company,²⁷ without discrimination,²⁸ and at reasonable rates.²⁹

The grant of a franchise is not the grant of any proprietary interest in the street,³⁰ but the company is invested with a right of property in the franchise which, unless the right is reserved, the municipality cannot take away or impair without the company's consent.³¹

The terms of the grant must be consulted to ascertain the extent of the grantee's rights, and unless an alleged right is included therein upon a reasonable construction, it must be denied.³²

The grant extends to and includes whatever is necessary to its proper exercise. Thus, a street railway company having been given the right to erect trolley wires in the streets, has the right to trim trees when reasonably necessary for the passage of the wires.³³

So express authority, granted by a municipal corporation to a street railway company to construct its road in certain streets, carries with it the right to make such use of other streets (in this case for poles carrying feed wires from power house to the trolley wires) as is essential to the enjoyment of the authority expressly granted.³⁴

§ 1671. Effect of grant where unnecessary or invalid.

If a public service company has the right, by virtue of a *statute*, to use the streets of a municipality, an ordinance authorizing it to use the streets, on certain conditions, either confers a franchise, and is invalid for the reason that the municipality had no power to grant the

27. § 1689 *post*.

28. § 1697 *post*.

29. § 1725 *post*.

30. *San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

31. § 1672 *post*.

32. § 1652 *ante*.

33. But general rule is that if injury results to abutter from trimming or cutting trees, he may recover damages. § 1328 *ante*, vol. 3.

34. *Beaumont Tr. Co. v. Brock*, 48 Tex. Civ. App. 41, 106 S. W. 460.

franchise;³⁵ or else an ordinance granting such a right does not constitute a franchise, but is merely an attempt to give what the company already has and is of no legal effect.³⁶ If the municipal authorities have no legislative power to grant a franchise, the franchise is void;³⁷ and if a municipality has no authority to grant a right to use its streets, it has no power to exact or receive compensation by way of free telephone service for itself or its citizens, or to fix rates for telephone charges.³⁸

§ 1672. Grant as a contract and impairment thereof.

The rule that ordinances cannot impair the obligation of contracts, based on the impairment of the contract clause in the federal constitution, considered at length in a preceding volume,¹ is often applied to the impairment of rights acquired by a public service company by a grant to it of the right to use the streets, or certain streets, of a municipality.²

A grant to a public service company, of the right to use a street, *when accepted*, becomes a contract between the municipality and the grantee,³ and the conditions

35. *State ex rel. v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108 (and see concurring opinion of Judge Winslow in 114 N. W. 315).

36. *Western Union Telegraph Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023; *Kenosha v. Kenosha Home Tel. Co.* (Wis., 1912), 135 N. W. 848.

37. *Brush Electric Light Co. v. Jones Bros. Electric Co.*, 5 Ohio Cir. Ct. Rep. 340, 3 O. C. D. 168.

38. *South McAlester-Eufaula Telephone Co. v. State ex rel.*, 25 Okla. 524, 106 Pac. 962; *Farmer & Getz v. Columbiana County Tel. Co.*, 72 Ohio St. 526, 74 N. E. 1078.

Compare § 1688 *post*.

1. §§ 753-771 *ante*, vol. 2.

2. §§ 759-764 *ante*, vol. 2.

3. *People ex rel. v. Chicago Tel. Co.*, 245 Ill. 121, 91 N. E. 1065; *Sapulpa v. Sapulpa Oil & Gas Co.*, 22 Okla. 347, 97 Pac. 1007; *Peoples' Passenger R. Company v. Baldwin*, 14 Phila. (Pa.) 231; *Hestonville, etc. R. Co. v. Philadelphia*, 89 Pa. 210; *Armour Packing Co. v. Metropolitan Water Co.*, 130 Fed. 851, 65 C. C. A. 335; *Africa v. Board*, 70 Fed. 729.

§§ 928, 1165 *ante*, vol. 3.

Acceptance. Some cases, however, hold that there must be something more than mere acceptance, so far as the right to revoke the franchise is concerned. See § 1661 *ante*.

therein are binding, the same as the terms of any other contract, both on the municipality and the company,⁴ and protected by the provision of the federal constitution against *impairment of contracts*,⁵ so that, unless the

Same binding effect as statute.

An ordinance granting the right to use streets, when accepted by the company, is as binding upon the company as a statute. *Tudor v. Chicago & S. S. Rapid Transit R. Co.*, 154 Ill. 129, 39 N. E. 136.

4. *Morristown v. East Tennessee Tel. Co.*, 115 Fed. 304, 53 C. C. A. 132.

Where a company, operating a street railway under authority of a statute, accepts the rights and privileges of a subsequent statute, it cannot be heard to say that the obligations imposed by such statute impaired the obligations of the former statute. *Binninger v. New York*, 80 N. Y. App. Div. 438, 81 N. Y. S. 226.

Modification with consent of company. While a right to use the streets granted by an ordinance, and a contract entered into therein with a party to it, cannot be abrogated and destroyed by a subsequent ordinance, yet if the second ordinance is passed upon the request of the company, and its terms and conditions are fully accepted and ratified by it, the second ordinance is valid and binding on both the municipality and the company. *Zimmerer v. Stuart*, 88 Neb. 530, 130 N. W. 300.

Reopening vacated street. An ordinance granting a right of way to a railroad company in consideration of a division station at that point and vacating cer-

tain streets across the station grounds of the company, constitutes a contract, where accepted by the company, so that the municipality cannot thereafter reopen one of the streets vacated without condemnation proceedings and the payment of compensation. *Atchison, T. & S. F. R. Co. v. Shawnee*, 183 Fed. 85.

5. *Alabama*. *Birmingham & P. M. St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

Louisiana. *East Louisiana R. Co. v. New Orleans*, 46 La. Ann. 526, 15 So. 157.

Missouri. *Springfield R. Co. v. Springfield*, 85 Mo. 674; *State ex rel. v. Corrigan Consol. St. R. Co.*, 85 Mo. 263, 55 Am. Rep. 361; *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

West Virginia. *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

United States. *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; *Citizens' St. R. Co. v. City R. Co.*, 56 Fed. 746.

Compare Logansport R. Co. v. Logansport, 114 Fed. 688.

Contract as to rates in grant of franchise, impairment of, see § 1737 *post*.

§ 759 *ante*, vol. 2.

Act of incorporation giving the company the right to lay gas

right so to do has been reserved, the grant cannot be revoked,⁶ nor additional burdens imposed,⁷ as against the objection of the company. So the contract is binding on the successors of both the municipality and the company. Thus if a part of one municipality is attached to another, and the former had granted a license to a public utility company to use its streets, and such license had been accepted so as to become a contract, the latter municipality has no right to repudiate the contract.⁸

However, there can not be an impairment of a contract as contained in a franchise unless there is a legal contract in existence to be impaired.⁹ And a franchise

mains in a certain township is not affected by subsequent statute which divided the township into several townships, none of the original townships remaining. *Public Service Corporation of New Jersey v. De Grote*, 70 N. J. Eq. 454, 62 Atl. 65.

Regulation of use of streets by a street railroad company must not violate existing contracts. *Eastern Wisconsin R. & L. Co. v. Hackett*, 135 Wis. 464, 115 N. W. 376, rehearing denied, 115 N. W. 1139.

All parts of franchise not a contract. So an ordinance granting a street railway company the right to use a street, in so far as it fixes the amount of the license fee for each car, is a contract which cannot be violated; but additional provisions for the exhibit of the certificate of payment and for a penalty in case of failure to exhibit such certificate cannot be read into the franchise as forming part of the contract. *New York v. New York City R. Co.*, 117 N. Y. S. 919, 921.

6. § 1661 *ante*.

7. § 760 *ante*, vol. 3.

8. *People ex rel. v. Chicago Tel. Co.*, 245 Ill. 121, 91 N. E. 1065.

9. Before a court can be asked to determine whether a statute or ordinance has impaired the obligation of a contract it must be made to appear that there was a legal contract subject to impairment. *New Orleans v. New Orleans Waterworks*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943.

Thus where a city grants an exclusive franchise to an electric light company to supply light, etc., without legal authority, the company has no contract good in law to be impaired so as to invoke the protection of either the state or federal constitution. *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142, 150.

So to make a grant of a franchise to furnish water to a city such a contract as is protected by the federal constitution the council must have authority to make the contract. *Walla Walla v. Walla Walla Waterworks Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

to use the streets, granted by a municipality, where the public service company already is entitled to use the streets by virtue of its incorporation, is not a contract because the municipality has no consideration to give for such a contract, and hence a provision in such a franchise requiring free service to the municipality is invalid.¹⁰ So there is no impairment of the contract by the state if the statutes in existence at the time of granting the right to use the streets reserve to the legislature the power to impose any conditions on the franchise of a corporation.¹¹

It is important to keep in mind, however, that a proper exercise of the *police power* cannot ever be successfully claimed to impair the obligation of a contract. There is, however, some difficulty in determining just how far the state or municipality may go in the exercise of its *police power* without passing beyond such power and impairing the obligation of a contract created by the granting of a franchise.¹²

10. *Kenosha v. Kenosha Home Tel. Co.* (Wis., 1912), 135 N. W. 848.

§ 1671 *ante*.

11. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127 Ia. 637, 103 N. W. 1005; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 898, aff'g 78 Ia. 367, 43 N. W. 224.

But see *Coast Line R. Co. v. Savannah*, 30 Fed. 646.

12. § 1677 *et seq.*, *post*.

Proper exercise of police power no impairment of contract. Such a grant, although, when accepted, constituting a contract which the municipal corporation cannot arbitrarily impair or revoke, is subject to the conditions imposed by its terms and to the proper exercise of police power by

the municipal corporation. *Mason v. Ohio River R. Co.*, 51 W. Va. 183, 41 S. E. 418.

Permits. Where a water company is authorized by statute to lay its pipes in the streets of a city, for which it was organized to supply with water, a subsequent provision of the city charter granted by the legislature providing that no pavement shall be disturbed until a *permit* has been issued by a designated official of the city, is not unconstitutional as being a violation of vested rights of the company. *Jamaica Water Supply Co. v. New York*, 109 N. Y. S. 948, 57 Misc. Rep. 475.

Paving. An ordinance requiring all street railway companies to pave a certain part of the street

The apparent conflict between the cases touching the character and force of municipal ordinances with respect to their being licenses or easements, or, when acted upon, becoming contracts, and their inviolability, has grown out of the failure in all cases to distinguish between the legislative or governmental powers, on the one hand, as applied to or affecting the *police power*, or in which the latter is involved, and *administrative powers* with respect to the private or proprietary rights and interests or business, on the other, or the dual capacity in which municipal corporations act. Neither is it a distinction readily drawn, and in each case must inhere in the subject-matter.¹³

In so far as the municipality itself is concerned, however, it seems that a condition in a franchise granted by the municipality and accepted by the public service company, may be impaired by the *legislature* with the consent of the public service company.¹⁴

on which their tracks were laid does not impair the validity of a contract with a company operating under a franchise purporting to exempt it from such liability for street paving. *Marshalltown L. P. & R. Co. v. Marshalltown*, 127 Ia. 637, 103 N. W. 1005.

Where a street railway company was operating under an ordinance which required it to pave the street between its rails and twenty inches on the outside with "small stone," a later ordinance requiring the company to repair with brick was valid and did not impair the obligation of its contract. *Mechanicsville v. Stillwater*, etc., St. R. Co., 71 N. Y. S. 1102 35 Misc. Rep. 513.

13. *Grand Trunk & W. Ry. Co. v. South Bend*, 173 Ind. 203, 89 N. E. 885, 890.

14. In *Worcester v. Worcester*

Consol. St. R. Co., 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591, aff'g 182 Mass. 49, 64 N. E. 581, the city of Worcester, Mass., had extended the franchise of the company, so as to allow the occupancy of additional streets, on condition that the company would pave the streets between the rails and eighteen inches on each side thereof. The legislature afterwards adopted a different system of taxation, and passed a statute absolving the railway company from the obligation to pave the streets. The city objected, on the ground that the statute impaired the obligation of the contract between the city and the railway company. In disposing of the contention, the court said: "It seems, however, plain to us that the asserted right to demand the continuance of the obligation to pave

§ 1673. Rights as between grantees of franchises.

As already noticed, the grantee of a franchise cannot object to the granting of a like franchise to a competing company where the first franchise is not exclusive.¹⁵ All that the grantee of a franchise "can lawfully demand is that its structure shall not be unreasonably interfered with. * * * If the city, which has control of the streets both above and below the surface, sees fit to economize space with reference to the wants of the future, it has a right to do so, and for this purpose to place, or authorize another corporation to place, conduit lines so near that of the plaintiff's as to make *access somewhat inconvenient and expensive*. The city cannot destroy the plaintiff's line, nor prevent reasonable access to it, but it is not obliged to consult the mere convenience of the plaintiff, *nor study to save it from expense*, to the detriment of the public."¹⁶

It is not within the scope of this work to consider in detail the relative rights of different companies erecting poles in streets or conduits underneath the streets

and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation, which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to terminate it, with the consent of the railway company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole,

of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection did not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method, with the consent of the company, even though, as to the company itself, there might be a contract, not alterable, except with its consent."

To same effect. *Springfield v. Springfield St. R. Co.*, 182 Mass. 41, 64 N. E. 577.

15. § 1633 *ante*.

16. *Western Union Tel. Co. v. Syracuse Electric L. & P. Co.*, 178 N. Y. 325, 70 N. E. 866, rev'g 81 N. Y. S. 1147, 81 App. Div. 655.

for the distribution of electricity as to interfering currents of different lines, etc., or the relative rights as between companies using the same tracks, but it may be stated that ordinarily, in the absence of other controlling circumstances, the company first erecting its poles or laying its conduit or tracks will be protected as against a later company which so erects its poles or places its wires or tracks as to impair the efficiency of the service of the first company.¹⁷ In other words, while the right of a grantee of a franchise to the space occupied by it in the streets is subject to such incidents as result from the rights of other parties who have acquired a valid franchise of a similar character, provided there is no unreasonable and unnecessary invasion of the operations of the first grantee,¹⁸ yet as between two grantees exercising similar franchises in the same streets, *priority carries superiority of right*.¹⁹ Their

17. *Alabama*. American Tel. & Tel. Co. v. Morgan County Tel. Co., 138 Ala. 597, 36 So. 178, 100 Am. St. Rep. 53.

Illinois. Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329.

Iowa. Northern Tel. Co. v. Iowa Tel. Co. (Iowa, 1904), 98 N. W. 113.

Kentucky. Cumberland Tel. & Tel. Co. v. Louisville Home Tel. Co., 114 Ky. 892, 72 S. W. 4.

Minnesota. Northwestern Tel. Exch. Co. v. Twin City Tel. Co., 89 Minn. 495, 95 N. W. 460.

Texas. Paris Electric Light & Ry. Co. v. Southwestern Telegraph & Tel. Co. (Tex.), 27 S. W. 902.

Vermont. Rutland Electric Light Co. v. Marble City Electric Light Co., 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. Rep. 868.

United States. Louisville Home Tel. Co. v. Cumberland Tel. & Tel.

Co., 111 Fed. 663, 49 C. C. A. 524, rev'g 110 Fed. 593.

A telephone company having erected its poles and wires under a franchise from a municipal corporation, an electric light company franchise subsequently granted will be enjoined from erecting its wires in such close proximity to the telephone wires as to impair the telephone service. *Paris Electric L. & P. Co. v. Southwestern Tel. & Tel. Co. (Tex.)*, 27 S. W. 902.

18. *Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co.*, 111 Fed. 663, 666, 49 C. C. A. 524.

19. Cases cited *ante*, this paragraph.

Grantee of a franchise will be protected in the exercise of those rights as against the invasion of a subsequent grantee of a similar franchise. *Newport v. Newport Light Co.*, 84 Ky. 166, 8 Ky. L.

conflicting interests will be adjusted as far as possible, by equity, in a way that each may exercise its own franchise as fully as is compatible with the necessary exercise of the others. If both cannot operate at the same time, the last one to come must give way, and the fact that it is under contract with the city for work of a public nature does not give it any claim to preference.²⁰

A municipality cannot, in the absence of any provision in regard thereto in the franchise granted to the first company, authorize another railroad company to run over the tracks of the first company, unless it consents thereto,²¹ or at least not without compensating

Rep. 22; Brooklyn Central R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Hamilton St. R., etc. Co. v. Hamilton, etc. Tr. Co., 5 Ohio Cir. Ct. 319; Fidelity Trust, etc. Co. v. Mobile St. R. Co., 53 Fed. 687.

20. Edison Electric Light, etc. Co. v. Merchants, etc. Electric Light, etc. Co., 200 Pa. 209, 49 Atl. 766, 86 Am. St. Rep. 712.

21. Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Hamilton St. Ry. & Electric Co. v. Hamilton & L. Electric Transit Co., 5 Ohio Cir. Ct. Rep. 319; Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525.

Compare Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. 687.

Contra. Toledo Consolidated St. Ry. Co. v. Toledo Electric St. Ry. Co., 6 Ohio Cir. Ct. R. 362, aff'd in 50 Ohio St. 603, 36 N. E. 312.

§ 1644 ante.

Use of tracks of another com-

pany. While a city does not have the right to grant the exclusive use of its streets to one company for the operation of a street railway, having granted a particular company that right, and having designated the particular streets which it may use and occupy with its railway system, and the grant having been accepted, the city cannot thereafter, and during the term of the contract thus entered into, grant to another street railway company the identical portions of the streets which it has theretofore granted to the first company. Peoria Ry. Co. v. Peoria Ry. Terminal Co., 252 Ill. 73, 96 N. E. 689.

Reserving the right to grant the privilege of the use of the tracks of a street car company to any interurban railroad does not include the right to grant another company the right to use such tracks under entirely different conditions from those reserved in the original ordinance. Peoria Ry. Co. v. Peoria Ry. Terminal Co., 252 Ill. 73, 96 N. E. 689.

the first company, unless there is a statute or charter provision to the contrary.²² However, a street railway company which has been granted a franchise to use certain streets is not entitled to the exclusive use of such street, as against a railway company subsequently granted the right to use such street.²³ If a franchise is granted an electric light company, the municipality cannot permit another company to string wires which interfere with the grantee of the first franchise.²⁴ So a municipality cannot grant a right to use the street which will make the water pipes in the street subservient to the privileges conferred on a street car company.²⁵

22. See *Grand Ave. Ry. Co. v. Citizens' Ry. Co.*, 148 Mo. 665, 50 S. W. 305.

23. *Oakland R. Co. v. Oakland, Brooklyn & F. V. R. Co.*, 45 Cal. 365, 13 Am. Rep. 181; *Electric City Ry. Co. v. Niagara Falls*, 95 N. Y. S. 73, 48 Misc. Rep. 91.

Two street railways in same street. A municipal corporation granting the use of a street to a company for street railway purposes, the grant not being exclusive, may grant to another company the right to use that part of the street not actually covered by the tracks of the former company. *Gulf City St. R. Co. v. Galveston City R. Co.*, 65 Tex. 502.

The grant of a right of way for a railroad along the north side of a street was not prohibitory in such a sense that its repeal was necessary to the validity of a subsequent grant to the same company of a right to use the other side of the street for another track. *Merchants Union Barb. Wire Co. v. Chicago, etc. R. Co.*, 70 Ia. 105, 28 N. W. 494, 29 N. W. 822.

A street railway operating un-

der an *ultra vires* grant from a township cannot prevent the township from granting a right to another company to construct and operate a road in the same highway. *Pennsylvania R. Co. v. Hamilton Twp.*, 67 N. J. L. 477, 51 Atl. 926.

A railroad had permission to lay a double track on a street but took no advantage of its right to lay a double track and operated a single track, in disobedience of the authorities of a municipal corporation which had subsequently included the street within its limits. The municipality granted another company the right to construct a double track car line on the same street. Held, the first company had no vested rights which were interfered with by the latter grant. *Newport News & O. P. Ry. & El. Co. v. Hampton Roads Ry. & El. Co.*, 102 Va. 795, 47 S. E. 839.

24. *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377, 26 Atl. 635, 36 Am. St. Rep. 868, 20 L. R. A. 821.

25. *Hough v. Smith*, 75 N. Y. S. 451, 37 Misc. Rep. 363.

The right of one public service company which has been granted a franchise to use the streets to enjoin another company which is a competitor from using the streets, because of the invalidity of the latter's franchise or otherwise, is considered hereafter.²⁶

§ 1674. Territorial limits of franchise.

An exclusive franchise for a term of years is not invalid because it provides that it shall be in force within the corporate limits as they exist or may thereafter be enlarged.²⁷ And where a franchise is granted to use the streets of a municipality and thereafter the territorial limits of the municipality are extended, the franchise immediately attaches, without any further action on the part of the municipality, to the newly acquired territory.²⁸ Likewise, where the right to use

26. § 1771 *post*.

27. *Truesdale v. Newport*, 28 Ky. L. Rep. 840, 90 S. W. 589.

28. *Kentucky. Truesdale v. Newport*, 28 Ky. L. Rep. 840, 90 S. W. 589.

Missouri. St. Louis Gaslight Co. v. St. Louis, 46 Mo. 121, 133.

New York. People ex rel. v. Deehan, 153 N. Y. 528, 47 N. E. 787.

Oklahoma. Tulsa Street R. Co. v. Oklahoma Union Traction Co., 27 Okla. 339, 113 Pac. 180.

Washington. Seattle Lighting Co. v. Seattle, 54 Wash. 9, 102 Pac. 767, 18 Am. & Eng. Ann. Cas. 1117 (note).

To same effect. *People ex rel. v. Chicago Tel. Co.*, 220 Ill. 238 77 N. E. 245.

But see *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 47 S. E. 848.

Territorial limits of franchise. In addition to being plagued by franchises granted in suburban

districts afterwards annexed, cities are sometimes troubled by the effect of territorial expansion upon the rights and obligations of the companies already operating in the city under city franchises. In the case of street railways, where grants are usually made for specific streets, the question, "Does the franchise follow the flag?" is not likely to arise. In the case of other companies, however, it is often contended that inasmuch as they have been granted the right to occupy, generally, the streets of the city, they are entitled to exercise similar rights in the streets of any new district that may be annexed to it. *Wilcox, Municipal Franchises*, vol. 1, § 19.

So a provision for transfers by a street railway company applies to territory annexed to the city after the contract is made. *Indiana Ry. Co. v. Hoffman*, 161 Ind. 593, 601, 69 N. E. 399.

the streets is granted to a public service corporation and thereafter the municipality *opens new streets*, the grant includes such new streets as well as those streets in existence at the time of the grant.²⁹ But the general rule seems to be that if a company is granted a franchise in certain territory which is afterwards annexed to another municipality, the franchise does not extend beyond the old limits of the territory annexed,³⁰ although the right conferred by statute to exercise the franchise within the limits of the territory annexed is not annulled thereby.³¹ But there are some decisions holding that on annexation of the municipality granting the franchise, to another municipality, the franchise terminates.³²

§ 1675. Public improvements interfering with grantee of franchise.

The grantee of a franchise to use the streets takes it subject to the right of the municipality to make public improvements whenever and wherever the public interest demands, and if the improvement causes injury to the company, as by requiring it to relay or change the location of its pipes, tracks, or poles, or otherwise, the grantee of the franchise cannot recover damages from

29. *People ex rel. v. Deehan*, 153 N. Y. 528, 47 N. E. 787; *People ex rel. v. Cromwell*, 85 N. Y. S. 878, 89 App. Div. 291.

A franchise granted by the proper officials to a railroad company is not void because the route specified is entirely over private property, and it may be enforced when the property over which the route was established was taken for public streets. *People ex rel. v. Coler*, 105 N. Y. S. 887, 121 App. Div. 293.

30. *Chicago v. Mutual Electric Light Co.*, 55 Ill. App. 429.

Incorporation as a village of parts of two towns, where one town had granted a waterworks company the right to supply it with water, did not give the company the right to supply water to the entire village. *Re Beauty Springs Water Co.*, 118 N. Y. S. 659, 134 App. Div. 17.

31. *Baltimore v. Baltimore County Water & Electric Co.*, 95 Md. 232, 52 Atl. 670; *People ex rel. v. Deehan*, 153 N. Y. 528, 47 N. E. 787.

32. § 1656 *ante*.

a municipality because thereof.³³ Thus, the grantee of

33. *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 111 La. 838, 35 So. 929, *aff'd* in 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831; *Rockland Water Co. v. Rockland*, 83 Me. 267, 22 Atl. 166; *Kirby v. Citizens' R. Co.*, 48 Md. 168, 30 Am. Rep. 455; *National Waterworks Co. v. Kansas*, 28 Fed. 921.

Public improvements vs. franchise rights. The use of a street by a railroad company for its road, under authority from a municipal corporation, is subject to the right of the municipal corporation to improve the street. *Kansas City, etc. R. Co. v. Morley*, 45 Mo. App. 304.

Allowing use of street does not deprive city of right to cause street to be paved. *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 563, 27 N. E. 192.

Sewers. "And while municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, and gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety, and convenience, notwithstanding the same may interfere with legal franchise rights. A water company placing its pipes in the streets under a franchise contract with the city, does so in subordin-

ation to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets whenever and wherever the public interest demands; and if in consequence of the exercise of this right the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account thereof. *McQuillin, Mun. Ord.*, § 521." *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684, 688, 6 L. R. A. (N. S.) 1026.

So where the action of a municipality in directing its sewers to be laid in the centers of the streets was neither arbitrary nor capricious, but was in the honest exercise of its sound discretion, a street railway cannot recover pecuniary losses caused by its suspension of operation during the laying of the sewer. *San Antonio v. San Antonio St. R. Co.*, 15 Tex. Civ. App. 1, 39 S. W. 136.

Taking property without due process of law. Municipal regulations of streets made in the exercise of the police power cannot be complained of by a public service company on the theory that there is a difference between the sub-surface of the streets and the surface; and a gas company cannot recover damages from a municipality accruing from changing the location of its pipes and mains, necessitated by the construction of a drainage system by the municipality, since the company has

the franchise cannot recover expenses incurred in making changes caused by the act of the municipality in changing the grade of the street.³⁴ This rule is merely an application of the rule that the grant of a franchise is subject to any proper exercise of the police power.³⁵ However, the public improvement must not unnecessarily interfere with the rights of the grantee of the franchise.³⁶ And if the statutes or the charter of a municipality provide for a recovery of damages resulting from the grading or change of grade of a street, a public service company injured thereby may recover damages from the municipality.³⁷

§ 1676. Liability of municipality for acts of public service company.

The general rule is that a municipality, by granting to a public service company the right to use its streets, does not become liable for injury resulting to private rights therefrom. For instance, the weight of author-

no property right in the location of its pipes and mains although laid under an exclusive franchise, as to constitute such change a taking of property without due compensation; and no contract rights are impaired by imposing on the gas company the costs of such changes in the location of its pipes. *New Orleans Gaslight Co. v. Drainage Com'rs of New Orleans*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831.

34. *Belfast Water Co. v. Belfast*, 92 Me. 52, 42 Atl. 235; *Columbus Gaslight & Coke Co. v. Columbus*, 50 Ohio St. 65, 33 N. E. 292, 40 Am. St. Rep. 648, 19 L. R. A. 510; *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665.

Change of grade. If there is a change of grade, cost of taking up and replacing gas pipes must be

met by the gas company itself without any recourse over. *Re Deering*, 93 N. Y. 361; *Scranton Gas & Water Co. v. Scranton*, 214 Pa. 586, 64 Atl. 84, 6 L. R. A. (N. S.) 1033.

Franchise cannot be destroyed by arbitrary change of grade. *Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, 33 Pac. 1048.

35. § 1677 *post*.

36. *Des Moines City R. Co. v. Des Moines*, 90 Ia. 770, 58 N. W. 906, 26 L. R. A. 767; *Clapp v. Spokane*, 53 Fed. 515.

But see *Spokane St. R. Co. v. Spokane*, 5 Wash. 634, 32 Pac. 456.

37. *Paris Mountain Water Co. v. Greenville*, 53 S. C. 82, 30 S. E. 699.

See chapter 37, **Public Improvements**, *post*.

ity supports the rule that where a railroad company, under authority from a municipal corporation, constructs upon the streets of a municipality, its railway tracks, and operates its trains thereon in a reasonable, proper, and lawful manner, the municipality is not liable for injury resulting to private rights.³⁸

b. *Police power.*

§ 1677. Effect of grant on subsequent exercise of police power.

The grant by a municipality to a public service company of the right to use streets does not divest the

38. *Illinois.* Olney v. Wharf, 115 Ill. 519, 5 N. E. 366, 56 Am. Rep. 178; Murphy v. Chicago, 29 Ill. 279, 286, 81 Am. Dec. 307.

Indiana. Burkam v. Ohio & M. R. Co., 122 Ind. 344, 23 N. E. 799.

Iowa. Frith v. Dubuque, 45 Ia. 406.

Kansas. Hedrick v. Olathe, 30 Kan. 348, 1 Pac. 118.

Maine. Green v. Portland, 32 Me. 431.

Missouri. Swenson v. Lexington, 69 Mo. 157; Tate v. Missouri, K. & T. R. Co., 64 Mo. 149.

Ohio. Dillenbach v. Xenia, 41 Ohio St. 207.

Oklahoma. McKay v. Enid, 26 Okla. 275, 109 Pac. 520.

But see Bentley v. Atlanta, 92 Ga. 623, 18 S. E. 1013; Pekin v. Brereton, 67 Ill. 477, 16 Am. Rep. 629; Torpey v. Independence, 24 Mo. App. 288; Zanesville v. Fannan, 53 Ohio St. 605, 42 N. E. 703, 53 Am. St. Rep. 664.

Liability of municipality for acts of grantee. "But the construction of ordinary railroad is not, as we have found, an improvement of the street for the con-

venience and benefit of the local public. It is a private enterprise, for private profit. True, the city attaches certain conditions to the license granted, such as that the railroad bed shall be upon a certain grade, that culverts shall be constructed for the gutters, and planks laid at the crossings, but otherwise the municipal authorities do not control the enterprise; whether we term the railroad company purely a private, or whether we call it a *quasi* public corporation, the situation remains unchanged. In constructing and operating the road it is acting for itself and not for the city. It is no more the city's agent than is the individual licensed by ordinance or resolution to engage in some legitimate private business requiring such license or authority. If the railroad company disobey the law, in building or operating its road, the city is not more responsible therefor than it would be for a tort of the private individual in the pursuit of his business aforesaid." *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6.

municipality of its police power over the grantee in relation to its use of such streets.³⁹ Furthermore, it is well

39. *Illinois*. St. Louis, A. & T. H. R. Co. v. Belleville, 122 Ill. 376, 12 N. E. 680; Quincy v. Bull, 106 Ill. 337.

Indiana. Grand Trunk & W. R. Co. v. South Bend, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L. R. A. (N. S.) 850.

Kentucky. Louisville City Ry. Co. v. Louisville, 71 Ky. (8 Bush) 415.

Louisiana. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904, 34 So. 868.

Michigan. Detroit v. Ft. Wayne & E. Ry. Co., 90 Mich. 646, 51 N. W. 688.

Missouri. Springfield Ry. Co. v. Springfield, 85 Mo. 674.

See State ex rel. v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515.

New Jersey. See Jersey City v. National Docks Ry. Co., 55 N. J. L. 194, 26 Atl. 145.

New York. Albany v. Water-vliet Turnpike & R. Co., 108 N. Y. 14, 15 N. E. 370, aff'g 45 Hun (N. Y.) 442; People v. Geneva, W., S. F. & C. L. Traction Co., 98 N. Y. S. 719, 112 App. Div. 581, aff'd without opinion in 186 N. Y. 516, 78 N. E. 1109; Delaware, L. & W. R. Co. v. Buffalo, 38 N. Y. S. 510, 4 App. Div. 562.

Pennsylvania. Appeal of Pittsburgh, 115 Pa. 4, 7 Atl. 778; Frank-ford & P. Pass. Ry. Co. v. Phila-delphia, 58 Pa. 119, 98 Am. Dec. 242; Philadelphia v. Western Union Tel. Co., 11 Phila. (Pa.)

327; McKeesport v. Citizens' Pass. Ry. Co., 2 Pa. Super. Ct. 249.

United States. Minneapolis Street Ry. v. Minneapolis, 189 Fed. 445, 454.

Extent and possession of police power by municipalities in general, § 894, 895 *ante*, vol. 3.

Police power. Franchises granted by a municipal corporation to persons and corporations to occupy the streets for purposes of street railways, gas, water, telephone, etc., are held by the grantees in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable may be enacted and enforced to protect the public health, safety, and convenience, notwithstanding the same may interfere with some of those franchise rights. Anderson v. Fuller, 51 Fla. 380, 41 So. 684.

Delegation of authority. If the power to prescribe reasonable regulations as to the use of streets by electric light companies is delegated to the municipal authorities, the common council cannot delegate the performance of the duty to a committee. Citizens' Electric Light & Power Co. v. Sands, 95 Mich. 551, 55 N. W. 452.

In Ohio, statute provides that if telegraph or telephone companies cannot agree with municipality as to mode of use of streets, the probate court of the county shall direct in what mode the line shall be constructed along the

settled that it is *not within the power* of a municipality, in any franchise it may confer upon, or contract with, a public utility company, to divest itself of its governmental police power, the exercise of which is necessary for the public welfare and the preservation of the public safety.⁴⁰ Nor can a municipality grant away or limit the police powers conferred upon it by the *legislature*.⁴¹ No contract between a municipality and a public service company, nor any franchise granted by a municipality to a public service company, can deprive the municipality of its police power to enact such legislation as is necessary for the general welfare, and the proper exercise of such

streets so as not to incommode the public in the use of the streets. *Queen City Tel. Co. v. Cincinnati*, 73 Ohio St. 64, 76 N. E. 392; *State ex rel. v. Toledo Home Tel. Co.*, 72 Ohio St. 60, 74 N. E. 162; *Zanesville v. Zanesville Tel. & Tel. Co.*, 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. Rep. 725.

Ohio statute requiring probate courts to direct the mode of use of streets under certain circumstances was held unconstitutional because conferring duties legislative in character rather than judicial. *Zanesville v. Zanesville Tel. & Tel. Co.*, 63 Ohio St. 422, 59 N. E. 109, but on rehearing this rule was reversed and the provision was held to be constitutional. 64 Ohio 67, 59 N. E. 781.

40. *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661, quoting from *McQuillin, Mun. Ord.*, § 473.

§ 382 *ante*, vol. 1; § 953 *ante*, vol. 3.

Surrender of police power. An ordinance containing an agreement between the municipal corporation and a railroad company by which the former surrendered

forever the control of grades and streets, is void. *Philadelphia W. & B. R. Co. v. Chester*, 3 Del. Co. Ct. Rep. (Pa.) 18.

The grant of a right to construct a railway in the streets is void if it restricts the exercise of legislative powers in the future by the city. *State v. New York*, 3 Duer (10 N. Y. Super. Ct.) 119.

City cannot contract that it will not require a railroad company to maintain a viaduct in a street and approaches to such viaduct across the company's tracks. *Chicago v. Pittsburg, C. C. & St. L. R. Co.*, 146 Ill. App. 403, 412.

Free service to municipality. A municipality cannot barter the exercise of its police power for free municipal service from a public service corporation. *Kenosha v. Kenosha Home Tel. Co.* (Wis., 1912), 135 N. W. 848.

41. *Rochester Ry. Co. v. Rochester*, 182 N. Y. 99, 118, 74 N. E. 953, 70 L. R. A. 773, followed in *People ex rel. v. Public Service Commission*, 128 N. Y. S. 384, 143 App. Div. 769.

power cannot be attacked as an *impairment of the obligation of the contract*, where designed for the public safety and convenience.⁴² Likewise, a municipality, *although having no authority to prevent the use of its streets by a public service company*, has authority under its general police power to regulate the manner in which the tracks, lines or pipes shall be constructed and maintained.⁴³

However, a municipality cannot, *under the pretense of regulation* as an exercise of its police power, deprive the grantee of a franchise of its property or of any of its essential rights and privileges acquired under the franchise.⁴⁴ For example, a municipality, as a regula-

42. *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 53 L. R. A. 175; *Charlotte v. Michigan Tel. Co.*, 93 Fed. 11.

An ordinance imposing terms and conditions for the use of streets, when accepted, becomes a binding contract, but not to the extent that the police powers are surrendered, i. e., such contracts are subject to regulation when the public interests intervene. *Grand Trunk & W. R. Co. v. South Bend*, 174 Ind. 203, 89 N. E. 885.

43. *Rochester v. Bell Tel. Co.*, 64 N. Y. S. 804, 52 App. Div. 6.

But where the right to use streets is granted by the legislature, the fact that power is delegated to the municipality to impose *regulations and restrictions* on the use of the streets by the public service company does not authorize the imposition of new conditions on the exercise of the corporate franchise. *Summit Tp. v. New York & N. J. Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146, holding that ordinance providing that

no telephone wire should be stretched across any street without the consent of the township committee was neither a "regulation" nor a "restriction."

44. *Chicago v. Chicago & O. P. El. R. Co.*, 250 Ill. 486, 95 N. E. 456; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

"When an ordinance has invited investments and expenditures made in good faith and in reliance upon it, the city authorities cannot arbitrarily impose, by subsequent regulations, without necessity or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power." *Northwestern Telephone Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 53 L. R. A. 175.

Exercise of police power to force contract. If the right to use the streets of a municipality is granted to a public service company by the legislature and

tion of an electric light company, cannot require it to furnish free of charge incandescent lamps in place of those burned out, notwithstanding the company had been in the practice of so doing before the passage of the ordinance.⁴⁵ So an ordinance fixing water rates cannot, as a mere exercise of the *police power*, require the company to supply water free to charitable, religious and educational institutions.⁴⁶ So if a public service company has the right to use the streets of a municipality by virtue of a statute and in pursuance thereof has occupied the streets, the municipality cannot require it to vacate the streets on the theory that it had no legal right to use them, and not in the exercise of its police power.⁴⁷ And the police power of a municipality, in connection with a franchise granted by the state, does not extend

the power is delegated to the municipality merely "to regulate the setting and stringing of * * * poles and wires," the power of the municipality is simply a police power to be exercised for the protection of the citizens, and the municipality cannot use that power for the purpose of forcing a contract with the company for benefits to itself or to the citizens, nor can it make any contract with the company except one which may be altered by a subsequent municipal council if necessary for the protection of the citizens. *Wright v. Glen Tel. Co.*, 99 N. Y. S. 85, 112 App. Div. 745, aff'g 95 N. Y. S. 101.

Requiring filtering plant. "When a city as part of its contract with a company furnishing water to its citizens agrees to and does furnish the water so used, and that water becomes impure, not because of any acts of omis-

sion or commission on the part of the water company, but because of bacteria in the source of the water supply, it cannot, in the absence of a contract to that effect, impose upon the water company the duty of constructing a filtration plant for the purpose of purifying such water. Under such circumstances the question is not one for the courts, as herein presented, but for efforts on the part of public-spirited citizens of the city and the water company to reach a just and equitable agreement in the matter." *Georgetown v. Georgetown Water, Gas, Electric & Power Co. (Ky.)*, 121 S. W. 428.

45. *Re Goodrich*, 160 Cal. 410, 117 Pac. 451.

46. *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, 73 N. E. 375, aff'g 116 Ill. App. 200.

47. *Duluth v. Duluth Tel. Co.*, 84 Minn. 486, 87 N. W. 1127.

to the *establishment of rates* or the *payment of a portion of the earnings* as a revenue to the city, etc.⁴⁸

It is generally held that the municipality may require a *change in the location of pipes*, where public convenience or security require it.⁴⁹ Moreover, if the franchise reserves the right to impose further conditions, the municipality may provide for the enforcement of such conditions by a *fine* for their disobedience.⁵⁰

The nature and scope of, and the general rules relating to, the police power of a municipality, have been considered at length in a preceding chapter,⁵¹ as have general requisites of valid police ordinances.⁵²

§ 1678. Same—police regulations must be reasonable.

It is elementary that an exercise of the police power, in order to be valid, must be reasonable.⁵³ And even if a

48. *State ex rel. v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, (and see concurring opinion of Judge Winslow in 114 N. W. 315).

49. *Re Deering*, 93 N. Y. 361. § 1682 *post*.

Where right to determine location of water pipes has been reserved by the municipality, the location once fixed may be afterwards changed. *Montgomery v. Capital City Water Co.*, 92 Ala. 361, 9 So. 339.

May require pipes to be raised or lowered. *Bryn Mawr Water Co. v. Lower Merion Tp.*, 15 Pa. Co. Ct. R. 527; *Bryn Mawr Water Co. v. Lower Merion Tp.*, 4 Pa. Dist. R. 157.

May require water pipes to be lowered so as to conform to a new grade. *Water Com'rs of Jersey City v. Hudson*, 13 N. J. Eq. 420.

Consumer cannot restrain the removal of water mains and fire

hydrants from near his property, notwithstanding such act will render his property practically valueless, where the municipality has determined that public welfare will be subserved by removing the mains and hydrants, there being no demand for fire protection and only one private consumer. *Asher v. Hutchison Water, Light & Power Co.*, 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52.

50. *Detroit v. Ft. Wayne & B. I. Ry. Co.*, 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79.

51. § 889 *et seq.*, *ante*, vol. 3.

Exercise of police powers outside corporate limits, see § 897 *ante*, vol. 3.

52. § 898 *ante*, vol. 3.

Police ordinances cannot delegate powers, see § 898, note 76 *ante*, vol. 3.

53. *Western U. Tel. Co. v. Richmond*, 178 Fed. 310; *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac.

franchise is granted so as to be expressly subject to all ordinances thereafter passed to regulate railroads in the city, it means only reasonable and legal ordinances for such purpose.⁵⁴ Requiring a water meter to be supplied and paid for by the consumer has been held reasonable,⁵⁵ as has the requiring gas pipes to be laid in the alleys whenever practicable instead of the streets.⁵⁶

661; *Murphy v. Chicago, etc. R. Co.*, 247 Ill. 614, 93 N. E. 381; *Chicago v. Pittsburg, etc. R. Co.*, 244 Ill. 220, 91 N. E. 422; *Derges v. Chicago B. & Q. R. Co.*, 148 Ill. App. 639.

§ 893 *ante*, vol. 3.

Freund, Police Powers, § 63.

Reasonableness. In one case it was held that an ordinance forbidding the cutting into any paved street without obtaining the consent of the property owners and filing bond, etc., was not a valid exercise of the police power as applied to a gas company that had laid pipes in the streets by virtue of a former ordinance whose conditions had been complied with. *Indianapolis v. Consumers Gas Co.*, 140 Ind. 107, 39 N. E. 433, 49 Am. St. Rep. 183, 27 L. R. A. 514.

Continuous telephone service. An order of the corporation commission requiring a telephone company to render "telephone service both day and night at any fractional part of the minutes of every day of the week" including Sundays, is unreasonable in a town of three hundred people, where operation at night time necessitates a pecuniary loss. *Twin Valley Telephone Co. v. Mitchell*, 27 Okla. 388, 113 Pac. 914.

Guard wires. Under statutory power to regulate the use of streets and to provide for their lighting, a municipality may require wires owned by an electrical company to be properly insulated and overhead conductors to be protected by guard wires or other suitable device. *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, 73 N. E. 780, *aff'd* 114 Ill. App. 181.

Ordinance requiring stretching of guard wires along electric cables is presumed to be reasonable. *Conrad v. Springfield Consol. Ry. Co.*, 145 Ill. App. 564, *aff'd* in 240 Ill. 12, 88 N. E. 180.

Prohibiting use of ungraded streets. Where use of streets is authorized by statute, borough cannot prohibit use of ungraded streets until the borough decides to grade them. *Mountain Water Co. v. Emaus Borough*, 43 Pa. Super. Ct. 179.

54. *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25.

55. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046, 16 Am. St. Rep. 116, 6 L. R. A. 756.

§ 1730 *post*.

56. *Traverse City Gas Co. v. Traverse City*, 130 Mich. 17, 89 N. W. 574.

But municipal prohibition against excavating a paved street to lay gas pipes is unreasonable.⁵⁷

§ 1679. Same—permit to excavate in streets.

A *permit* to excavate in streets is to be distinguished from a *grant* of the right to use the streets. The former is a mere police regulation which may be required after the public service company has obtained, either from the state or the municipality, the right—whether it be called a license, franchise or contract—to use the streets.⁵⁸

The grant of a franchise to use streets does not preclude the municipality from requiring application for a permit to excavate the streets to lay pipes or erect poles or the like, since requiring such a permit and the payment of a reasonable fee therefor is a proper and reasonable exercise of the police power,⁵⁹ and does not

57. *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318.

58. *Permit as distinguished from franchise.* Where the consent of the municipality is necessary to authorize a public service company to use streets but the ordinances of the municipality require, even after a grant of the right to use the streets is made, an application to administrative officers for a permit to dig in or open the streets, such permit forms no part of the franchise and is not essential to its existence. *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 53 N. E. 692; *New York City v. New York Mutual Gaslight Co.*, 120 N. Y. S. 776, 135 App. Div. 260.

59. *State v. Frost*, 78 Neb. 325, 110 N. W. 986; *Beaver Valley Water Co. v. Conway Borough*, 213 Pa. St. 225, 62 Atl. 844; *Spring-*

field Water Co. v. Darby, 199 Pa. St. 400, 49 Atl. 275; *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565; *Wheat v. Alexandria*, 88 Va. 742, 14 S. E. 672.

See also *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490, 8 Del. Co. Rep. 175.

Regulations as to excavating in streets held invalid. *Re Wilcox*, 14 Cal. App. 164, 111 Pac. 374.

Purpose of permits. *Carthage v. Garner*, 209 Mo. 688, 108 S. W. 521, holds that such an ordinance is not unreasonable, when not inconsistent with the laws of the state nor repugnant to the legislative policy of the state, the purpose being to enable the municipality to protect the public from injury.

Statutory authority to lay water pipes in streets does not preclude the municipality from

impair the franchise right of a company to use the streets.⁶⁰

It has been held in California, however, that where the right of a public service company to use the streets is granted by a constitutional provision, the requirement by a municipality of the taking out of a permit from a certain municipal officer to make excavations is not an exercise of the police power and is not within the authority of the municipality;⁶¹ but it is submitted that the proper rule is that the mere granting of a permit to excavate is an exercise of the police power, and while the municipality cannot thereby actually prevent the use of its streets by a public service company which complies with the conditions precedent to requiring a permit, yet it may prevent the use of the streets unless such a permit is taken out. The purpose of the permit is to give notice to the municipality that a certain street or part thereof is about to be excavated so as to enable the corporate authorities to take the necessary steps to guard the excavation or compel the company to do so, in order that municipal liability for damages for injuries received by third persons from such excavations may not arise.

The granting of a permit to excavate streets, however, is generally *mandatory* where the applicant has complied with all lawful requirement⁶² and in such case if a per-

requiring a permit before disturbing the pavement to lay pipes. *Jamaica Water Supply Co. v. New York*, 109 N. Y. S. 948, 57 Misc. Rep. 475.

Presumptions. Where an ordinance which granted a franchise to an electric light company to use a city's streets provided that permission must be obtained from certain city officials before work was done, it is presumed that such permission was obtained where the company proceeds with

the work. *Aurora Electric L. & P. Co. v. McWethy*, 104 Ill. App. 479, aff'd in 202 Ill. 218, 67 N. E. 9.

60. *Carthage v. Garner*, 209 Mo. 688, 108 S. W. 521; *Jamaica Water Supply Co. v. New York*, 109 N. Y. S. 948, 57 Misc. Rep. 475.

61. *Re Johnston*, 137 Cal. 115, 69 Pac. 973.

62. *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492.

See *People ex rel. v. Keating*, 67 N. Y. S. 413, 55 App. Div. 556.

mit is refused *mandamus* lies to compel its issuance.⁶³ Furthermore, a provision in a franchise granting the use of streets, requiring the permission of certain officials to be first obtained, may be *waived* by the municipality.⁶⁴

Where a state gives a perpetual franchise subject only to a condition subsequent or a permit to dig into the streets, and such permit has been granted and acted upon, the municipality cannot *revoke the permit*.⁶⁵

aff'd in 166 N. Y. 601, 59 N. E. 1128.

§ 1770 *post*.

Granting permit mandatory. Ordinarily, under ordinances requiring the consent of a municipality to obtain a permit to dig up a street for any purpose and authorizing a refusal of the permit if a certain bond is not given, the permit cannot be refused arbitrarily where the applicant complies with the conditions of the ordinance. *Gaslight Co. v. South River Borough*, 77 N. J. Eq. 487, 77 Atl. 473; *Madison v. Morristown Gaslight Co.*, 65 N. J. Eq. 356, 54 Atl. 439; *Cook v. North Bergen*, 72 N. J. L. 119, 59 Atl. 1035, aff'd in 73 N. J. L. 818, 65 Atl. 885.

Cannot, by refusing a permit or imposing unreasonable conditions, exclude public service company from use of streets. *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. Rep. 520.

See *New Union Tel. Co. v. Marsh*, 89 N. Y. S. 79, 96 App. Div. 122.

Delegation of power. An ordinance giving the city marshal authority to issue permits for excavating streets for telegraph and telephone lines and to determine whether or not necessity exists therefor is void as an improper delegation of power. *Texarkana v. Southwestern Telegraph & Telephone Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915.

63. § 1770 *post*.

64. *McWethy v. Aurora Electric Light & Power Co.*, 202 Ill. 218, 67 N. E. 9, aff'g 104 Ill. App. 479.

65. *New York City v. New York Mutual Gaslight Co.*, 120 N. Y. S. 776, 135 App. Div. 260.

Revocation of permit, § 1008 ante, vol. 3.

Repeal of statute. A proviso in a statute creating a public service corporation with a perpetual franchise that no street shall be dug into without the permission of the municipality, provided that such permission shall not be required if the majority of the owners in interest of the property immediately adjoining such street shall give their consent in writing, is inconsistent with and repeals the provision in a statute

§ 1680. Same—rules as applied to poles and wires.

Telegraph, telephone, and electric light poles and wires are erected with an implied understanding that if the public necessity require it they shall be changed or so regulated as to make their use of the streets as slight an inconvenience to the public as possible.⁶⁶ Even if a public service company is *granted the right by the legislature* to place poles in the streets of a city, the municipality, in the exercise of its police power, may compel such poles to be placed in such manner and in such places as the public interests require;⁶⁷ and in New Jersey,⁶⁸ and some other jurisdic-

authorizing the formation of gas companies which provides that the company shall have power to use the streets for pipes, etc., "with the consent of the municipal authorities of said city," etc., since the franchise given by the first statute was perpetual and required no secondary franchise from the municipality to make it effective, and the provisions in regard to permission to dig in the streets was the administrative consent to the particular place, time or circumstances of such digging. *New York City v. New York Mutual Gaslight Co.*, 120 N. Y. S. 776, 135 App. Div. 260.

66. *Western Union Telegraph Co. v. Richmond*, 178 Fed. 310, 322.

Poles and wires. Reasonable rules and regulations for the erection and maintenance of the poles and wires of electric light companies may be adopted and enforced. The removal of those that are dangerous may be compelled. *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43, 82 N. W. 821; *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502, 80 N.

W. 383, 47 L. R. A. 87; *Michigan Telephone Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104.

If poles placed in the streets are no longer used, their removal may be compelled by the municipality. *Hempstead v. Ball Electric Light Co.*, 41 N. Y. S. 124, 9 App. Div. 48.

67. *Monongahela City v. Monongahela Electric Light Co.*, 12 Pa. Co. Ct. Rep. 529.

A city authorized to control its streets may require the location of poles and the further occupation of its streets by a telephone company authorized by statute to erect its poles in city streets, to be only upon approval of the municipal authorities. *State ex rel. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

68. In New Jersey, telegraph or telephone companies have no right to erect poles in municipality without first obtaining from it a designation of the streets in which they shall be placed. *New York & New Jersey Tel. Co. v. East Orange Tp.*, 42 N. J. Eq. 490,

tions,⁶⁹ the municipality is *required* to designate the

8 Atl. 289; New York & N. J. Tel. Co. v. Bound Brook Borough, 66 N. J. L. 168, 48 Atl. 1022; New York & N. J. Tel. Co. v. Bound Brook Borough, 66 N. J. L. 168, 48 Atl. 1022; Home Tel. Co. v. New Brunswick, 62 N. J. L. 172, 40 Atl. 628, (holding requirement applicable only to lines through the municipality as distinguished from local system of lines maintained within the municipality).

Common council need not specify precise place where each pole shall be located. Marshall v. Bayonne, 59 N. J. L. 101, 34 Atl. 1080.

Statute requiring the designation of streets by cities before poles can be erected thereon by private companies for public lighting, etc., is complied with by a general designation of all the streets of the city. Meyers v. Hudson County Electric Co., 63 N. J. L. 573, 44 Atl. 713, rev'g 60 N. J. L. 350, 37 Atl. 618.

The regulations which may be imposed in connection with a statutory duty of designating a route for a telegraph or telephone line, does not justify requiring the filing of the written consent of abutters with the map of the route, or requiring a bond for performance of the conditions imposed by the municipality, or prohibiting sale or transfer or rental to other parties without permission, or requiring fire and police wires to be carried on the poles free of charge, or providing that ownership of poles and wires shall vest in the municipality in case of

abandonment or non-user. State ex rel. v. Linden Tp., 80 N. J. L. 158, 76 Atl. 444.

Where municipality is required to designate streets in which poles of telephone or telegraph company shall be erected, such designation must be of a reasonably practical route and is not legally made when the prescribed route is already so occupied by other poles and wires as substantially to prohibit any further erections of that character. State ex rel. v. Linden Tp., 80 N. J. L. 158, 76 Atl. 444.

Borough is not a "city or town" in which permission to erect poles must first be obtained. Point Pleasant Electric Light & Power Co. v. Bay Head Borough, 62 N. J. Eq. 296, 49 Atl. 1108.

Townships. Statutory provision that no posts or poles shall be erected in any street of any incorporated "city or town" without first obtaining a designation of the streets in which they shall be placed from the incorporated "city or town" does not include townships. East Orange Tp. v. Suburban Electric Light & Power Co., 59 N. J. Eq. 563, 44 Atl. 628, aff'g 41 Atl. 865.

69. In Massachusetts, a statute authorizing the erection of electric *telegraph* lines along the highways in streets "in such manner as not to incommode their use by the public" and providing that the mayor and aldermen of the municipalities through which they pass shall specify "where the posts may be located," etc., even if to

streets on which telegraph or telephone poles shall be erected.

Under its general powers, a municipality may designate the particular spots in which poles shall be erected and the manner in which wires shall be strung,⁷⁰ and may designate the particular street or streets to be used.⁷¹ Furthermore, the granting by a municipality of a franchise to erect poles in the streets does not create a right to maintain each pole in the identical spot in which located but the municipality may require a *change of location* of the poles.⁷² But a municipality, although having authority to direct any change in the location of the poles or wires of a company, cannot ar-

be construed as mandatory as to the granting of a location for the posts, cannot be considered as mandatory in regard to *electric light* companies, notwithstanding statutes extend the provisions of the former statutes to electric light companies so far as applicable. *Suburban Light & Power Co. v. Boston*, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497.

70. *New Castle v. Central Dist. & Printing Tel. Co.*, 207 Pa. St. 371, 56 Atl. 931; *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co.*, 111 Fed. 663, 49 C. C. A. 524, rev'g 110 Fed. 593.

Delegation of power to commissioner of public works, see *St. Paul v. Freedy*, 86 Minn. 350, 90 N. W. 781.

71. *Wichita v. Missouri & K. Tel. Co.*, 70 Kan. 441, 78 Pac. 886; *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565.

But where municipality grants rights to company to run its wires

"over and through the streets of the city," the determination of what streets shall be occupied is for the company. *Commonwealth ex rel. v. Warwick*, 185 Pa. St. 623, 40 Atl. 93.

72. *Merced Falls Gas & Electric Co. v. Turner*, 2 Cal. App. 720, 84 Pac. 239, holding also that mere lapse of time cannot create prescriptive right to maintain poles in a certain spot.

Telephone company acquires no permanent vested right in part of street occupied by its poles. *Redfield Tel. & Tel. Co. v. Cyr*, 95 Me. 287, 49 Atl. 1047.

Removal as act of state. A removal of wires and electrical appliances from streets pursuant to a statute authorizing designation by ordinance of city officers to carry out the provisions of the statute, held the act of the state rather than the municipality, so that city is improper party to be enjoined from removing wires. *Postal Telegraph-Cable Co. v. Worcester*, 202 Mass. 320, 88 N. E. 777.

bitrarily require a change without good cause,⁷³ nor arbitrarily remove poles from its streets,⁷⁴ but may require a change of location if there are good reasons therefor.⁷⁵ For example, a municipality may require a telephone company which has been granted the right to use a certain street, to remove its line, where another location on another street is offered, where the line has become dangerous and inconvenient to persons using the street.⁷⁶

So a municipality may *prohibit the encumbering of a certain street* with wires and poles;⁷⁷ and general power conferred on a municipality to prevent the encumbering of streets, etc., authorizes it to exclude the poles and wires of a telephone company from the main business block of a street, where the only effect thereof is to make the route less convenient or involve a larger expenditure.⁷⁸

The right of a *telegraph company*, which has accepted the provisions of the federal act of 1866, to use the streets of a municipality, is subject to reasonable municipal regulations.⁷⁹ For instance, a municipality may

73. *Hannibal v. Missouri & K. Tel. Co.*, 31 Mo. App. 23; *Southern Bell Tel. & Tel. Co. v. Mobile*, 162 Fed. 523.

74. *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

If a telephone company is lawfully granted the right to use a street, such right is an easement and a property right so that the municipality cannot require the removal of telephone poles and wires, where not interfering with the safety or convenience of ordinary travel, and where there has been no violation of the franchise. *Southern Bell Tel. & Tel. Co. v. Mobile*, 162 Fed. 523, 532.

75. *American Tel. & Tel. Co. v. Millcreek Tp.*, 195 Pa. St. 643, 46 Atl. 140; *Ganz v. Ohio Postal Tel. Cable Co.*, 140 Fed. 692, 72 C. C. A. 186.

76. *Michigan Tel. Co. v. Charlotte*, 93 Fed. 11.

77. *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565.

78. *Jonesville v. Southern Michigan Tel. Co.*, 155 Mich. 86, 118 N. W. 736, 130 Am. St. Rep. 562.

79. *Western Union Tel. Co. v. Richmond* (decided April 1, 1912) (U. S.), 32 Sup. Ct. 449, aff'g 178 Fed. 310, 319.

Telegraph companies which have the right by the federal

require that positions shall be reserved upon the poles for the use of the municipality,⁸⁰ and that space be left in conduits for wires of third persons, to be used upon permission by the municipality and payment of compensation,⁸¹ since this is merely another incident of the necessity for insisting upon a single system. So an ordinance applicable to all telegraph companies is not objectionable because it provides that the poles shall be subject to the determination of the city engineer as to size, number, location and manner of erection;⁸² nor because it gives the municipality the right to use such poles for its fire alarm and police telegraph wires without compensation.⁸³

The prescribing rules and regulations to govern those erecting and maintaining poles in a street does not exhaust the police power of the municipality in regard to such poles.⁸⁴

statute of 1866 as amended to use the streets of a municipality are nevertheless subject to the exercise of police power by the municipality. *Ganz v. Ohio Postal Telegraph-Cable Co.*, 140 Fed. 692, 72 C. C. A. 186, rev'g 137 Fed. 947; *Toledo v. Western Union Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730; *Michigan Telephone Co. v. Charlotte*, 93 Fed. 11.

80. *Western Union Tel. Co. v. Richmond* (decided April 1, 1912) (U. S.), 32 Sup. Ct. 449, aff'g 178 Fed. 310.

May require the company to permit other persons or companies to place wires on its poles upon payment of compensation where, in the judgment of the municipal committee on streets, it will not unreasonably interfere with its business. *Western Union Telegraph Co. v. Richmond*, 178 Fed. 310, 320.

Where city is authorized to

make reasonable regulations of telegraph lines, a regulation that a telegraph company shall permit the city to place its electric wires on its poles, free of charge, and that other corporations shall be allowed to place their wires there on payment of reasonable compensation, is reasonable; nor are such regulations an interference with interstate commerce. *Postal Telegraph-Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927.

81. *Western Union Tel. Co. v. Richmond* (decided April 1, 1912) (U. S.), 32 Sup. Ct. 449, aff'g 178 Fed. 310.

82. *Western Union Telegraph Co. v. Richmond*, 178 Fed. 310, 320.

83. *Western Union Telegraph Co. v. Richmond*, 178 Fed. 310, 321.

84. *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 66 L. R. A. 238.

§ 1681. Same—requiring wires to be put underground.

As already stated in another chapter,⁸⁵ wire using companies may be compelled to place their wires underground or in subsurface conduits, when convenience or the good government of the municipality requires.⁸⁶ To illustrate, it has been held that requiring a telephone company to build conduits through ungraded streets in suburban parts of the city and in the open country, to carry its wires, was clearly an unreasonable exercise of the police power.⁸⁷ But creating an "*underground district*" and requiring all poles and wires in use therein to be removed from the surface, except trolley wires, and to be placed in conduits, where the *underground* section is the congested center of the city, is a valid exercise of the police power.⁸⁸

However, it is held that a municipality cannot require wires to be put underground unless authority so to do has been delegated to it by the legislature;⁸⁹ and that

85. § 928 *ante*, vol. 3.

86. *State ex rel v. Murphy*, 134 Mo. 548, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515.

Ordering wires underground. A municipality "has the undoubted right in the exercise of the police power to order the placing of telegraph and telephone wires underground whenever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot act arbitrarily in the premises." *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 53 L. R. A. 175, quoting from the first point of the official syllabus.

Legislature may require. *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 13

L. R. A. 454, 21 Am. St. Rep. 764, aff'g 12 N. Y. S. 537; *Western Union Tel. Co. v. New York*, 38 Fed. 552.

Conduit companies. § 1624 *ante*.

Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654.

87. *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 53 L. R. A. 175.

88. *Western Union Telegraph Co. v. Richmond*, 178 Fed. 310, 321.

89. *State ex rel v. Red Lodge*, 30 Mont. 338, 76 Pac. 758; *Geneva v. Geneva Tel. Co.*, 62 N. Y. S. 172, 30 Misc. Rep. 236.

Legislature may delegate power. *People ex rel v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, aff'd in 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666.

municipal power to *regulate* the erection of poles or stringing of wires does not authorize a municipality to require the placing of wires underground.⁹⁰

§ 1682. Same—rules as applied to railways.

No public service companies, using the streets of a municipality, are in fact subject to as many police regulations, in most municipalities, as are railways, especially street railways.⁹¹ Many of such regulations, including those applicable to the *rate of speed*, the *number of servants* on each car, the giving of *danger signals*, the use of a particular *kind of rail*, the *elevation or depression of the tracks*, a *change of the location of the tracks*, the giving of *transfers*, the *stopping of interurban cars at street corners*, the *frequency of the service*, the *sprinkling of the streets*, etc., have been referred to in a preceding chapter.⁹² A municipality which

90. *Carthage v. Central New York Tel. & Tel. Co.*, 185 N. Y. 448, 78 N. E. 165, 113 Am. St. Rep. 932.

91. An ordinance providing that a street car company shall not allow more than a certain number of passengers on its cars is not unreasonable, nor is an ordinance requiring the weekly fumigation of such cars and that they be kept at a temperature of not less than fifty degrees, nor an ordinance requiring the operation of cars in sufficient numbers to accommodate reasonably the public; and such ordinances are a proper exercise of the municipal power conferred on the municipality, and are not an interference with interstate commerce, where the street railway carries passengers only to the state line where they are delivered to a foreign corporation. *South Covington & C. R. Co. v. Covington*, 146 Ky. 592, 143 S. W. 28.

Rails. Ordinance requiring street railway company to remove rails on certain streets and to replace them with seven inch T-rails, seven inches in height, and weighing not less than eighty-five pounds per lineal yard, etc., is not necessarily unreasonable. *State ex rel. v. Alabama City G. & A. R. Co.* (Ala., 1912), 55 So. 176.

Forbidding smoking in street cars. § 902 ante, vol. 3.

92. §§ 954, 955 ante, vol. 3.

Street sprinkling. Ordinances requiring street sprinkling by street railways are not unreasonable where it provides that watering shall not be done when the temperature is at or below the freezing point because it requires tracks to be watered during the winter season when the temperature is above the freezing point. *St. Paul v. St. Paul City R. Co.*, 114 Minn. 250, 130 N. W. 1108.

has authorized the laying of railroad tracks, reserving the power to regulate the kind of propelling force, may *prohibit the use of steam*.⁹³ So municipal regulations requiring street car conductors to go ahead of their cars at steam railroad crossings, and forbidding the car to cross until signalled so to do, are held to be reasonable,⁹⁴ as are ordinances requiring *fenders* upon trac-

Ordinance requiring street sprinkling held unreasonable on the ground that no distinction was made between summer and winter and that sprinkling a seven foot strip in the winter would amount to a nuisance. *Chester v. Chester Traction Co.*, 40 Wkly. Notes Cas. (Pa.) 183, rev'g 5 Pa. Dist. Rep. 609. For further cases as to sprinkling, see § 955, pp. 2103, 2104 *ante*, vol. 3.

Compelling stopping of cars, see also notes in 17 Am. & Eng. Ann. Cas. 552, and in 16 L. R. A. (N. S.) 914.

Speed. Power of city to regulate speed of trains, see also note in 17 L. R. A. (N. S.) 561.

Track elevation. Charter power to define and abate nuisances, general authority to adopt necessary police regulations to secure the safety of the inhabitants in the running of trains, and special power to require change of location, grade of roads and crossings, to compel the raising or lowering of tracks to conform to any grade that might be established, and to construct bridges, viaducts or tunnels across the right of way at street crossings, was held in Indiana insufficient to authorize a general ordinance declaring grade crossings a nuis-

ance and directing all railroad companies to elevate their tracks within the city for the purpose of abolishing grade crossings, where it appeared that the condition of some of the crossings did not require such remedy. The court viewed the question as solely one of charter power, and whether the ordinance was within the general police power. The opinion was expressed that, although crossings were authorized by law, if they are so maintained as to become public nuisances the question of fact may be judicially determined in a case properly presented, but that general charter power to define nuisances does not empower the municipal corporation to declare anything a nuisance *per se* which in fact was not recognized as such by common law. *State ex rel. v. Indianapolis Union Ry. Co.*, 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831, and see § 955, note 36 *ante*, vol. 3.

93. *New York & H. R. Co. v. New York*, 1 Hilt. (N. Y.) 562.

94. *Indianapolis Traction & Terminal Co. v. Formes*, 40 Ind. App. 202, 80 N. E. 872; *Indianapolis Tractional & Terminal Co. v. Romans*, 40 Ind. App. 184, 79 N. E. 1068.

tion cars.⁹⁵ Likewise an ordinance *limiting the number of passengers* on each street car to seventy-five has been held reasonable;⁹⁶ and a further provision that when any passenger is admitted into any street car in excess of the carrying capacity thereof as defined, the company shall forfeit to the city a certain sum for each and every passenger so admitted is valid.⁹⁷ Likewise, a municipality may compel a street railway company to stop its cars on the near side of every crossing.⁹⁸

Regulations relating to the *frequency of street car* service are upheld provided they are reasonable, the question of reasonableness being determined according to whether the regulation practically amounts to confiscation.⁹⁹

The obligation of a street railroad company to grant universal *transfers* can be imposed by the municipality only as a matter of contract.¹ And where a municipality

95. Chicago & Joliet El. R. Co. v. Freeman, 125 Ill. App. 318, holding, however, that provision as to position and height of the fenders, where impracticable, is void.

§ 954, p. 2098, note 28 *ante*, vol. 3.

Discrimination. Ordinance requiring a particular fender on street cars operated by two street railway companies, where there are no other street railways in the city, is valid and not discriminating in favor of a particular fender, where there is nothing to show that it is patented or that anybody is prohibited from making or selling it. Plinkiewisch v. Portland Ry. L & P. Co., 58 Ore. 499, 115 Pac. 151.

96. Minneapolis Street Ry. v. Minneapolis, 189 Fed. 445, 455.

97. Minneapolis Street Ry. v. Minneapolis, 189 Fed. 445, 457.

98. Camden v. Public Service Ry. Co. (N. J. L. 1912), 82 Atl. 609.

99. Tacoma v. Boutelle, 61 Wash. 434, 112 Pac. 661, holding ordinance providing for five minutes service over South Tacoma Line was reasonable.

Ordinance requiring cars "to be run two round trips each day" held not the expression of an intention not to require more trips. Tacoma v. Boutelle, 61 Wash. 434, 112 Pac. 661.

Requiring six minute service on certain streets between prescribed hours held proper in Detroit. People v. Detroit Citizens' St. R. Co., 116 Mich. 132 74 N. W. 520.

1. Shreveport v. Shreveport Traction Co., 127 La. 560, 53 So. 863.

has failed to reserve the right to compel two street car companies to issue transfers to each other's lines, the courts are powerless to compel such transfers, so long as they are legally independent of each other, since courts cannot make contracts or supply omissions in contracts, or bind one company by the contract of another.²

Unless authority so to do has been delegated by the legislature, it has been held that a municipality has no power to compel interurban and street railway companies to *light the streets* occupied by their tracks;³ but it has been held that a municipality may require an interstate railway to maintain lights at its street crossings.⁴

In the control of street railroads reasonable rules may be laid down by the municipality to *compel the removal* of turnouts, the laying of switches, the construction of approaches to bridges, etc.⁵ So for the convenience and welfare of the public, a municipality may require the tracks of a railroad company to be shifted from one street to another,⁶ or from one part of the street to the other.⁷ So there is a proper exercise of the police power, as distinguished from the impairment of a contract, where the municipality revokes the *right to lay a second track* in a street, on the theory that the public interests demanded such revocation, notwithstanding it had authorized the company by grant to lay two tracks in the street, where the second track had not been laid although

2. State ex rel. v. Tacoma Ry. & Power Co., 61 Wash. 507, 112 Pac. 506.

3. Ohia Electric Ry. Co. v. Ottawa (Ohio St., 1912), 97 N. E. 835.

4. Pittsburg, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362.

5. Eastern Wisconsin R. & L.

R. Co. v. Hackett, 135 Wis. 464, 115 N. W. 376, rehearing denied in 115 N. W. 1139.

6. Atlanta & B. Ry. Co. v. Cordele, 125 Ga. 373, 54 S. E. 155. § 955 ante, vol. 3.

7. Snouffer v. Cedar Rapids & M. City R. Co., 118 Ia. 287, 92 N. W. 79.

many years had elapsed from the time of the grant.⁸ And if the power to regulate the construction of tunnels by a railway company is delegated to the municipality, it may provide for the construction of *tracks in the streets depressed* within open cuts.⁹ However, a municipality cannot require the removal of the tracks of a street railway, as an exercise of the police power, where it will practically deprive the company of its franchise to use the streets.¹⁰

§ 1683. License fees.

It has already been stated, in connection with the question of the power of a municipality to impose conditions on granting a franchise to use the streets, that it may, in consideration of granting the franchise, require the grantee to pay a fixed sum annually or a certain share of the receipts or the like.¹¹ Here, however, a different question is presented, in that the right to impose a license fee, after the right to use the streets has been *granted*, is to be determined. The imposition of such a fee for the use of the streets and to compensate the municipality for inspection and supervision, is clearly an exercise of the police power,¹² and is within

8. *Grand Trunk & W. R. Co. v. South Bend*, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L. R. A. (N. S.) 850.

To same effect, see *Lake Roland El. Ry. Co. v. Baltimore*, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126.

Contra, *People's Co. v. Baldwin*, 14 Phila. (Pa.) 231.

Compare *Hestonville Co. v. Philadelphia*, 89 Pa. St. 210.

"We cannot say that an ordinance is unreasonable which would restrict the number of railroad tracks on a street, for a distance of three or four squares, to one track, when more than one might

tend to interfere with the free use of the street by the general public or effect the security of life or property in its use." *Grand Trunk Western Ry. Co. v. South Bend*, 174 Ind. 203, 91 N. E. 809.

9. *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126.

10. *Chicago v. Chicago & O. P. Elev. R. Co.*, 250 Ill. 486, 95 N. E. 456.

11. § 1645 *ante*.

12. *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 66 L. R. A. 238.

the power of the municipality,¹³ provided the power to

13. *Kansas*. Wyandotte v. Corrigan, 35 Kan. 21, 10 Pac. 99.
Michigan. Detroit v. Detroit Ry. Co., 76 Mich. 421, 43 N. W. 447.

Missouri. Springfield v. Smith, 138 Mo. 645, 40 S. W. 757.

New Jersey. North Hudson County R. Co. v. Hoboken, 41 N. J. L. 71.

Pennsylvania. Frankford & Phila. Pass. R. Co. v. Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242.

United States. Allerton v. Chicago, 6 Fed. 555; St. Louis v. Western Union Tel. Co., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810.

§ 783 *ante*, vol. 2.

License tax on pipes of gas company is not invalid unless it clearly appears the ordinance is a revenue measure or the license fee is grossly in excess of that necessary for police supervision. Kittanning Borough v. Kittanning Consol. Nat. Gas Co., 26 Pa. Super. Ct. 355.

Liability for license fees may result from provisions in charter of public service company. New York v. Broadway & Seventh Ave. R. Co., 97 N. Y. 275.

License fee as rental. In St. Louis v. Western U. Tel. Co., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810, the Supreme Court of the United States held that: "A municipal charge for the use of the streets of the municipality by a telegraph company, erecting its poles therein, is not a privilege or license tax." And in its opinion the supreme court, speaking by Mr. Justice Brewer, says: "All

that we desire or need to notice is the fact that this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental. So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet, it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental." Mitchell v. Dakota Central Telephone Co. (S. D., 1910), 127 N. W. 582.

Inspection. A municipality having power to prescribe reasonable regulations for the conduct of the business of an electric light company may provide for a reasonable inspection of all poles to see if they are secure and charge the

impose license fees in general has been delegated to the local corporation,¹⁴ and the fee is for supervision and

cost thereof to the company. *Saginaw v. Swift Electric Light Co.*, 113 Mich. 660, 72 N. W. 6.

Poles used solely for city purposes. A license tax cannot be imposed by a municipality on poles and wires used exclusively for lighting the city under a contract with it but may be imposed on all poles and wires used for furnishing light to private consumers. *New Castle v. Electric Co.*, 16 Pa. Co. Ct. Rep. 663.

Boroughs have equal power with cities to impose a license tax for the poles erected in streets. *North Braddock v. Central Dist. & Printing Telephone Co.*, 11 Pa. Super. Ct. 24; *Kittanning Electric Light, Heat & Power Co. v. Kittanning*, 11 Pa. Super. Ct. 31.

In Arkansas, an ordinance requiring every person and corporation erecting and using any poles on any street to pay the city as a license a sum equal to twenty-five cents for each of the poles is not invalid as a demand of rental for the use of the streets; and a contract of the municipality with an electric company in respect to the poles does not preclude the city from exercising its police power in imposing such a license. *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 66 L. R. A. 238.

State may levy excise tax. *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994.

14. Authority to license hackmen, draymen, omnibus drivers, etc., and all others pursuing like

occupations and to prescribe their compensation, gives power to license street railways. *Allerton v. Chicago*, 6 Fed. 555.

Operating a street railway is a "business" within the meaning of a statute providing that a license tax may be imposed on such business. *New Orleans v. New Orleans City, etc.*, R. Co., 40 La. Ann. 587, 4 So. 512.

Ordinance requiring water company to pay certain fees for each plug held not authorized by charter of city. *Cambridge v. Cambridge Water Co.*, 99 Md. 501, 58 Atl. 442.

The tax may be imposed under an ordinance relating to a license on omnibuses, carriages, hacks and other vehicles used in carrying passengers. *North Braddock v. Second Ave. Tract. Co.*, 28 Pittsb. L. J. (Pa.) 27.

License for revenue denied. A provision in the charter of the city granting power "to license and regulate," does not authorize the city to exact license fees for revenue purposes from a street railway company. *North Hudson Ry. Co. v. Hoboken*, 41 N. J. L. 71; *New York v. Second Ave. Ry. Co.*, 32 N. Y. 261.

A license on passenger railroad cars for revenue purposes only is not an ordinance for police and internal government. Hence, under general power, without special authority, an ordinance imposing annual tax on passenger railroad cars running into cities is valid. *New York v. Second*

inspection and *not for revenue*,¹⁵ and the fee is reason-

Avenue R. R. Co., 32 N. Y. 261; New York v. Third Ave. Ry. Co., 33 N. Y. 42. These cases considered and limited in New York v. Broadway & Seventh Ave. R. Co., 97 N. Y. 275.

Occupation tax. Levying a tax of a certain per cent on the gross receipts of a public service company is a provision for an occupation tax. Capital City Water Co. v. Board of Revenue of Montgomery County, 117 Ala. 303, 23 So. 970.

15. North Hudson County R. Co. v. Hoboken, 41 N. J. L. 71; New York v. Third Ave. R. Co., 33 N. Y. 42; New York v. Second Ave. R. Co., 32 N. Y. 261; Johnson v. Philadelphia, 60 Pa. St. 445; Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828.

Fee as one for revenue. "But if it be admitted that the sum in question is a reasonable charge for a license as a police regulation (which we must assume), then its incidental operation in augmenting the receipts into the city treasury cannot invalidate it." Johnson v. Philadelphia, 60 Pa. St. 445, 450.

Charter power to license telephone companies and to fix the compensation which they shall pay annually to the city for such license or privilege does not authorize an ordinance requiring all telephone companies to pay an annual license tax of one hundred dollars, where it is a revenue provision and greatly in excess of the cost of issuing the license,

etc. Sunset Tel. & Tel. Co. v. Medford, 115 Fed. 202. This decision, however, seems to go to the extreme as it is very doubtful if a license tax of such sum should be considered one for revenue.

But a municipality may require a gas company to pay annually a reasonable sum to compensate for the city's necessary supervision of the work as well after as during its installation; and a clause in the ordinance that the payments are "for the benefit of the gas and light fund of said city" does not make the ordinance invalid as *one for general revenue*. Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 N. E. 440.

In Wisconsin, it is held that where a city has no power to grant any privileges in the streets to a particular public service company and no power to prevent the use by the company of the streets in a reasonable manner, consistent with the public use, the municipality cannot impose an annual license tax on the company, where the court can clearly see that revenue and not regulation is the aim of the ordinance. Wisconsin Tel. Co. v. Milwaukee, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581, 110 Am. St. Rep. 836.

Under the 1895 statute as amended in 1897, providing for the payment of license fees by street railroads, based on their gross receipts, in lieu of all other taxes, the city of Milwaukee cannot impose an annual license

able;¹⁶ and it is generally held to be immaterial that the authority to use the streets has already been granted by the *legislature*,¹⁷ or the federal gov-

fee of \$15.00 a car, since imposing a fee for revenue rather than one under the police power for a regulation and supervision of the business. *Milwaukee v. Milwaukee Electric Ry. & L. Co.*, 147 Wis. 458, 133 N. W. 593.

The mere power to exclude a corporation from exercising a franchise in a municipality does not include power to allow such exercise on condition of submitting to a special taxation burden as distinguished from a mere license. *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530.

Distinction between a license to regulate and a tax to raise revenue. § 991 *ante*, vol 3.

Modification of rule. Power to license may, however, confer power to tax for revenue, where the legislative intent to confer such power is evident. See chapter on Taxation.

In Missouri, both an *ad valorem* tax and the tax upon the use of the company's cars as street railroad cars can be exacted. *Kansas City v. Corrigan*, 18 Mo. App. 206; *Aurora v. McGannon*, 138 Mo. 38, 39 S. W. 469; *Springfield v. Smith*, 138 Mo. 645, 40 S. W. 757; *St. Louis v. Green*, 70 Mo. 562, and 7 Mo. App. 468; *St. Louis v. Ernst*, 95 Mo. 360, 8 S. W. 558. Such power may be exercised by the city as a police regulation or for the purpose of raising revenue within the constitutional limitations. *Springfield v. Smith*, 138

Mo. 646, 40 S. W. 757. A contract on the part of the city not to levy and collect a tax from a railroad company thereafter, is *ultra vires* and void. *Springfield v. Smith*, 138 Mo. 645, 40 S. W. 757; *State v. H. & St. J. Ry. Co.*, 75 Mo. 208.

An ordinance taxing a street railway \$10 for each car operated by it, and imposing a fine on the company for operating its cars without having paid such license tax, is valid, and a conviction of the manager for violating such ordinance was proper. *Springfield v. Smith*, 138 Mo. 645, 40 S. W. 757.

16. § 1685 *post*.

17. *Baltimore v. United Railways & Electric Co.*, 107 Md. 250, 68 Atl. 557; *Memphis v. Postal Tel. Cable Co.*, 145 Fed. 602, 606, 76 C. C. A. 292 (particular statute involved).

In Mississippi, however, it is held that if a statute authorizes a public service company to use the streets without compensation, the municipality cannot charge the company rent for the use of its streets. *Hodges v. Western Union Tel. Co.*, 72 Miss. 910, 18 So. 84, 29 L. R. A. 770, in which case the ordinance was copied from the St. Louis ordinance declared valid in *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810, but the court distinguishes the federal decision on the ground that St. Louis operates

ernment,¹⁸ or the municipality or otherwise,¹⁹ or that a contract has already been made fixing the terms and conditions for erecting poles in the municipality.²⁰ Where the franchise does not grant the privilege of using the streets, free from any license, the exaction of one does not impair the obligation of the contract.²¹ So it is held

under a freeholder's charter and is the absolute owner of the fee in its streets, but in truth the city has an easement only.

New York. Municipality may not impose a car tax on street car company, operating under a state franchise, unless power to do so is specially delegated. *New York v. New York City Ry. Co.*, 122 N. Y. S. 457.

And in Wisconsin, where a municipality has no right or privilege to grant to a telephone company whose right to use the streets is derived from the legislature, and no power to prevent its use of the streets in a reasonable manner consistent with the public use, it cannot exact a license fee for the privilege of maintaining poles and wires in the streets. *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581.

Contract invalid. But if the legislature has granted a telegraph or telephone company the right to construct their lines upon streets of cities, subject to the right given to cities to regulate the manner of such construction, any contract made by such a company with a city to pay it any sum for permission to establish its lines upon the streets of the city is unenforceable for lack of consideration and the same ap-

plies to a provision in the franchise. *People's Home Telephone Co. v. Gainesville* (Tex. Civ. App.), 141 S. W. 1044.

18. § 1684 *post*.

19. *Boise City v. Boise Artesian Hot & Cold Water Co.*, 136 Fed. 705, 710.

See also cases cited *ante* under general rule.

But in Louisiana, it is held that a municipality cannot impose a charge of five dollars a pole on the poles of a telephone company, which has already been granted a franchise to use the streets. (*New Orleans v. Great Southern Telephone & Telegraph Co.*, 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502), but that a contract giving the right to lay tracks for a street railway, without dispensing with the payment of a license, is not impaired by afterwards imposing such license. *New Orleans v. New Orleans C. & L. L. R. Co.*, 40 La. Ann. 587, 4 So. 512.

20. *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 66 L. R. A. 238.

21. *New Orleans v. Railroad Co.*, 40 La. Ann. 587, 4 So. 512; *State v. Herod*, 29 Ia. 123.

Right to license denied under condition of grant. *Philadelphia v. Empire Pass. Ry. Co.*, 177 Pa. St. 382, 35 Atl. 721.

After expiration of franchise. After the expiration of the term

by the supreme court of the United States that a street railway ordinance under which it *agrees to pay certain sums* for the use of the city streets for a specified period, but not expressly relinquishing the right to exact license fees, does not preclude a subsequent imposition of license fees on the company;²² but in Texas it is held that if a franchise is granted by a city to an electric light company on its agreement to furnish free of charge lines for public buildings, etc., a municipality cannot thereafter impose a license fee as a rental or charge for the use of the streets.²³ And in New York, where the ordinance granting the franchise to use the streets provided for a certain license fee per car as a condition of granting the franchise, a subsequent ordinance raising the fee from twenty to fifty dollars per car was held invalid.²⁴ Other decisions relating to license fees or taxes are set out in the note below.²⁵

for which the franchise of a street railroad company was granted, if not renewed, it is not liable for the license tax during the time it occupies the streets after the expiration of the franchise, it being a mere trespasser on the streets. *Cincinnati Incline Pl. Ry. Co. v. Cincinnati*, 52 Ohio St. 609, 44 N. E. 327.

22. *St. Louis v. United Railways Co.*, 210 U. S. 266, 28 Sup. Ct. 630, 52 L. Ed. 1054.

Contra, *New York v. Twenty-third St. R. Co.*, 79 N. Y. S. 323, 77 App. Div. 373, 378, where franchise was sold to company at public auction for \$150,000.

23. Where an electric light company obtained from a city a franchise to put its poles on the streets, and in pursuance thereof erected its poles, and the franchise required the company to furnish free of charge electric

lights for use in certain public buildings and to furnish electric street lights at certain prices agreed upon, and no other street license fees were therein exacted, the municipality cannot thereafter impose a license fee on the poles owned and used by the company. *Texarkana Gas & Light Co. v. Texarkana* (Tex. Civ. App.), 123 S. W. 213.

See also *St. Louis v. Western Union Tel. Co.*, 63 Fed. 68.

24. *New York v. Third Ave. R. R. Co.*, 33 N. Y. 42.

But see *Railway Co. v. Philadelphia*, 101 U. S. 528.

25. An ordinance fixing a tax of \$50 upon every railroad running through the city was held to be valid and within the power of the city to pass under the authority given it by the state; being a tax imposed upon the business in the town and not a

§ 1684. Same—application of rules.

Subject to the rules just stated, it is generally held that a municipality may impose a mileage license tax on the *pipes of a water company*.²⁶ or may require a license fee for every street car regularly operated.²⁷ So a rea-

tax on the property of the railroad company. *Richmond & Danville Ry. Co. v. Reidsville*, 101 N. C. 404, 8 S. E. 124, 2 L. R. A. 284.

A license on "each and every street railway company," in addition to an *ad valorem* tax on the railroad property, sustained, as not unequal taxation. *Newport News & O. P. Ry. & E. Co. v. Newport News*, 100 Va. 157, 40 S. E. 645.

Where the charter provides for the payment of license fees to the local corporation and the amount is fixed, such fees may be collected without an ordinance. *New York v. Broadway & Seventh Ave. Ry. Co.*, 97 N. Y. 275, 284.

Method of calculating license tax. Under an ordinance requiring a street railroad company to pay \$4 per lineal foot for every car, and in addition 2½ % of the gross earnings, it was held that in calculating the amount due at \$4 per lineal foot the company was not entitled to any allowance for the time when the cars were not in use. *Cincinnati St. Ry. Co. v. Cincinnati*, 8 Ohio N. P. 80.

Under an ordinance imposing a tax of \$2.50 on each working horse in the city it was held that a street railway company was liable for this sum upon each horse in addition to a stipulated license upon each car. *Montreal*

Street Ry. Co. v. Montreal, 23 S. C. (Can.) 259.

Enforcement. The fact that the council has passed an ordinance imposing a penalty for failure of a street railway company to procure a certificate for a license, does not prevent the city from maintaining an action to recover the license fee. *New York v. Eighth Ave. Ry. Co.*, 118 N. Y. 389, 398, 23 N. E. 550.

26. *Kittanning Borough v. Armstrong Water Co.*, 35 Pa. Super. Ct. 174.

27. *Bloomington & N. R. E. & H. Co. v. Bloomington*, 123 Ill. App. 639; *Gettysburg v. Gettysburg Transit Co.*, 36 Pa. Super. Ct. 598.

License on street cars. Ordinance imposing an annual license of fifty dollars per car operated by a street railroad company within the corporate limits was held to be a valid exercise of the police power. *Allerton v. Chicago*, 6 Fed. 555.

Construction of ordinance. Annual license fee of twenty dollars a car for each car held to require payment for each car operated over the line and not merely for the greatest number in daily use during the busiest season of each year. *New York v. New York City R. Co.*, 110 N. Y. S. 720, 126 App. Div. 36, aff'd without opinion in 193 N. Y. 680, 87 N. E. 1117.

sonable license fee may be imposed on *telegraph or telephone poles and wires* within the limits of the municipality,²⁸ and this is so notwithstanding the company is engaged in *interstate commerce*,²⁹ or that the right of

License fees required to be paid by street railway in New York City held to be controlled by the practical construction of the parties by a uniform course of conduct for many years. *New York v. New York City R. Co.*, 193 N. Y. 543, 86 N. E. 565.

An ordinance requiring street railway companies to pay an annual license fee of so much per car may be enforced against all companies whose charters provide that they shall be subject to the payment of license fees. In one case the charter, granting the right to construct and operate the road, was made subject "to the payment to the city of the same license fee annually for all cars run thereon as is now paid by other city railroads in said city." At the time two railroads paid a license fee of \$50 per car, one paid \$20 per car, and three paid no license. Here it was held that a license fee of \$50 per car could be legally levied and collected. *New York v. Broadway & Seventh Ave. Ry. Co.*, 97 N. Y. 275.

28. *Pensacola v. Southern Bell Tel. Co.*, 49 Fla. 161, 37 So. 820; *Braddock v. Allegheny County Tel. Co.*, 25 Pa. Super. Ct. 544; *Norwood v. Western Union Tel. Co.*, 25 Pa. Super. Ct. 406.

§ 1019 *ante*, vol. 3; § 783 *ante*, vol. 2.

Nature of charge. *Postal Tel. Cable Co. v. Newport*, 25 Ky. L. Rep. 635, 76 S. W. 159.

Discrimination. An ordinance making it unlawful to erect telephone poles without a franchise, as relating to companies doing a *local or intrastate business*, and imposing a semi-annual charge of seventy-five cents for each pole of a line used in *interstate business* unless the interstate company has secured a franchise or privilege, does not discriminate against the interstate company. *Sunset Telephone & Telegraph Co. v. Pasadena (Cal., 1912)*, 118 Pac. 796.

29. *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, *rev'g* 39 Fed. 59.

Municipalities may impose upon telegraph and telephone companies using the streets by permission or license, as distinguished from an irrevocable grant or franchise, a reasonable charge in the nature of a rental for the exclusive use of the parts of the street occupied by poles; and sometimes charges may be imposed upon public service corporations occupying the streets of a municipality, not by way of rental, but in the exercise of police power in the nature of a license fee. *Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, 97 N. E. 672.

a telegraph company to use the streets is derived from the federal statute of 1866 relating to telegraph companies.³⁰

§ 1685. Same—reasonableness of amount of license.

The general rules as to the reasonableness of the amount of license is considered in another volume.³¹ Primarily, the amount of the license fee imposed on a public service company is discretionary with the municipality,³² but the reasonableness of any such charge is a matter for judicial investigation,³³ although such discretion will not be interfered with in the absence of fraud or abuse.³⁴ So, where not prohibited by statute or otherwise, the amount of the fee may be increased or decreased from time to time.³⁵ *Prima facie*, a license

30. *Philadelphia v. Postal Telegraph-Cable Co.*, 66 Hun (N. Y.) 633, 67 Hun (N. Y.) 21, 21 N. Y. S. 556; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, rev'g 39 Fed. 59; *Western Union Telegraph Co. v. Attorney General*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, 97 N. E. 672.

Municipality may impose charge of two dollars a pole and the same sum per mile of underground wire, on a telegraph company which has the right to use the streets because of the federal statute. *Western Union Tel. Co. v. Richmond (U. S.)* (decided April 1, 1912), 32 Sup. Ct. 449, aff'g 178 Fed. 310.

31. § 1002 *ante*, vol. 3.

Question for court. Reasonableness of license tax for poles is a question for the court and not for the jury. *Taylor v. Postal Tel. Cable Co.*, 202 Pa. St. 583, 52 Atl. 128; *West Conshohocken v.*

Conshohocken Electric Light & Power Co., 29 Pa. Super. Ct. 7. But in some cases may be questioned for jury. *Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U. S. 160, 166, 23 Sup. Ct. 817, 47 L. Ed. 995.

Defenses in action to recover. The fact that in previous years the borough neglected its supervisory duty and was put to no expense for police supervision of the poles is no defense to an action to recover a license fee of a certain sum per pole. *West Conshohocken v. Conshohocken Electric Light & Power Co.*, 29 Pa. Super. Ct. 7.

32. *Sunset Telephone & Telegraph Co. v. Pasadena (Cal., 1912)*, 118 Pac. 796; *Byrne v. Chicago Gen. R. Co.*, 169 Ill. 75, 48 N. E. 703.

33. § 784, note 30 *ante*, vol. 2.

34. *North Braddock v. Second Ave. Tel. Co.*, 8 Pa. Super. Ct. 233.

35. *State ex rel. v. Hilbert*, 72 Wis. 184, 39 N. W. 326.

fee is reasonable, and it devolves on the public service company to show the contrary.³⁶ And a license fee is not unreasonable merely because it yields a return in excess of the amount necessary to reimburse the municipality for the costs of supervision and inspection,³⁷ since the exact cost of supervision is incapable of proof in advance; and hence the municipality may make the charge large enough to cover any reasonable anticipated

36. *Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U. S. 160, 165, 23 Sup. Ct. 817, 47 L. Ed. 995.

Requiring an electric light company to number and designate with figures each of its poles in the city and to pay a license of fifty cents a year for each pole is reasonable and valid. *Lancaster v. Edison Electric Illuminating Co.*, 8 Pa. Co. Ct. Rep. 178.

37. *Western Union Tel. Co. v. New Hope Borough*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240.

Reasonableness of license fee. In *Chester City v. Western U. Tel. Co.*, 154 Pa. 464, 25 Atl. 1134, in which it was averred in the affidavit of defense that the rates charged were at least five times the amount of the expense involved in the supervision exercised by the municipality, the supreme court said: "For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary, or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. *It makes no reference to the liability imposed upon the city by the erection of telegraph poles.* It is the duty of the city to see that the poles are safe, and prop-

erly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the *amount actually expended by the city for a particular year*, to the particular purposes specified in the affidavit."

In *Taylor v. Postal Tel. Cable Co.*, 202 Pa. 583, 52 Atl. 128, the supreme court said: "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation, and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. * * * Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts, and is to be determined upon a view of the facts, not upon

expenses, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual cost of supervision.³⁸

Furthermore, what "is reasonable in one municipality may be oppressive and unreasonable in another."³⁹ However, the fee is invalid if its amount is so much in excess of that necessary for supervision and inspection that it is clear the fee is one for revenue.⁴⁰ For instance, where the license fee charged was more than twenty times what would reasonably be expended for inspection, the ordinance was held void on the ground that it was plainly a revenue measure.⁴¹

An annual license fee of a dollar a pole, and two dollars and a half per mile of wire, imposed on telegraph, telephone and electric light poles, has been held reasonable.⁴² So a charge of one dollar,⁴³ two dollars,⁴⁴ and

evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same."

License tax of three dollars for making any excavation held reasonable. *Pottsville Borough v. Pottsville Gas Co.*, 33 Pa. Super. Ct. 480.

38. *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 164, 165, 23 Sup. Ct. 817, 47 L. Ed. 995.

39. *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 167, 23 Sup. Ct. 817, 47 L. Ed. 995.

40. See *Denver City R. Co. v. Denver*, 21 Colo. 350, 41 Pac. 826, 29 L. R. A. 608, 52 Am. St. Rep. 239; *Gettysburg v. Gettysburg Transit Co.*, 36 Pa. Super. Ct. 598.

§ 783 *ante*, vol. 2.

41. *Postal Tel. Cable Co. v. Taylor*, 192 U. S. 64, 70, 24 Sup. Ct. 208, 48 L. Ed. 342.

42. *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240, aff'g 16 Pa. Super. Ct. 306.

43. Ordinance requiring inspection by municipal officer of all telegraph poles within the city and imposing a fee of a dollar a pole is reasonable. *Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820.

An ordinance which fixes a charge of one dollar a year for each pole of a telegraph company as a remuneration to the municipality for the use of the street by the pole is *prima facie* reasonable, and the burden to prove unreasonableness is upon those who assert the contrary. *Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, 97 N. E. 672.

44. *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161, aff'd in 156 U. S.

three dollars per pole⁴⁵ have been held reasonable. On the other hand, five dollars a pole has been held unreasonable.⁴⁶

c. Right to attack franchise.

§ 1686. Who may attack validity of franchises and how.

The validity of a franchise granted by a municipal corporation is not subject to collateral attack.⁴⁷ Nor can it ordinarily be attacked by one who does not claim an

210, 15 Sup. Ct. 356, 39 L. Ed. 399.

May impose a charge of two dollars a pole per year and provide a penalty for its non-payment. *Western Union Telegraph Co. v. Richmond*, 178 Fed. 310, 321, aff'd in (U. S.) 32 Sup. Ct. 449 (decided April 1, 1912).

"While it is true that the city cannot impose a tax upon the franchises of the company, as that would be a burden upon interstate commerce, still it can make a reasonable charge for the use of its property, in which all the public are interested; and if the complainant occupies any of such property there is no reason why it should not pay a reasonable rent for it, as all citizens and all other corporations do for a like use. It is not a tax, in the sense in which that word is ordinarily used, but is in the nature of a special toll, imposed for a specific use of designated property by a particular party. The poles deprive the city and the public of the use of certain portions of the streets, and frequently necessitate the excavation, repair, and inspection of the same, causing expense to the city and inconvenience to

the public. A toll of two dollars per pole per annum might be an unreasonable charge along a country highway, but in a thickly settled section, like the streets of the city of Richmond, where many people for various purposes make continuous uses of them, the sum of two dollars per year for such use per pole seems entirely proper and reasonable." *Western Union Telegraph Co. v. Richmond*, 178 Fed. 310, 324, aff'd in (U. S.) 32 Sup. Ct. 449 (decided April 1, 1912).

45. *Memphis v. Postal Tel. & Cable Co.*, 164 Fed. 600.

46. *St. Louis v. Western Union Tel. Co.*, 63 Fed. 68.

47. *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 346, 65 N. E. 329; *Lees v. Drainage Com'rs*, 125 Ill. 47, 50, 16 N. E. 915; *Vicksburg, etc. R. Co. v. Monroe*, 48 La. Ann. 1102, 30 So. 664; *Consumers Gas, etc. Co. v. Congress Spring Co.*, 61 Hun (N. Y.) 133, 15 N. Y. S. 624; *Franklin Trust Co. v. Peninsular Pure Water Co.*, 161 Fed. 855.

Remedies, see § 1763 *et seq.*, *post.*

exclusive or concurrent right.⁴⁸ Thus, if a grant is claimed to be invalid because exclusive, the only one who can raise the question is one claiming the right to do something contrary to such exclusive feature.⁴⁹

Usually a taxpayer or an abutting owner cannot attack the validity of a franchise,⁵⁰ at least unless he sus-

48. *New Orleans Gas Light Co. v. Hart*, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544; *Larimer, etc. St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533, 20 Atl. 570; *Patton v. Chattanooga*, 108 Tenn. 197, 65 S. W. 414.

§ 1763 *post*.

Right of competitors to attack franchise, see § 1771 *post*.

49. *Patton v. Chattanooga*, 108 Tenn. 197, 65 S. W. 414; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

50. *Sommers v. Cincinnati*, 6 Ohio Dec. 887.

§ 1763 *post*.

A taxpayer cannot prevent the municipality from granting a franchise unless it will increase the rate of taxation. *Clark v. Interstate Independent Tel. Co.*, 72 Neb. 883, 101 N. W. 977; *Linden Land Co. v. Milwaukee Electric R. & L. Co.*, 107 Wis. 493, 83 N. W. 851.

A franchise having been granted to a corporation, and accepted and acted upon by it, became a contract between itself and the city, and one not a party to such contract cannot question its validity. *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 347, 65 N. E. 329.

However, it has been declared that an individual may have an

incorporeal interest in a street as will enable him to enjoin a diversion of it to objects and uses inconsistent with the purposes for which it was granted. *Ingram v. Chicago, etc. R. Co.*, 38 Ia. 669.

An injunction will not be granted at the suit of a taxpayer to enjoin the construction of a street railway if it does not appear that any wrong or injury resulted to the city by the council granting the right to construct the same. *Sloane v. People's Electric R. Co.*, 7 Ohio Cir. Ct. Rep. 84.

Taxpayer cannot question the validity of a franchise on the ground that the grant was inadvisable or not for the best interests of the city. *Linden Land Co. v. Milwaukee Electric R. & L. Co.*, 107 Wis. 493, 83 N. W. 851.

Nor can an abutting property-owner attack such a grant on the ground of inexpediency, it being legislative in character. *Lange v. LaCrosse, etc. R. Co.*, 118 Wis. 558, 95 N. W. 952.

In New York, however, in an early case, it was held that where the city of New York had granted the use of streets for a railway track on terms less advantageous to the city than the offers of others, taxpayers could sue in their own name to enjoin the laying of the tracks. *Milbau v. Sharp*, 15 Barb. (N. Y.) 193.

tains some special injury because thereof,⁵¹ or unless the right to test the validity of the franchise is granted to private persons by statute.⁵²

§ 1687. Estoppel of municipality to object to use of streets.

It has been noted in a preceding volume in the chapter relating to municipal contracts in general that an *ultra vires contract* is void,⁵³ and that the general rule is that if a contract is entered into by a municipality without observing mandatory legal requirements, no recovery can be had against the municipality because of ratification or on the ground of estoppel, or for the benefits actually received on the theory of an implied contract.⁵⁴ Applying these rules to the granting of franchises (and no good reason is apparent why they should not be so applied), it is held that a municipality cannot be estopped to question the use of its streets without a franchise, or the validity of a franchise, where it had *no power* to grant such a franchise,⁵⁵ as where the

51. *McWethy v. Aurora Electric Light & P. Co.*, 202 Ill. 218, 67 N. E. 9; *Tallon v. Hoboken*, 60 N. J. L. 212, 37 Atl. 895; *State v. Trenton*, 36 N. J. L. 79; *Patton v. Chattanooga*, 108 Tenn. 197, 65 S. W. 414.

52. *State ex rel. v. Milwaukee Ind. Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315.

53. § 1172 *ante*, vol. 3.

54. § 1181 *ante*, vol. 3.

55. *Missouri. State ex rel. v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 L. R. A. 369, 56 Am. St. Rep. 515.

New York. Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186.

Ohio. Brush Electric Light Co. v. Jones Bros. Electric Co., 5 Ohio Cir. Ct. Rep. 340.

Pennsylvania. Com. v. Erie &

N. E. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

Wisconsin. See Ashland v. Chicago & N. W. R. Co., 105 Wis. 398, 80 N. W. 1101.

United States. Detroit v. Detroit City R. Co., 56 Fed. 867 (no power to grant extension of franchise).

But see *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43, 82 N. W. 821.

Where a franchise to use streets is without authority of law, and this defense is interposed to defeat the franchise, ratification or estoppel cannot be set up against such defense of *ultra vires*. *State ex rel. v. Monroe*, 40 Wash. 545, 82 Pac. 888.

Want of authority of committee of common council and of city attorney to consent to use

grant was a perpetual one,⁵⁶ or where the franchise is granted without complying with mandatory requirements of the statute or charter,⁵⁷ as where it is not submitted for sale to the highest bidder.⁵⁸ So a municipality is not estopped because of the expenditure by the company of large sums on the faith of a franchise to use the street, to deny the validity of a grant beyond the life of the company.⁵⁹ And the fact that the grantee of a franchise has acted in good faith and fulfilled all its obligations does not estop the municipality to attack the grant of an *exclusive* franchise.⁶⁰

On the other hand, if a municipality *has the power to grant a franchise*, and a public service company uses the streets with the knowledge of the municipality, the latter may be estopped to question the right to use the streets without a franchise, or the validity of the franchise granted where it does not violate statutory or charter requirements.⁶¹ For instance, a municipality,

of streets may be relied on by municipality. *St. Louis, A. & T. H. R. Co. v. Belleville*, 122 Ill. 376, 12 N. E. 680, and see § 1181, note 10, *ante*, vol. 3.

56. *Logansport R. Co. v. Logansport*, 114 Fed. 688.

57. *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 271, 2 S. E. 636 (vote of inhabitants required).

58. *Tri-State Telephone & Telegraph Co. v. Thief River Falls*, 183 Fed. 854, citing Minnesota statute, in which case franchise was granted without advertising for proposals or any competition as required by the charter and it was held that the city was not estopped from questioning the validity of the franchise although the grantee had expended money thereafter and Judge Willard said: "It is very easily seen, therefore, that it would be within

the power of a city council and a corporation desiring a franchise to entirely nullify the law, by the city granting a franchise without notice, without soliciting proposals, and without advertising, and the corporation commencing at once the installation of its plant, thereby making the estoppel complete, while the council granting the franchise was in office, and before the general public had an opportunity to know what had been done, or to become aroused to the necessity of action" (p. 858).

§ 1181 *ante*, vol. 3.

59. *Detroit v. Detroit City R. Co.*, 56 Fed. 867, 60 Fed. 161.

60. *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526.

61. *Illinois. Chicago v. Union Stock Yards & T. Co.*, 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 181;

which has acquiesced for years in the use of its streets by a public service company, which has spent thousands

Chicago & N. W. R. Co. v. People, 91 Ill. 251; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25.

Iowa. See *Farmers' Telephone Co. v. Washta* (Ia., 1911), 133 N. W. 361.

Missouri. *Union Depot Co. v. St. Louis*, 8 Mo. App. 412, *aff'd* in 76 Mo. 393.

New Jersey. *North Jersey St. R. Co. v. Newark*, 73 N. J. Eq. 106, 67 Atl. 691.

Pennsylvania. *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210.

Washington. See also *Spokane St. Ry. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072.

United States. *Louisville v. Cumberland Tel. & Tel. Co.* (U. S.) (decided May 13, 1912), 32 Sup. Ct. 572. Compare *Cleveland v. Cleveland C. C. St. L. R. Co.*, 93 Fed. 113, 123.

§ 1164, p. 2567 *ante*, vol. 3.

Estoppel to attack use of streets. In *Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co.*, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 677, it was said: "But we know as matter of current history that street railways have been projected, and actually constructed, and are now in operation, over country roads where no legal consent has been obtained, and where no attention has been paid to the rights of property holders. Such railways cannot now be torn up or enjoined either by the township officers or at the instance of landowners along their routes. Where such

enterprises have been allowed to proceed, and the expenditure of large sums of money has been permitted, it would be inequitable to correct at this time what was a mutual mistake under the influence of which these enterprises have been pushed to completion."

"It has frequently been decided that the doctrine of *estoppel in pais* is applicable to municipal corporations, but that they will be estopped, or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule; and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine. In the exercise of proper diligence, the public authorities may prevent encroachments upon public right, and, if they do not, any citizen may take the necessary steps to do so; and if there is not only a failure to act by either, but affirmative action by

of dollars in connection with such use, and which has received the benefits of such use of the streets and has

the public authorities, with the apparent approval of every one interested, under which the situation is changed, and permanent improvements are made, the principles of equity require that the public should be estopped." *People ex rel. v. Rock Island*, 215 Ill. 488, 74 N. E. 437.

A municipality may be precluded by laches from compelling a public service company to remove its poles from the streets, by failure to object thereto for many years, during which permission has been granted to use the streets and valuable considerations had been received by the city and was still being received (*Bradford v. New York & P. Tel. & Tel. Co.*, 206 Pa. St. 582, 56 Atl. 41), but mere delay for a short time, after notice to remove the poles, to resort to force to remove the poles does not estop the municipality (*Keystone State Tel. & Tel. Co. v. Ridley Park*, 28 Pa. Super. Ct. 635).

Omission of name in grant. The fact that a resolution granting permission to use the streets does not specify the name of the telephone company granted the permission, cannot be urged as an objection to the grant, where the grantee of the privilege took possession under the resolution and held for a number of years with the acquiescence of the municipality. *East Tennessee Telephone Co. v. Frankfort*, 141 Ky. 588, 590, 133 S. W. 564.

Want of consideration. That

extension of franchise was without legal consideration cannot be urged by city, where it knew the extension was to be used as a basis for negotiating a loan for the company. *City R. Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114.

Necessity for ordinance. A municipality which has granted a company the right to use streets is estopped to assert that the consent required to be given by the statute should, in the first instance, have been by ordinance. *London Mills v. White*, 208 Ill. 289, 70 N. E. 313.

Use for certain purposes. Ordinance regulating use of and imposing gross earnings tax on electric companies, and acceptance of taxes from a company based on its income from electricity furnished for power as well as lighting purposes, held not to estop the municipality to deny the right of an electric light company to use the streets for other than lighting purposes, i. e., to supply electricity for power or heating purposes. *Omaha Electric Light & Power Co. v. Omaha*, 172 Fed. 494, 497.

Presumptions. Acquiescence by the municipal authorities for a great many years in the use of its streets by a public service company authorizes a presumption that consent to such use had been given by the municipality. *People ex rel. v. Cromwell*, 85 N. Y. S. 878, 89 App. Div. 291.

regulated the use and levied licenses and granted permission as to certain uses, cannot contest the right of the company to use the streets.⁶²

Likewise, acquiescence by a municipality in the use of streets by a railroad company pursuant to a grant of such right by the legislature, precludes the municipality from objecting thereto.⁶³ So it has been held that where a municipality permits a company to expend a large sum in preparing to supply the city with gas it *cannot refuse* the company the right to lay pipes through the streets.⁶⁴ But it has been held that a municipality is not estopped to prevent the use of the streets by a railway, because of its silence while the company expended money in constructing its road in the streets.⁶⁵

Furthermore, the use of a street by a public service company, although no grant of the right to use the street has been made, where for the period required by the

Special meetings of council. Where no particular mode of manifesting municipal consent to the use of its streets by a public service company is prescribed by the statutes or charter, a municipality is estopped from contesting the validity of an ordinance granting the use of streets on the ground that the special meeting of the council at which the ordinance was granted was irregular, in that notice had not been given to absent aldermen and that it was held in pursuance of an ordinance in regard to special meetings which had never been legally adopted. *Missouri River Tel. Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67.

62. *Bradford v. New York & P. Tel. & Tel. Co.*, 206 Pa. St. 582, 56 Atl. 41.

63. *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210.

64. *Atlanta v. Gate City Gas-light Co.*, 71 Ga. 106.

65. *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 352.

In Michigan, it is held that where a street railway laid its tracks in a highway without obtaining authority from the township (and it seems that the township had authority to grant such consent), the fact that the officers of the township made no objection to the building and maintenance of the road does not estop the township from bringing proceedings against the company to compel it to remove its tracks. *Bangor Tp. v. Bay City T. & E. Co.*, 147 Mich. 165, 110 N. W. 490, 7 L. R. A. (N. S.) 1187, 11 Am. & Eng. Ann. Cas. 293.

statute of limitations, may give a right to use the street by *prescription*.⁶⁶

§ 1688. Estoppel of grantee of franchise to attack it.

The general rule is that one who makes a contract with a municipality is estopped to assert that it is *ultra vires*, when it is sought to be enforced against him.⁶⁷ On the same theory, the beneficiary of a grant to use the streets, who has acquiesced therein and received valuable property thereunder, is estopped to deny its validity as against the municipality and another beneficiary.⁶⁸ Thus, the grantee of a franchise which has accepted it is estopped to attack the validity of the grant on the ground that the municipality had no power to grant it,⁶⁹ or to claim that the conditions of the franchise are *ultra vires*,⁷⁰ although there is a line of cases holding

66. *New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 57 N. E. 516.

§ 1396 *ante*, vol. 3.

Street railroad. Right of a municipality to enjoin the operation of a street railroad in its streets may be barred by the statute of limitations. *Cincinnati v. Columbia & C. St. Ry. Co.*, 17 Wkly. Law Bul. (Ohio) 192.

67. § 1276 *ante*, vol. 3.

68. *Kirtland v. Macon*, 66 Ga. 385.

69. *Bolivar v. Bolivar Water Co.*, 70 N. Y. S. 750, 62 App. Div. 484.

70. *People ex rel. v. Suburban R. Co.*, 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; *Chicago Gen. Ry. Co. v. Chicago*, 176 Ill. 253, 52 N. E. 880, 66 L. R. A. 959, 68 Am. St. Rep. 188; *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, 63 Atl. 84; *Sandy Lake Borough v. Sandy Lake & Stoneboro Gas Co.*, 16 Pa. Super. Ct.

234; *Vermillion v. Northwestern Telephone Exchange Co.*, 189 Fed. 289.

Estoppel to attack conditions. Condition that city may condemn portions of tracks of street railway for joint use of other companies, when deemed necessary, cannot be repudiated because the city has no power to condemn for such purposes. *Mercantile Trust & Deposit Co. v. Collins Park & D. R. Co.*, 101 Fed. 347.

Where a public service company voluntarily enters into a contract with a municipality and thereby recognizes the right of the municipality to make it and to grant certain rights and privileges thereafter used and enjoyed by the company, the latter is estopped, according to the general rule, from questioning the right of the municipality to grant the privilege, and repudiating that part of its agreement limiting the rates as provided in the

that where the condition imposed is unlawful the grant is valid but the condition is of no effect.⁷¹ In other words, the general rule is that although the municipality has no power to impose conditions on granting the right to use the streets, the public service company is nevertheless bound by conditions imposed, where it accepts the grant with the conditions and the municipality has the right to refuse to consent to the use of the streets, since it may be assumed that without such conditions consent would not have been given.⁷² So a company which has accepted a franchise containing conditions is estopped from thereafter claiming that the conditions

contract. *Rochester Telephone Co. v. Ross*, 109 N. Y. S. 381, 125 App. Div. 76, followed in *Farnsworth v. Boro Oil & Gas Co.*, 134 N. Y. S. 348.

In Massachusetts, however, a street railway company, by accepting a location granted by the board of aldermen of a city or the selectmen of a town, does not make valid conditions which the city or town could not lawfully impose. *Keefe v. Lexington & B. St. R. Co.*, 185 Mass. 183, 70 N. E. 37, followed in *Worcester v. Worcester Consol. St. R. Co.*, 192 Mass. 106, 111, 78 N. E. 222, and *Clinton v. Worcester Consol. St. R. Co.*, 199 Mass. 279, 285, 85 N. E. 507.

In California, the rule is limited. Thus it is held that the company is not estopped to attack an extraterritorial condition, on the theory that this rule as to estoppel "cannot be made to cover conditions entirely beyond the range of the municipal authority." *Arcata v. Green*, 156 Cal. 759, 764, 106 Pac. 86.

71. § 1649 *ante*.

Unauthorized conditions. If the municipality has no power to compel a public service company to furnish supplies or service at certain rates, the fact that the company complies for some time with a franchise requiring it to furnish supplies or service at stipulated rates, does not estop the company from afterwards refusing to comply. *Wright v. Glen Tel. Co.*, 99 N. Y. S. 85, 112 App. Div. 745, *aff'd* 95 N. Y. S. 101.

72. *Southern Bell Tel. & Tel. Co. v. Richmond*, 103 Fed. 31, 38, 44 C. C. A. 147.

A telephone company which without objection accepts and acts upon a franchise granted by a city, is bound by the conditions thereof, although the council had no power to impose them, but merely power to give or withhold consent. *Southern Bell Tel. & Tel. Co. v. Richmond*, 98 Fed. 671, *aff'd* in 103 Fed. 31, 44 C. C. A. 147.

are unreasonable.⁷³ On the other hand, where a municipality has *no power to grant a franchise* to use a street, it cannot be contended that a company to whom it has granted a franchise is estopped to deny the validity of the grant as to conditions imposed, while accepting the benefits thereof.⁷⁴

d. *Duties and liabilities of grantee of franchise.*

§ 1689. Duty to furnish supply or service.

It was held in some early cases that a public service company, such as a gas company, was under no more obligation to continue to supply its customers than the vendors of any other article.⁷⁵ But now the well settled

73. *Kansas City v. Kansas City Belt R. Co.* (Re Topping Avenue), 187 Mo. 146, 86 S. W. 190.

But see *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, 63 Atl. 84.

74. *South McAlester-Eufaula Telephone Co. v. State ex rel.*, 25 Okla. 524, 106 Pac. 962.

Compare *New Cumberland Borough v. Riverton Consolidated Water Co.*, 232 Pa. 525, 81 Atl. 548.

Where the only power possessed by a municipality in regard to pay for the use of its streets by a telephone company was to demand compensation necessary to restore the pavement to its former state of usefulness, but the city was authorized to agree on the "mode of use" by the company, and it granted a more beneficial mode of using the streets than it otherwise would have, pursuant to an invalid agreement as to rates and furnishing free telephone service to the municipality, the company is

nevertheless not estopped to deny the validity of the arrangement as to rates, etc., notwithstanding the benefits conferred because of consenting to such arrangement. *Farmer & Getz v. Columbiana County Telephone Co.*, 72 Ohio St. 526, 74 N. E. 1078.

In an action by an *individual* claiming the benefits of a condition as to rates imposed upon a railroad company, on granting the right to use the streets, where the municipality had no authority to grant the right to use the streets and no authority to fix the rates as a condition, the railroad company is not estopped from relying upon the invalidity of the condition as to rates as a defense, notwithstanding it is using the streets. *T. B. Townsend Brick & Contracting Co. v. Central Trust Co.*, 187 Fed. 63, 70.

75. *McCune v. Norwich City Gas Co.*, 30 Ky. 521, 79 Am. Dec. 278; *Paterson Gaslight Co. v. Brady*, 27 N. J. L. 245, 72 Am. Dec. 360.

rule is to the contrary, and it is universally held that a public service company, or a municipality which performs the duties of a public service company, must furnish a supply or services, to any applicant, within the prescribed territory, and cannot cut off the supply or service without good cause,⁷⁶ and cannot unjustly dis-

76. *California*. McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264.

Indiana. Indiana Natural & Illuminating Gas Co. v. State ex rel., 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761; Indiana Natural & Illuminating Gas Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868; Rushville v. Rushville Natural Gas Co. (Ind.), 28 N. E. 853; Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639, holding right to supply is not limited to those having an interest in the company.

New York. McEntee v. Kingston Water Co., 165 N. Y. 27, 58 N. E. 785; Jones v. Rochester Gas & Electric Co., 158 N. Y. 678, 52 N. E. 1124, aff'g 39 N. Y. S. 1110, 7 App. Div. 474; Whitehouse v. Staten Island Water Supply Co., 91 N. Y. S. 544, 101 App. Div. 112.

Oregon. Haugen v. Albina Light & Water Co., 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424.

Texas. Van Alstyne v. Morrison, 33 Tex. Civ. App. 670, 77 S. W. 655.

West Virginia. Charleston Natural Gas Co. v. Low, 52 W. Va. 662, 44 S. E. 410.

Duty to supply. Provided there is a reasonable expectation that the consumption of the supply will warrant the necessary preliminary expenditure. Public Service Corp. v. American Light-

ing Co., 67 N. J. Eq. 122, 57 Atl. 482.

It was said by Chancellor Pitney in Long Branch Commission v. Tintern Manor Water Co., 70 N. J. Eq. 71, 62 Atl. 474, in speaking for the court of chancery of New Jersey, that: "A company which seeks and obtains a franchise to supply a certain territory with water for public and domestic uses is under a moral, and in my judgment a legal, obligation to furnish a supply which shall be equal to all emergencies which may be reasonably anticipated, including unusual droughts and unusual conflagrations, and to bear constantly in mind the prospective increase in population and a consequent increased demand for water."

The duty of a city to supply water at reasonable rates to all takers, without discrimination, does not carry with it any obligation to supply water free of charge for a property owner's private fire system. Shaw Stocking Co. v. Lowell, 199 Mass. 118, 85 N. E. 90, 18 L. R. A. (N. S.) 746.

Duty of telephone company to serve all persons alike extends to service to telegraph companies as well as individuals. Delaware v. Delaware & A. Tel. & Tel. Co., 47 Fed. 633.

criminate between patrons.” “To compel a public service corporation to live up to the law of its existence, and to discharge the duties for which it was organized and for which it received its franchise, can in no case amount to a *confiscation* of its property, or taking its property without *due process of law*, even though such requirement necessitates the corporation using a part or all of its property or investing its money in order to

Gas. Rule applies to gas companies. *New Orleans Gaslight & Banking Co. v. Baulding*, 12 Rob. (La.) 378; *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479, including a natural gas company. *Portland Natural Gas & Oil Co. v. State*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

Street sprinkling. A water company cannot arbitrarily refuse to supply water to one engaged in the business of street sprinkling because he is not an inhabitant of the city or because water is not furnished directly to the citizens. *Wiemer v. Louisville Water Co.*, 130 Fed. 251.

Municipal ownership. Municipality which owns its plant cannot arbitrarily refuse to furnish a supply to any one, at least for a purpose which it has recognized as legitimate and which it has granted to other persons. *Gordon & Ferguson v. Doran*, 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1049.

Electricity—ordinance requiring supply. Ordinance requiring companies using streets for distribution of electricity, to install their service upon the demand of any citizen, is unreasonable where not

limited to those parts of the city to which the conduits or lines of the companies are extended; and another provision requiring installation on a deposit of the value of one month's service and providing that the service shall not be discontinued "except by consent of the city council or by request of the consumer" is unreasonable because forbidding the company to cut off the supply where good cause exists therefor if city does not consent thereto or the consumer request it. *Minneapolis General Electric Co. v. Minneapolis*, 194 Fed. 215, 219.

Notice of shutting off or removal. Provision in contract with telephone company for written notice by company of removal of telephone may be waived by patron. *Malochee v. Great Southern Tel. & Tel. Co.*, 49 La. Ann. 1690, 22 So. 922.

The rights of water or light consumers, in the absence of a fixed rate, are limited to the right to receive water or light (1) at reasonable rates and (2) without discrimination. *Johnson-Kahn Co. v. Thompson*, 130 N. Y. S. 216.

77. § 1697 *post*.

meet its duties and obligations.”⁷⁸ But if a water company is chartered to supply water for “domestic purposes,” it cannot be compelled to supply water for purposes not coming within the term domestic.⁷⁹ And it has been held that where a consumer of gas puts electric lights into his premises and subsequently uses gas only occasionally, he ceases to be a consumer of gas within a statute requiring gas companies to supply gas to consumers.⁸⁰ So it is self-evident that a municipality cannot compel a public service company, without its consent, to furnish a supply in a manner and at a rate entirely at the option of the consumer.⁸¹

Likewise, the duty to furnish a supply does not exist in favor of a *non-resident* of the municipality,⁸² or one

78. *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670.

Compelling water company to put in laterals from its main to the property line of an abutting owner at an expense of \$8.50, where he tenders a monthly water rate of \$1.50 in advance, does not constitute confiscation or a taking of property without due process of law, since the rental rate constitutes a fair income on the sum invested and it will not be presumed that consumers will pay for a month's supply merely to compel the company to put in laterals. *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670.

79. *Kimball v. Northeast Harbor Water Co.*, 107 Me. 467, 78 Atl. 865, holding that furnishing water to operate an elevator in a summer hotel was for *domestic purposes*.

Duty to supply “for family uses” includes water for drinking, bathing, for domestic animals, and for other like domestic uses.

Spring Valley Waterworks v. San Francisco, 52 Cal. 111.

“Domestic uses or purposes, of water for a family occupying a dwelling house, include all uses which contribute to the health, comfort and convenience of the family in the enjoyment of their dwelling as a home.” *Crosby v. Montgomery*, 108 Ala. 493, 18 So. 723.

Manufacturing purposes. The use of water for manufacturing purposes is not a domestic use because the manufactured products are used for domestic purposes. *Gallagher v. Philadelphia*, 4 Pa. Super. Ct. 60.

80. *Adams Exp. Co. v. Cincinnati Gaslight & Coke Co.*, 10 Ohio Dec. 389.

81. *Logan Natural Gas & Fuel Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 122.

82. *Crouch v. Arnett*, 71 Kan. 49, 79 Pac. 1086; *Childs v. Columbia*, 87 S. C. 566, 70 S. E. 296; *Sturgeon v. Paris*, 56 Tex. Civ.

outside the territorial limits served by the company.⁸³

§ 1690. Same—grounds for refusing supply or service.

The following, *inter alia*, have been held good grounds for refusing a supply or services, or for cutting off the supply or service: refusal of consumer to comply with, or violation of, reasonable rules or regulations of the company;⁸⁴ refusal to pay for current

App. —, 122 S. W. 967 (construing charter provision where house outside city limits but part of land inside).

A non-resident of a city cannot enjoin the city from cutting off his water supply or charging him a water rate alleged to be unreasonable, since a city operating waterworks does not assume toward a non-resident the relations and duties of a public service company but is bound only by the contracts actually made. *Childs v. Columbia*, 87 S. C. 566, 70 S. E. 296; and see *Childs v. Columbia*, 87 S. C. 573, 70 S. E. 299, where it was held that city was not estopped to terminate agreement with such consumer on thirty days' notice.

Foreign corporation not entitled to supply, see *American Lighting Co. v. Public Service Corp.*, 132 Fed. 794.

Public service companies cannot collaterally attack, after the lapse of five years, the validity of the act of the city council in extending the city limits. *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670, citing *McQuillin*, Mun. Ord., § 279.

83. Whether an applicant for water living outside the municipality is within a reasonable dis-

tance from the main line is a question for the court and cannot be arbitrarily fixed by the water company. *West Hartford v. Board of Water Com'rs*, 68 Conn. 323, 36 Atl. 786.

84. *Kimball v. Northeast Harbor Water Co.*, 107 Me. 467, 78 Atl. 865; *Treadwell v. Van Schaick*, 30 Barb. (N. Y.) 444; *Harbison v. Knoxville Water Co.* (Tenn. Ch.), 53 S. W. 993.

Violation of rules—cutting off supply. The owner of a building in the possession of a tenant cannot enjoin the shutting off of the supply for a violation of rules by the tenant. *Brass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905.

Telephone company may forbid attachment of private extension instruments to their lines and may refuse to furnish a telephone to one refusing to comply with the rules. *Gardner v. Providence Tel. Co.*, 23 R. I. 262, 49 Atl. 1004.

Deposits. Burden of showing that deposit, as condition precedent to supply, is unreasonable in amount, is on the consumer. *Bennett v. Eastchester Gaslight Co.*, 57 N. Y. S. 847, 40 App. Div. 169.

Company cannot require a particular customer to make a deposit of money as security when no general rule requiring such a

supply;⁸⁵ failure to pay a valid claim for willful or un-

deposit exists. *Owensboro Gaslight Co. v. Hildebrand*, 19 Ky. L. Rep. 983, 42 S. W. 351.

If a consumer has not made a deposit as required by the company, he cannot enjoin the company from refusing to furnish gas to him because of his refusal to pay more than the statutory rate. *Pollits v. Consolidated Gas Co.*, 102 N. Y. S. 1017, 118 App. Div. 92.

85. *Georgia*. *Macon Gaslight & Water Co. v. Freeman*, 4 Ga. App. 463, 61 S. E. 884.

Missouri. *Mulrooney v. Obear*, 171 Mo. 613, 71 S. W. 1019.

New York. *Brass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905; *Krumenaker v. Dougherty*, 77 N. Y. S. 467, 74 App. Div. 452, 11 N. Y. Ann. Cas. 237 (charter provision); *People v. Manhattan Gaslight Co.*, 45 Barb. (N. Y.) 136; *Morey v. Metropolitan Gaslight Co.*, 6 Jones & S. (N. Y. Super. Ct.) 185.

Ohio. *Mansfield v. Humphreys Mfg. Co.*, 82 Ohio St. 216, 92 N. E. 233, 31 L. R. A. (N. S.) 301 (note).

Pennsylvania. *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. 393; *Tyrone Gas & Water Co. v. Burley*, 19 Pa. Super. Ct. 348.

See *Frothingham v. Bensen*, 44 N. Y. S. 879, 20 Misc. Rep. 132.

Refusal to pay—cutting off supply. This is so notwithstanding the patron is solvent and able to pay whatever may be recovered against him. *Bellaire Goblet Co. v. Findlay*, 5 Ohio Cir. Ct. Rep. 418.

May cut off gas for failure to pay rent, although amount of

deposit has not been used up by charges for gas. *Hewsey v. Queensborough Gas & Electric Co.*, 93 N. Y. S. 1114, 47 Misc. Rep. 375.

Where a certain sum per thousand feet is fixed for gas and a larger sum is fixed if payment is not made on or before a certain date, a consumer cannot compel the turning on of his gas after it has been shut off for failure to pay arrearages, by depositing the amount payable if the payment had been made before such date. *State ex rel. v. Duluth Board of Water & Light Com'rs*, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581.

A patron of a telephone company cannot refuse to pay for future service on the ground that he is entitled to a credit for inefficient past service. *Southwestern Telegraph & Telephone Co. v. Murphy* (Ark., 1911), 140 S. W. 720.

But if a bill for water is admittedly exorbitant the company cannot cut off the supply, because of failure to pay it. *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874.

Action not sole remedy. The company may shut off the supply for non-payment, and is not restricted to an action at law to recover the sum due. *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273.

In *Arkansas*, however, a telephone company has no right to refuse service on the ground of

reasonable waste or for fraudulent use of the supply;⁸⁶ service in furtherance of an *illegal business*;⁸⁷ refusal or failure of tenant in possession to execute contract, he alone having the right to give servants of the company access to the premises;⁸⁸ lateral service pipes owned by the consumers, refusal of consumer to pay the expenses of repairing the break in a service pipe in the street near the main pipe.⁸⁹

On the other hand, the following, *inter alia*, have been held not a sufficient ground for refusing a supply in the first instance, or for cutting off the supply:⁹⁰ receipt of

failure to pay for past service. *Southwestern Telegraph & Telephone Co. v. Murphy* (Ark., 1911), 140 S. W. 720; *Danaher v. Southwestern Telegraph & Telephone Co.*, 94 Ark. 533, 127 S. W. 963, 30 L. R. A. (N. S.) 1027 (note).

86. *J. N. Matthews Co. v. Buffalo*, 126 N. Y. S. 596.

87. *Cullen v. New York Tel. Co.*, 94 N. Y. S. 290, 106 App. Div. 250 (pool room); *Godwin v. Carolina Tel. & Tel. Co.*, 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941 (bawdy house).

88. *Vanderberg v. Kansas City Missouri Gas Co.*, 126 Mo. App. 600, 105 S. W. 17.

89. *Jackson v. Ellendale*, 4 N. D. 478, 61 N. W. 1030.

90. *Supply in fact furnished.* Company cannot be compelled to furnish water through an old system of mains where applicant had petitioned for water through another system of mains and it was being furnished through such system. *State ex rel. v. Hillyard Water Co.*, 49 Wash. 232, 94 Pac. 1080.

Telephone company cannot refuse to deliver messages to plaintiff, engaged in a general messenger business, to notify persons who have been called for at another telephone exchange, and if his telephone is removed on his refusal to pay therefor if such messages are not delivered, he may recover damages from the company. *Owensboro Harrison Tel. Co. v. Wisdom*, 23 Ky. L. Rep. 97, 62 S. W. 529.

If question of whether any arrearages are due is fairly doubtful, company cannot exact as a condition of putting back a telephone that all arrearages claimed be paid and also the cost of the reinstallation. *State ex rel. v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684.

Meter. Gas company is not compelled to leave gas meter in the house of one using electric light furnished by another company, so that in case of accident to the electric light, the gas may be used. *Fleming v. Montgomery Light Co.*, 100 Ala. 657, 13 So. 618.

supply through another consumer;⁹¹ the fact that the applicant, the lessee of property, is a *married woman*;⁹² telephone company, refusal of service on the ground that its service is by means of public stations only;⁹³ water supply drained into the streets, by consumers, so as to create a nuisance;⁹⁴ unavoidable deficiency in the supply which, if furnished to the applicant would inconvenience other patrons;⁹⁵ refusal to furnish to tenant who tenders payment in advance because of a rule that the company should deal only with the owner or his agent.⁹⁶ So it is no ground for a refusal to supply, that the *application is insufficient* by reason of failure to comply with certain technical rules, where no opportunity is given to supply the omission or informalities, especially where a supply is furnished a business competitor under substantially similar circumstances.⁹⁷

However, a municipality, as a prerequisite to furnishing a consumer a supply of water, has no power to re-

91. *Jones v. Rochester Gas & E. Co.*, 168 N. Y. 65, 60 N. E. 1044.

92. *Vanderberg v. Kansas City Gas Co.*, 126 Mo. App. 600, 105 S. W. 17.

93. *Central Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114, 123 Ind. 113, 24 N. E. 215.

It is no defense to proceedings to compel telephone company to furnish telephone service to say that the person or corporation engaged in furnishing service did not rent telephones but furnished such service by means of public stations only. *Central Union Tel. Co. v. State ex rel.*, 123 Ind. 113, 24 N. E. 215.

94. *Van Alstyne v. Morrison*, 33 Tex. Civ. App. 670, 77 S. W. 655.

95. *State ex rel. v. Consumers Gas Trust Co.*, 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245.

96. *State ex rel. v. Butte City Water Co.*, 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574, 32 L. R. A. 697.

97. *Wiemer v. Louisville Water Co.*, 130 Fed. 251.

Sufficiency of application for gas, see *Jones v. Rochester Gas & Electric Co.*, 39 N. Y. S. 1105, 7 App. Div. 465.

Under statute requiring lighting companies to supply light for lighting premises within a certain distance from their wires, under a penalty, on application, the application must state the number of lights and how much power required, especially where such information is requested by the company. *Andrews v. North River Electric Light & Power Co.*, 53 N. Y. S. 810, 24 Misc. Rep. 671, aff'g 51 N. Y. S. 872, 23 Misc. Rep. 512.

quire him to enter into an agreement absolving the municipality from the duties imposed upon it by law and releasing it from liability for its own negligence,⁹⁸ and this rule applies equally well where the supply is furnished by a public service company instead of a municipality.

Furthermore, the fact that a public service company bases its refusal to supply water or light on an untenable ground does not entitle the consumer to recover damages or compel the furnishing of the supply where there is in fact a good ground for refusing to furnish the supply.⁹⁹

§ 1691. Same—compelling payment of amount due at other premises or of independent claims.

The general rule is that a patron cannot be refused a supply or service because of his unpaid bills at other premises,¹ or his failure to pay past due rents for some other and independent use,² or amounts due on a separate and distinct transaction from that for which he is claiming and demanding a supply.³

98. *Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293, 48 S. W. 1114.

99. *Vanderberg v. Kansas City, Missouri, Gas Co.*, 126 Mo. App. 600, 105 S. W. 17.

1. *Lloyd v. Washington Gaslight Co.*, 1 Mackey (D. C.) 331; *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670; *Dayton v. Quigley*, 29 N. J. Eq. 77.

Contra. *People v. Manhattan Gaslight Co.*, 45 Barb. (N. Y.) 136; *Mackin v. Portland Gas Co.*, 38 Ore. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596; *Benson v. Paris Mountain Water Co.*, 88 S. C. 351, 70 S. E. 897; *Montreal Gas Co. v. Cadieux*, App. Cas. 589.

Cannot cut off gas from one

house for failure to pay for gas furnished to another house owned by the same person. *Gaslight Co. of Baltimore v. Colliday*, 25 Md. 1.

Telephone company cannot demand, before reinstating telephone, that subscriber pay moneys due under another contract for a telephone in a different building for which his wife only was liable. *Cumberland Tel. & Tel. Co. v. Hobart*, 89 Miss. 252, 42 So. 349.

2. *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670.

3. *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670.

Cannot require consumer to pay a bill for water and piping furnished him over a year before,

§ 1692. Same—payment of debt of another.

In the absence of statutory regulation, a supply or service cannot be refused by a public service company or a municipality because of arrearages of a former tenant or owner of the premises.⁴ By statute or charter provisions in some jurisdictions, however, failure to pay arrears of predecessors may be ground for cutting off or refusing to turn on the supply.⁵ But if payment in

as a condition. *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S. W. 1058.

But gas company may, it has been held, remove meter from building on refusal of owner to pay cost of furnishing and laying pipes, as per agreement. *Detroit Gas Co. v. Moreton Truck & Storage Co.*, 111 Mich. 401, 69 N. W. 659.

4. *Illinois*. See *Chicago v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770 (note).

Kentucky. *Covington v. Ratterman*, 32 Ky. L. Rep. 1225, 108 S. W. 297.

Massachusetts. *Turner v. Revere Water Co.*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432.

Missouri. *Vanderberg v. Kansas City Missouri Gas Co.*, 126 Mo. App. 600, 105 S. W. 17.

New Jersey. *McDowell v. Avon-By-The-Sea Land & Improvement Co.*, 71 N. J. Eq. 109, 63 Atl. 13.

New York. *Morey v. Metropolitan Gaslight Co.*, 6 Jones & S. (N. Y. Super Ct.) 185.

Refusal to pay debt of another: right to supply. Cannot refuse supply of gas to tenant because of his refusal to pay bill of former tenant, notwithstanding company

had passed resolution or by-law to that effect. *Miller v. Wilkes-Barre Gas Co.*, 206 Pa. St. 254, 55 Atl. 974.

The lessee of part of a room is entitled to a water supply notwithstanding the former supply was discontinued for nonpayment of rentals by the landlord, it being immaterial whether the lessee has the exclusive possession of the room. *Ginnings v. Meridian Waterworks Co.* (Miss., 1911), 56 So. 450.

Gas company cannot refuse to supply gas to a married woman unless she pay her husband's debt to the company. *Vanderberg v. Kansas City Missouri Gas Co.*, 126 Mo. App. 600, 105 S. W. 17.

Under an ordinance providing that for a failure to pay water rents due the city, the water may be turned off until the back rent is paid, the city could not refuse water to the purchaser of a building whose former occupant owed for water. The claim is against the occupant, not the property. *Covington v. Ratterman*, 32 Ky. L. Rep. 1225, 108 S. W. 297, 17 L. R. A. (N. S.) 923.

5. *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214; *Howe v. Orange*, 73 N. J. Eq. 410, 75 Atl. 1101, aff'g 70 N. J. Eq. 648, 62 Atl. 777.

advance for a supply has been accepted, the supply cannot be cut off because the former occupant had not paid the water rent for the preceding year.⁶

§ 1693. Same—refusal to pay disputed bill.

Generally, a public service company cannot refuse a supply to a consumer, upon payment of rent in advance as required by the rules of the company, merely because he declines and refuses to pay a *disputed bill*.⁷ A for-

In Pennsylvania, it is held that a municipality owning its own gas or water works may make and enforce a rule that all arrearages on the premises must be paid before a new applicant can be allowed to use the supply; and that in such a case supply may be shut off if the owner does not pay arrearages accumulated during the time the property was owned or leased by other persons. *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. St. 393, followed in *Commonwealth v. Philadelphia*, 132 Pa. St. 288, 19 Atl. 136.

6. *Merrimac River Sav. Bank v. Lowell*, 152 Mass. 556, 26 N. E. 97, 10 L. R. A. 122.

7. *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670.

Disputed bills: nonpayment: supply. "While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust, or which the consumer in good faith and with show of reason disputes, by denying him

such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term." *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923, followed in *Benson v. Paris Mountain Water Co.*, 88 S. C. 351, 70 S. E. 897.

"The parties are not upon equal ground. The city as a water company cannot do as it will with its water. It owes a duty to each consumer. The consumer once taken on to the system becomes dependent on that system for a prime necessity of business, comfort, health, and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water, in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender, and swallow his choking sense of injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money, yet the consumer must

tiori, a company cannot shut off the supply for failure to pay an overdue and disputed installment of rates after acceptance of payment of a subsequent installment.⁸

§ 1694. Duty of water company to furnish pure water.

It is the duty of a municipality or company, furnishing water for domestic purposes, to furnish pure water. "Pure" water means wholesome or ordinarily pure water.⁹ A water company is not required to furnish water which is chemically pure, provided that it is reasonably pure and wholesome, i. e., reasonably clean and free from bacteria or other contamination, which will render it unfit for domestic use and dangerous to individuals.¹⁰ A citizen cannot compel the municipality, where it owns its own water works, to furnish him with a supply of pure water, he claiming that the water is impure and it appearing that the water supply is not so far from be-

pay it again, and perhaps still again. He cannot resist, lest he lose the water. * * * To oblige a person to follow such a course would be a violation of the fundamental juristic principle of procedure. * * * The water must be supplied to the complainant so long as he will promptly pay current installments, and otherwise conform to the reasonable rules governing the supply of water." *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670, 674.

A telephone company cannot refuse to furnish one a telephone in his office without discrimination because of a disagreement with him in regard to payment for previous service. *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 337, 52 Am. Rep. 404.

Mandamus lies to compel a supply in such a case, § 1773 *post*.

8. *Wood v. Auburn*, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376.

9. *Commonwealth v. Towanda Waterworks (Pa.)*, 15 Atl. 440.

10. *Peffer v. Pennsylvania Water Co.*, 221 Pa. 578, 70 Atl. 870.

"Pure" water. A water company is not bound to supply its customers with chemically pure water, but it must be ordinarily and reasonably pure; and where it has supplied water that is utterly unfit for domestic or steam purposes, it will be enjoined from collecting rents therefor. *Brymer v. Buttler Water Co.*, 172 Pa. St. 489, 33 Atl. 707.

Liability of water company for furnishing impure water, see *Green v. Ashland Water Co.*, 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117, 70 Am. St. Rep. 911.

ing pure as to be outside the limits of possible honest choice and selection.¹¹

§ 1695. Fee for turning on supply after shutting it off.

A rule requiring the payment of a fee for turning on the supply, after turning it off, is generally held unreasonable.¹² If the rent is tendered after the last day for payment but before the supply is cut off, the company cannot charge a fee provided for turning on the water.¹³

§ 1696. Consumer as liable for connections with street mains.

While it has been held in some cases that the consumer may be required to pay the expense of laterals extending from the curb line to the main, these decisions are for the most part based upon express statutes,¹⁴ and where there is no such statute it is generally held that it is the duty of the company, at its own expense, to supply and lay the laterals from its main to the line of a consumer's property abutting on the street.¹⁵ If the

11. *Oakes Mfg. Co. v. New York City*, 120 N. Y. S. 796, 65 Misc. Rep. 97.

12. § 1714 *post*.

13. *Royal v. Cordele*, 132 Ga. 125, 63 S. E. 826.

14. *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249.

15. *Arkansas Pine Bluff Corp. v. Toney*, 96 Ark. 345, 131 S. W. 680.

Idaho Hatch v. Consumers' Co., 17 Idaho 204, 104 Pac. 670; *Bothwell v. Consumers' Co.*, 13 Idaho 568, 92 Pac. 533, 24 L. R. A. (N. S.) 485.

Illinois. But see *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067; *Prindiville v. Jackson*, 79 Ill. 337.

New York. See *Alvord v. Syracuse*, 163 N. Y. 158, 57 N. E. 310.

But see *Donovan v. Oswego*, 86 N. Y. S. 155, 90 App. Div. 397.

North Dakota. Compare *Jackson v. Ellendale*, 4 N. D. 478, 61 N. W. 1030.

Texas. *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

Costs of service connections. Compelling a water company to bear the costs of a service connection does not amount to a confiscation of its property without due process of law; and the fact that the charter of the company provides that it shall not be required to extend its distributing system in any ungraded street, does not preclude compelling the company to make service connections to residents of an ungraded street at its own expense, where

service pipes from the main in the street are put in by the abutter at his own expense, they belong to him as a part of his real property,¹⁶ and are wholly within his control.¹⁷

§ 1697. Discriminations.

Discriminations between patrons by a public service company,¹⁸ including discriminations as to

the water company had voluntarily laid its main in such ungraded street and was supplying water from such main to residents on the street. *Consumers' Co. v. Hatch* (U. S.) (decided April 1, 1912), 32 Sup. Ct. 465.

Contra. In the absence of constitutional or statutory requirement, this obligation to afford service at reasonable rates and without discrimination to all who will "pay the charges and abide by the reasonable regulations of the company" does not as a rule extend to making physical connection with the company's lines, but there is high authority for the position that, when such physical connection has been voluntarily made, under a fair and workable arrangement and guaranteed by contract, and the continuous line has come to be patronized and established as a great public convenience, such connection shall not in breach of the agreement be severed by one of the parties. *Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co.* (N. C., 1912), 74 S. E. 636.

16. *Fisher v. St. Joseph Water Co.*, 151 Mo. App. 530, 132 S. W. 288.

17. *Franke v. Paducah Water Supply Co.*, 88 Ky. 467, 11 S. W. 432, 718, 4 L. R. A. 265.

18. *State ex rel. v. Birmingham Waterworks Co.*, 164 Ala. 566, 51 So. 354, 27 L. R. A. (N. S.) 674 (note); *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379, 30 So. 445; *Kerz v. Galena Water Co.*, 139 Ill. App. 598; *Red Star Line S. S. Co. v. Jersey City*, 45 N. J. Eq. 246; *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422.

Discriminations. "Corporations or persons who undertake to supply a demand which is 'affected with a public interest' are not a law unto themselves, but are required to supply all alike who are alike situated, and are not permitted to discriminate in favor of or against any." *Phelan v. Boone Gas Co.*, 147 Ia. 626, 125 N. W. 208.

"The common law upon the subject is founded on public policy, which requires one engaged in a public calling to charge a reasonable and uniform price to all persons for the same services rendered under the same circumstances. Special contracts are not absolutely forbidden, for rates

rates,¹⁹ are invalid, provided the discrimination is an *un-*

may vary as conditions change; but there can be no discrimination without a reasonable basis therefor. The rule requires reasonable and impartial charges to all, but the exception permits a reduction when special facts make it reasonable and just. The rate charged must not only be reasonable, but uniform, so that all are treated alike under like circumstances. There can be no favoritism, no arbitrary reduction in favor of a particular customer, and no undue advantage to one person through undue disadvantage to another, but discriminations founded on reason and justice may be made. Whether a discrimination is unreasonable or not is usually a question of fact." *New York Telephone Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109.

In *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, it is said: "There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination."

Water works must supply

patrons on equal terms. In operating its water works, a city cannot arbitrarily select its patrons; but it must serve all who may apply on equal terms. *Chicago v. Northwestern Mutual L. Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770.

Failure to enforce rule in particular cases as making its enforcement in other cases an unjust discrimination, see *Plummer v. Hattelsted* (Ia., 1908), 117 N. W. 680; *State v. Everett Water Co.*, 38 Wash. 609, 80 Pac. 794.

19. *Gordon & Ferguson v. Doran*, 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1049; *People v. Albion Waterworks Co.*, 121 N. Y. S. 660, 66 Misc. Rep. 651; *Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co.* (N. C., 1912), 74 S. E. 636.

Discriminations as to rates. "The franchise of laying pipes through the city streets, and selling water to the inhabitants, being in the nature of a public use or a natural monopoly, the company cannot act capriciously or oppressively, but must supply water to all impartially and at reasonable rates; and an injunction will issue to prevent the cutting off the water supply where the customer offers to pay a reasonable rate, and the company demands an unreasonable one. 2 *Beach, Priv. Corp.*, § 834c; *Munn v. Illinois*, supra; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60. In 29 *Am. & Eng. Enc. Law*, 19, it is said: "The acceptance by a water com-

just one,²⁰ and this is so although the means of conduct-

20. *Post*, this section.

pany of its franchise carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates.' If this were not so, and if corporations existing by the grant of public franchises, and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like, could charge any rates, however, unreasonable, and could at will favor certain individuals with low rates, and charge others exorbitantly high, or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. They could kill the business of one, and make alive that of another; and, instead of being a public agency created to promote the public comfort and welfare, these corporations would be the masters of the cities they were established to serve." *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

The rule of the common law so universally recognized and enforced declares that persons, either artificial or natural, engaged in conducting a business which is public in its character or nature, or which is impressed with a public interest, cannot arbitrarily

select their patrons, but must serve impartially, or on equal terms, and at reasonable rates, all who apply for service. It is true that this rule cannot be interpreted as requiring absolute uniformity of rates or prices, nor as prohibiting, under any and all circumstances, a discrimination by performing services for one person at a price or rate lower than that exacted of others." *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744.

Refusal to furnish a customer with the use of a *transformer* necessary to protect his house from fire is an unjust discrimination by an electric light company, where no extra pay therefor was demanded from other customers. *Snell v. Clinton Electric Light, Heat & Power Co.*, 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341, rev'g on this ground 95 Ill. App. 552.

²⁰An ordinance permitting a *street railroad company* engaged in *interstate commerce* under franchise granted by the local corporation to make discrimination in rates in favor of residents of the city against residents of another state conflicts with the interstate commerce clause of the federal constitution and is therefore void. *State ex rel. v. Omaha & C. B. Ry. & Bridge Co.*, 113 Ia. 30, 84 N. W. 983; *Pacific Junction v. Dyer*, 64 Ia. 38, 19 N. W. 862.

ing the business is protected by *patents*,²¹ and the rate

21. Discriminations by telegraph or telephone companies cannot be made notwithstanding that the telegraph or telephone is protected by patent since "where one engages in such public business it is of no consequence whether the means or instruments whereby it is conducted are patented or not. It is the *business* that is regulated. A patent secures title to the thing patented and its use, just as the law secures title to other descriptions of property. The owner

need not apply his property by either description to such public employment, but if he does, the employment itself will be subject to the rules which the law has prescribed for its government without respect to the means or instrument by which it is conducted." *Delaware & A. Tel. & Tel. Co. v. State ex rel.*, 50 Fed. 677, 680; *Commercial Union Tel. Co. v. New England Tel. & Tel. Co.*, 61 Vt. 241, 17 Atl. 1071.

Ordinances of this character must have an uniform operation. If they give residents of the city the special privilege of obtaining transportation at a less rate than other residents of the state they will be declared unconstitutional. *Lake Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743.

Effect of contract. The fact that a payment of certain rates is pursuant to a contract with the customer does not affect the rule against discrimination in charges as between different customers. *Armour Packing Co. v. Edison Electric Illuminating Co.*, 100 N. Y. S. 605, 115 App. Div. 51.

But it was said in another case in the same state: "Where a private citizen, for whose benefit

the contract is made between the city and the telephone company fixing maximum rates for telephone service, voluntarily and with full knowledge of the facts, enters into a contract with the telephone company for services at a different rate than that prescribed by the municipal franchise, he cannot, while said contract is still in force, elect to repudiate his contract and demand a different service at a different rate, by virtue of the franchise, in place and stead of the service he has contracted for, on the ground that the telephone company is bound by its franchise to render the service demanded at the more favorable rate." *Buffalo Merchants' Delivery Co. v. Frontier Tel. Co.*, 112 N. Y. S. 862.

Note on right of water company to discriminate between consumers as to rates, see 20 Am. & Eng. Ann. Cas. 952.

charged the person discriminated against is a reasonable one.²²

Statutes enforcing this common-law liability of a public service company not to discriminate are merely an affirmance of the common-law.²³

Discriminations are not forbidden but only *unjust* discriminations.²⁴ For example, it is not an unjust dis-

22. *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506.

Discrimination where rate reasonable. "It is argued by the telegraph company that no cause of action can be predicated upon the mere fact that another patron obtained services for a lesser rate, unless it be shown that the rate charged the complainant is in itself unreasonable and excessive. There are cases to this effect, but we cannot lend our assent either to their reasoning or to their conclusion. On the contrary, we believe the true rule to be that rates must not only be reasonable in themselves, but must be relatively reasonable; that is, that a person or corporation engaged in public business, and obligated to render its services to all persons having occasion to avail themselves thereof, is bound in fixing its rates to observe two rules: First, its rates must be reasonable; and, second, it must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other." *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506.

But a recent case in Alabama, where a water company was furnishing a supply under a contract that the rates therein fixed should never be exceeded, it was held that a manufacturing company could not compel a water company to furnish it water at the same price it was being furnished by the company to consumers similarly situated, where the rate charged the objecting consumer was under the maximum rate and was not claimed to be an unreasonable rate (*State ex rel. v. Birmingham Waterworks Co.*, 164 Ala. 586, 51 So. 354); but it is submitted that this decision should not be followed, inasmuch as it authorizes a discrimination between consumers as to rates, and the suggestion in the Alabama case that if the discrimination works an injury it is an abuse of the franchise, which possibly could be punished by indictment or process to revoke and annul its franchise, is of a round about way to accomplish that which could be much more quickly and easily accomplished by mandamus.

23. *Cumberland Tel. & Tel. Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268.

24. *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N.

crimination to make to one patron a less rate than to another, where there exists *differences in conditions* affecting the expense or difficulty of performing the service which fairly justify a difference in rates.²⁵ So a company may make *experimental contracts* to obtain a basis for future charges, notwithstanding the result is to give for a limited time a better rate to a few customers than to others.²⁶

This rule forbidding public service companies to discriminate justly between their patrons applies equally well to all public service companies, including *telegraph and telephone* companies;²⁷ and *gas*

W. 506; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765.

Permitting a ten per cent discount for electric current used by theaters, music halls, buildings in process of construction, etc., in lieu of furnishing and renewing lamps, is not an unjust discrimination where the cost of lamp renewal is much greater than in the case of other customers. Halpern v. New York Edison Co., 113 N. Y. S. 790, 61 Misc. Rep. 288.

25. Williams v. Maysville Telephone Co., 119 Ky. 33, 82 S. W. 995; Western Union Tel. Co. v. Call Pub. Co., 44 Neb. 326, 62 N. W. 506.

It is proper to make a less water rate to a manufacturer using a certain quantity in one plant, than is made to another using the same amount in several disconnected plants. St. Louis Brewing Ass'n v. St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

26. Graver v. Edison Electric

Illuminating Co., 110 N. Y. S. 603, 126 App. Div. 371.

27. Central Union Tel. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035; Mooreland Rural Telephone Co. v. Mouch (Ind. App., 1911), 96 N. E. 193; Cumberland Tel. & Tel. Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268.

Cannot refuse service because there are public pay stations. State ex rel. v. Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684

Discriminations by telegraph and telephone companies. Mere neglect or inattention in repairing telephone instruments does not constitute discrimination within a statute fixing a penalty therefor. Southwestern Telegraph & Telephone Co. v. Murphy (Ark., 1911), 140 S. W. 720.

Telephone companies have no right to discriminate as to prices. Nebraska Telephone Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

Charging one person more than another for a residential 'phone on the theory that his 'phone is a business 'phone and used for busi

companies.²⁸

The rules relating to discriminations by *common carriers of goods* apply, so far as the principle is concerned, to *all* public utility corporations;²⁹ and the fact that a *public service system is owned by a municipal corporation* does not affect the rule that there must be no unjust discrimination and that the commodity must be furnished to each and every citizen or resident who needs the commodity sold or the service given.³⁰

In applying these rules, the courts have not been entirely in harmony, although certain matters seem to be well settled. For instance, it is well settled that there is not necessarily any discrimination because *meter rates* are charged against certain consumers and flat rates against other consumers of the same class,³¹ nor because

ness purposes is unjust discrimination where there is no substantial difference in the conditions, mode and kind of service rendered by the company to him and to other users of its 'phone in dwelling houses. *Mooreland Rural Telephone Co. v. Mouch* (Ind App. 1911), 96 N. E. 193.

In so far as discriminations are concerned, a telephone company is not bound to permit another telephone company to make a physical connection with its line for the purpose of using it as its own subscribers use them. *Home Telephone Co. v. People's Telephone & Telegraph Co.* (Tenn., 1911), 141 S. W. 845.

Discrimination in rates by telephone company as violation of the anti-trust law and right of the state to recover penalties therefor, see *Cumberland Telephone & Telegraph Co. v. State ex rel.* (Miss., 1910), 54 So. 446.

28. *Gas Company* given a franchise to lay pipes and furnish gas,

assumes a public duty and must supply gas at reasonable rates to all the inhabitants of the municipality and charge each the same price and furnish on the same terms as is furnished to every other for like service under the same similar conditions. *Phelan v. Boone Gas Co.*, 147 Ia. 626, 125 N. W. 208.

29. *New York Telephone Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109.

30. *Houston v. Lockwood Inv. Co.* (Tex. Civ. App., 1912), 144 S. W. 685.

31. *Shaw v. San Diego Water Co.*, 118 Cal. XVI, 50 Pac. 693; *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 27 Pac. 439; *Frothingham v. Bensen*, 44 N. Y. S. 873, 20 Misc. Rep. 132; *Exchange & Bldg. Co. v. Roanoke Gas & Water Co.*, 90 Va. 83, 17 S. E. 789.

Meter rate as discrimination. Water rate of \$2.25 a thousand cubic feet charged against all boarding house keepers in a mu-

small consumers are charged by the room and large consumers according to the amount of water used.³² So there is not necessarily an unjust discrimination because different rates are charged in different parts of the municipality,³³ and a higher rate may be charged for water furnished to summer cottages in an outlying district, than is charged in the center of the city.³⁴ So the fact that a telephone company, under no duty to extend its lines outside of the municipal limits, deems it proper to make such extension to one or two persons, does not make its refusal to furnish service to another person outside the limits an unlawful discrimination.³⁵ Whether a smaller rate may be charged to *large customers* is a question not well settled,³⁶ and nearly all the decisions

nicipality is not an unjust discrimination in favor of other residents assessed at a "fixture rate," where the meter rate and the fixture rate were about the same *per capita*. Woodruff v. East Orange, 71 N. J. Eq. 419, 64 Atl. 466.

Where a municipality fixes the maximum rates, both flat and meter rates, the company may substitute a meter rate for a flat rate in furnishing lights, where the meter rates are reasonable, and where no flat rate contract had been made for over a year a consumer cannot claim that he has been discriminated against by charging him the meter rate. Horner v. Oxford Water Electric Co., 153 N. C. 535, 69 S. E. 607.

32. Wagner v. Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

33. Mercur v. Media Electric Light, Heat & Power Co., 19 Pa. Super. Ct. 519.

34. Souther v. Gloucester, 187 Mass. 552, 73 N. E. 558, 69 L. R. A. 309.

35. Younts v. Southwestern Tel. & Tel. Co., 192 Fed. 199, 207.

36. Furnishing electricity to certain consumers at a certain sum per kilowatt hour at a less price than furnished to others, but under a contract guaranteeing the use of the current for from 750 to 1250 kilowatt hours per month, held not an illegal discrimination. Graver v. Edison Electric Illuminating Co., 110 N. Y. S. 603, 126 App. Div. 371.

"Presumably the company was aware, when it obtained its charter and established its monopoly, that there would be small consumers, as well as large ones, and there would be less profit in furnishing the one class than the other; but it did not, on that account, reject the charter, or obtain the right to add to the price of the small consumer's bill. Louisville Gas. Co. v. Dulaney & Alexander, 100 Ky. 405, 38 S. W. 703, 36 L. R. A. 125, 126; Thornton on Oil & Gas, §§ 552, 561, 562." Montgomery Light & Water

in regard thereto relate to *railroad rates* which are not considered in this work.³⁷ On the other hand, a public service company cannot charge different prices according to the *use of the supply* made by the customer,³⁸ nor is a discrimination proper which is based on the *value of the service* to the customer.³⁹ Thus, a company incorporated to supply natural gas for "light or other purposes" cannot discriminate by making a larger charge for gas used for light than for that used for heat.⁴⁰

The general rule is that exacting from some patrons or consumers *payment of rental in advance*, while giving credit to others, is not an unjust discrimination;⁴¹ but it has been held that a public service company cannot discriminate by requiring a *cash deposit* or bond as a

Power Co. v. Watts, 165 Ala. 370, 51 So. 726.

37. See *Wyman, Public Service Corporations*, § 1318 *et seq.*

38. *Robbins v. Bangor Ry. & Electric Co.*, 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963.

39. *Robbins v. Bangor Ry. & Electric Co.*, 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963.

40. *Baily v. Fayette Gas-Fuel Co.*, 193 Pa. St. 175, 44 Atl. 251.

Charging one consumer of gas twelve and one half cents per thousand cubic feet for gas used for fuel only and charging another twenty cents for the same amount, solely because he consumed an additional quantity for light, is an arbitrary and unlawful discrimination. *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744.

"The implied condition of the grant of all corporate franchises of even *quasi* public nature is that they shall be exercised, without individual discrimination, in

behalf of all who desire. From the inception of the rules applied in early days to innkeepers and common carriers down to the present day of enormous growth of corporations for nearly every conceivable purpose, there has been no departure from this principle. And from all the legion of cases upon this subject the distinguished counsel for the appellee have not been able to cite a single one in which a discrimination based solely on the value of the service to the customer has been sustained." *Baily v. Fayette Gas-Fuel Co.*, 193 Pa. St. 175, 44 Atl. 251.

41. *Yancey v. Batesville Tel. Co.*, 81 Ark. 486, 99 S. W. 679, 11 Am. & Eng. Ann. Cas. 135; *Vaught v. East Tennessee Tel. Co.*, 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315.

Contra, see *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214; *Owensboro Gaslight Co. v. Hildebrand*, 19 Ky. L. Rep. 983, 42 S. W. 351.

condition of supplying the commodity, where such condition is not required of other consumers.⁴²

Discriminations *in favor of the government or charitable institutions*, however, are upheld. Discriminations in favor of the public at large are not opposed to public policy inasmuch as they benefit the people generally by relieving them of part of their burdens and such discrimination cannot be held illegal in the absence of legislation upon the subject.⁴³ Thus, the furnishing telephone service free to municipal buildings does not constitute an unjust discrimination.⁴⁴ So, the

42. *Fair v. Home Gas & Electric Co.* (Cal. App., 1911), 115 Pac. 754.

43. *New York Telephone Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109.

Discrimination in favor of public. In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, the rate fixed under a statute was eighty cents per thousand feet for gas supplied to general customers and seventy-five cents to the city of New York, and it was held that this was not an unreasonable discrimination. While the subject mainly considered was the validity of the statute, still in the discussion the court said: "Lastly, it is objected that there is an illegal discrimination as between the city and the consumers individually. We see no discrimination which is illegal, or for which good reasons could not be given." 212 U. S. 54, 29 Sup. Ct. 200, 53 L. Ed. 382.

See, also, *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 278, 12 Sup. Ct. 844, 36 L. Ed. 699.

Contra. Contract between pub-

lic service company and municipality to supply electric power to village free of charge held invalid as unjust discrimination. *Kilbourn City v. Southern Wisconsin Power Co.* (Wis., 1912), 135 N. W. 499.

44. Free telephone service. In *Superior v. Douglas County Telephone Co.*, 141 Wis. 363, 122 N. W. 1023, in holding that a contract binding a telephone company operating in a city to maintain, without charge, telephones in the public offices of the city, is not invalid as contrary to public policy, the court said: "The contract in this case having been made before the legislation occurred prohibiting discriminatory rates, such legislation does not cut any figure in the case. If the contract were valid when made, it is within the constitutional protection precluding the legislature from impairing the obligations of contracts. * * * Discriminatory contracts between public utility corporations and other patrons, which are held to be void as inimical to the public good, are so held because un-

act of a telephone company in allowing a discount of twenty-five per cent to clergymen and charitable institutions and to the city is not an unjust discrimination against a department store requiring extensive telephone service, where there is no showing as to the effect of the discrimination, or that it adds appreciably to the cost of the general service, since the favorite classes do not compete with the objector in business.⁴⁵

As to who may raise the question that the charges of a public service company are invalid because of discrimination, it seems that only the patrons injured by such discrimination can object.⁴⁶

§ 1698. Liability of public service company to abutters.

Even though a public service company has been granted the right to use the streets of a municipality, either by statute, its charter, or the act of the municipality, yet if it constructs or lays its track, poles or pipes, whichever it may be, in such a careless, improper

reasonable advantage is given to one customer or a class over others; whereas all have a moral and legal right to equality of treatment. In the case of the contract being between a private corporation and the state or other public corporation, whatever advantage the particular customer has over general customers obviously inures to the benefit of the latter in the aggregate. In other words, in the ultimate, there is no discrimination which is inimical to the public good; and hence no violation of public policy. Such is the situation here. If one concede that the patron under the contract was a favored customer, in that if the same advantage had been granted by contract to a private corporation the agreement would

have been unenforceable, still in the circumstances here the contract is enforceable, because the advantage is to the public, instead of to any particular member thereof."

45. *New York Telephone Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109, reviewing at some length the New York cases relating to discriminations.

46. *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197, holding that user of gas for fuel who is charged eighty cents per thousand cubic feet could not complain of discrimination in favor of users of gas for power who are only charged sixty cents, the latter not being competitors of the former.

or negligent manner as to be an injury to the owner of property abutting on the street, the abutter may recover damages from the company, provided his injury is special and not common to the general public.⁴⁷ To illustrate, if the municipality has forbidden, by a valid ordinance, the construction of any track within eighteen feet of the curb line, a side track within six feet of such line is a nuisance for which an abutter who has sustained special injury may recover.⁴⁸ So a railroad company is liable to an abutting owner for any change in the grade of a street which obstructs access to the abutter's property, notwithstanding the municipality itself would not be liable for a change of grade, and that it could lawfully authorize a railroad company to change the grade.⁴⁹ What constitutes such a *special injury* as

47. *Cain v. Chicago, R. I. & P. R. Co.*, 54 Ia. 255, 257, 3 N. W. 736, 6 N. W. 268.

§ 1318 *ante*, vol. 3.

General rules as to rights of abutting owners, § 1321 *ante*, vol. 3.

Additional servitudes, § 1700 *et seq.*, *post*.

Liability to abutters. By legislative act, a water company was granted the right to lay its water pipes in the streets and other highways. Held water company not liable for laying a pipe under the sidewalk in front of complainant's lot, although it prevented him from building steps leading down to his cellar. *Provost v. New Charter Water Co.*, 162 Pa. St. 275, 29 Atl. 914, 34 Wkly. notes Cas. 572.

Where a water company in laying a water pipe injured and obstructed plaintiff's sewer so that the sewage flowed back into a cellar, the company was held lia-

ble for damages, where it appeared that the plaintiff was authorized by the municipal authorities to lay his sewer as he had in the street. *Kankakee Waterworks Co. v. Irwin*, 56 Ill. App. 510.

A railroad in a street may become such a nuisance in so far as an abutting owner is concerned as to entitle him to recover damages from the company, but in such case he must show that he has suffered an injury special to himself and different in kind from that suffered by the general public. *McKay v. Enid*, 26 Okla. 275, 109 Pac. 520.

Trees. Liability of public service corporation to abutters where trees are cut or injured, § 1328 *ante*, vol. 3.

48. *Cain v. Chicago, R. I. & P. R. Co.*, 54 Ia. 255, 262, 3 N. W. 736, 6 N. W. 268.

49. *Shrader v. Cleveland, C. C. & St. L. R. Co.*, 242 Ill. 227, 89 N.

to entitle an abutting owner to recover damages is governed by the rules laid down in a preceding volume,⁵⁰ and the remedies available to an abutter are enumerated hereafter in this chapter.⁵¹

§ 1699. Liability for loss by fire where supply of water insufficient.

Although the contrary has been declared in a few states,⁵² the rule which prevails in nearly all the states

E. 997, 26 L. R. A. (N. S.) 226 (note on liability of railroad company to abutting owner for damages from change of grade of highway necessary to carry it across tracks), aff'g 147 Ill. App. 252.

50. §§ 1328-1389 *ante*, vol. 3.

51. § 1777 *post*.

52. *Florida*. Woodbury v. Tampa Waterworks Co., 57 Fla. 243, 249, 49 So. 556, 21 L. R. A. (N. S.) 1034; Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81, 6 L. R. A. (N. S.) 1171 (note).

Kentucky. Shelbyville Water & Light Co. v. McDade, 122 Ky. 639, 92 S. W. 568, 29 Ky. L. Rep. 119; Lexington Hydraulic & Mfg. Co. v. Oots, 119 Ky. 598, 84 S. W. 774, 27 Ky. L. Rep. 233, 86 S. W. 684; Graves County Water Co. v. Ligon, 112 Ky. 775, 66 S. W. 725, 23 Ky. L. Rep. 2149; Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 25 Am. St. Rep. 536, 7 L. R. A. 77; Duncan v. Owensboro Water Co. (Ky.), 12 S. W. 557.

See Springfield Fire & Marine Ins. Co. v. Graves County Water & Light Co., 120 Ky. 40, 85 S. W. 205, 27 Ky. L. Rep. 420; Paducah Water Supply Co. v. Paducah Lumber Co., 14 Ky. L. Rep. 141;

Owensboro Water Co. v. Duncan's Adm'x (Ky., 1895), 32 S. W. 478.

North Carolina. Jones v. Durham Water Co., 135 N. C. 553, 47 S. E. 615; Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598.

See Jones v. Durham Water Co., 138 N. C. 383, 50 S. E. 769.

Tennessee. Harris & Cole Bros. v. Columbia Water & Light Co., 114 Tenn. 328, 85 S. W. 897.

United States. Dicta in Guardian Trust & Deposit Co. v. Fisher, 200 U. S. 59, 26 Sup. Ct. 186, 50 L. Ed. 367.

Water company; liability for fires. Where a water company has a contract with the city whereby it enjoys privileges and franchises and the right to have special taxes levied on property of citizens to pay for its supply of water furnished for the extinguishment of fires, which it was required by the contract to furnish it owes a duty to furnish water for extinguishing fires, and where a taxpayer's property was destroyed by fire on account of the company's neglect in not furnishing water in accordance with the contract, the company is liable therefor. Mugge v. Tampa Water-

is that a resident taxpayer whose property is destroyed by fire because of the failure of the water company to furnish a sufficient supply of water, as required by its contract with the municipality, cannot recover damages from the water company.⁵³ The ground for such deci-

works Co., 52 Fla. 371, 42 So. 81, 6 L. R. A. (N. S.) 1171.

Kentucky. "It may be considered as an established principle of the law of contracts in this state that where a water company has contracted with a city to furnish a supply of water sufficient for the protection of the inhabitants and property of the city against fire, the company must answer in damages to the citizen for loss by fire resulting from its failure or refusal to perform its contract; and that an inhabitant of the city who has suffered loss by fire by reason of the water company's breach of its contract with the city may have an action against the water company without joining the city as a party defendant. This class of cases comes within the rule which permits a party for whose benefit a contract is made to sue thereon in his own name, though the engagement be not directly to or with him." *Kenton Water Co. v. Glenn*, 141 Ky. 529, 133 S. W. 573.

53. **Alabama.** *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374, 41 So. 76, 6 L. R. A. (N. S.) 429.

California. *Niehaus Bros. Co. v. Contra Costa Water Co.*, 159 Cal. 305, 113 Pac. 375.

Connecticut. *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1.

Georgia. *Fowler v. Athens City*

Waterworks Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; *Holloway v. Macon Gaslight & Water Co.*, 132 Ga. 387, 64 S. E. 330.

Idaho. *Bush v. Artesian Hot & Cold Water Co.*, 4 Idaho 618, 43 Pac. 69.

Illinois. *Galena v. Galena Water Co.*, 132 Ill. App. 332; *Peck v. Sterling Water Co.*, 118 Ill. App. 533.

Indiana. *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258.

Iowa. *Davis v. Clinton Waterworks Co.*, 54 Ia. 59, 6 N. W. 126, 37 Am. Rep. 185; *Becker v. Keokuk Waterworks*, 79 Ia. 419, 44 N. W. 694, 18 Am. St. Rep. 377.

Kansas. *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12, 28 Pac. 989, 30 Am. St. Rep. 267, 15 L. R. A. 375.

Louisiana. *Allen & Curry Mfg. Co. v. Shreveport W. W. Co.*, 113 La. 1091, 37 So. 980, 68 L. R. A. 650, 104 Am. St. Rep. 525, overruling *Planters' Oil Mill v. Monroe*, W. W. Co., 52 La. Ann. 1243, 27 So. 684; *Planters' Oil Mills v. Monroe Waterworks & Light Co.*, 108 La. 236, 32 So. 376.

Maine. *Hone v. Presque Isle Water Co.*, 104 Me. 217, 71 Atl. 769, 21 L. R. A. (N. S.) 1021 (note).

Mississippi. *Wilkinson v. Light, Heat & Water Co.*, 78 Miss. 389, 28 So. 877.

Missouri. *Metz v. Cape Girardeau Waterworks & Electric Light*

sions usually is that there is no privity of contract between the company and the taxpayer.⁵⁴ So it is held that even though the contract between the municipality

Co., 202 Mo. 324, 100 S. W. 651; *Howsmen v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146; *Houck v. Cape Girardeau Waterworks & Electric Light Co.* (Mo. App., 1905), 114 S. W. 1099.

Nevada. *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. St. Rep. 485.

Nebraska. *Eaton v. Fairbury Waterworks Co.*, 37 Neb. 546, 56 N. W. 201, 40 Am. St. Rep. 510, 21 L. R. A. 653.

New York. *Wainwright v. Queens County Water Co.*, 78 Hun (N. Y.) 146, 28 N. Y. S. 987.

Ohio. *Akron Waterworks Co. v. Brownless*, 10 Ohio Cir. Ct. Rep. 620, 5 O. C. D. 1; *Blunk v. Dennison Water Supply Co.*, 71 Ohio St. 250, 73 N. E. 210.

Oklahoma. *Lutz v. Talequah Water Co.* (Okla., 1911), 118 Pac. 128.

Pennsylvania. *Beck v. Kittanning Water Co.* (Pa.), 11 Atl. 300; *Stone v. Uniontown Water Co.*, 4 Pa. Dist. Rep. 431; *Thompson v. Springfield Water Co.*, 215 Pa. St. 275, 64 Atl. 521.

South Carolina. *Ancrum v. Camden Water, Light & Ice Co.*, 82 S. C. 284, 64 S. E. 151; *Cooke v. Paris Mountain Water Co.*, 82 S. C. 235, 64 S. E. 157.

Tennessee. *Foster v. Lookout Water Co.*, 71 Tenn. 42.

Texas. *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532, aff'g 22 S. W.

277; *Greenville Water Co. v. Beckham* (Tex. Civ. App., 1909), 118 S. W. 889.

West Virginia. *Nichol v. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290.

Wisconsin. *Britton v. Green Bay & Ft. H. Waterworks Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856.

United States. *Metropolitan Trust Co. v. Topeka Water Co.*, 132 Fed. 702; *German Alliance Ins. Co. v. Home Water Supply Co.*, 174 Fed. 764; *Boston Safe-Deposit & Trust Co. v. Salem Water Co.*, 94 Fed. 238.

54. *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091, 37 So. 980, 68 L. R. A. 650, 104 Am. St. Rep. 525.

"The authorities deny the liability on the ground that there is no *privity of contract* between property owners and the water company. In commenting on the rule of these authorities in 1 Farnham on Water and Water Rights, the author says (pages 848-851): 'The difficulty is that these decisions, although correct in their result, are all placed on the wrong principle. The non-liability of the water company depends, not on the inability of the taxpayer to maintain the action, but on the failure of the water company's contract to cover the liability sued for.'" *Niehaus Bros. Co. v. Contra Costa Water Co.*, 159 Cal. 305, 113 Pac. 375, 381.

and the water company provides that the latter shall be liable for all damages sustained by *any* fire, in case of failure to furnish an adequate supply of water,⁵⁵ or requires the company to pay all damages sustained by "any persons or property,"⁵⁶ or "all damages that may accrue to any citizen of the city" from failure to supply a sufficient amount of water,⁵⁷ a citizen cannot recover from a water company damages for loss by fire.

On the other hand, if there is a contract between the company *and the consumer* to furnish water in case of a fire, the consumer may recover from the company, where his property is destroyed by fire because of the breach of the contract,⁵⁸ unless the contract expressly provides that the company shall not be liable in such a case.⁵⁹

Undoubtedly, the municipality, where it has a contract with a water company for a certain or sufficient pressure of water to extinguish fires in municipal buildings, may recover, where a municipal building is de-

55. *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118.

56. *Smith v. Great South Bay Water Co.*, 81 N. Y. S. 812, 82 App. Div. 427.

57. *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12.

58. *Middlesex Water Co. v. Knappman Whiting Co.*, 64 N. J. L. 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467; *Lottman Bros. Manufg Co. v. Houston Waterworks Co.* (Tex. Civ. App., 1896), 38 S. W. 357.

Construction of contract. A privilege by a former water company to plaintiff's predecessor, as the owner of property, to erect fire hydrants, at its own expense, to be connected with the mains, but not

to be used except in case of fire in its building and to pay "such an amount as will be agreed upon by the parties," without any other definite agreement between the parties, imposed no obligation upon said water company to furnish sufficient water for protection against fire or to pay for any loss of the building by fire. *Niehaus Bros. Co. v. Contra Costa Water Co.*, 159 Cal. 305, 113 Pac. 375.

Landlord cannot recover on contract between tenant and water company. *Nichol v. Huntington Water Co.*, 53 W. Va. 348, 358, 44 S. E. 290.

59. *Buchanan & Smock Lumber Co. v. East Jersey Coast Water Co.*, 71 N. J. L. 350, 59 Atl. 31.

stroyed by fire because of an insufficient supply of water.⁶⁰ But a water company is not liable to a municipality for property destroyed by fire, through failure to supply sufficient water, where the company was under no express obligation to furnish protection to such property.⁶¹ So it has been held in California that where a contract between a municipality and a water company to furnish water for protection against fire is entered into to provide fire protection for the benefit of all its inhabitants, and there is nothing to indicate that the protection of any specific property was contemplated, the municipality cannot recover for its loss from fire.⁶²

Even in those jurisdictions where a recovery by a citizen is allowed, it must be shown that the failure to furnish sufficient pressure was the proximate cause of the loss.⁶³

Where the municipality owns its own water plant, it is generally held that it is not liable for loss by fire because of an inadequate supply of water.⁶⁴

60. See *Galena v. Galena Water Co.*, 132 Ill. App. 332.

61. *Inhabitants of Milford v. Bangor R. & E. Co.*, 106 Me. 316, 76 Atl. 696, 30 L. R. A. (N. S.) 526, with note on liability where property of municipality is destroyed.

62. *Ukiah City v. Ukiah Water & Improvement Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107.

63. See *Georgetown Water, Gas, Electric & Power Co.*, 137 Ky. 197, 125 S. W. 293; *Terrell v. Louisville Water Co.*, 31 Ky. L. Rep. 1281, 105 S. W. 100.

Proximate cause. "Where an individual sues a water company for damages sustained by the

destruction of his property by fire consequent upon the alleged ground that such water company failed to supply water for the extinguishment of such fire in compliance with its contract with the municipality, the burden of proof is at all times on the plaintiff to show by a preponderance of the evidence (1) that the water company failed to supply water in the quantity called for by its contract with the city; and (2) that but for such failure the plaintiff's property could have been saved from destruction." *Tampa Waterworks Co. v. Mugge* (Fla., 1910), 53 So. 943.

64. Chapter on Municipal Liability for Torts, *post*.

9. COMPENSATION TO ABUTTING OWNERS.

§ 1700. General considerations.

The question to be considered in this subdivision is this: Is an abutting owner entitled to recover damages from a railroad or other public service corporation where it uses the street, under valid authority so to do, in a proper and reasonable manner? If the use is not authorized by the legislature, or by the municipality where a grant from the municipality is necessary to legalize the use of the streets, then a recovery by abutters is permissible, without regard to whether the use is negligent or unreasonable. Likewise, it is well settled that even if it be held that the use of a street for a particular purpose does not of itself authorize a recovery of damages, yet if the use causes actual injury to the abutter's right of access or otherwise causes injury over and above that resulting to all abutters from the necessary use of the streets, or the use is in fact unreasonable or negligent, the abutter may recover. The question as usually presented, is whether a particular use of a street is an *additional servitude*, and therefore it is first necessary to consider what is meant by that term. "Servitude" is the civil law equivalent for "easement" as the term is used in the common law,⁶⁵ and includes a right of way over the land of another.⁶⁶

If a street is established, the public obtains a right of way, an easement, a servitude. The question then arises as to the extent of this right of way so far as conflicting rights of abutting owners are concerned. The public may use a street for the purpose of travel in any legitimate manner, whether on foot, horseback, horse-driven carriage, automobile, or other reasonable mode of conveyance, subject to a reasonable exercise of the police power.⁶⁷

65. *Corning v. Gould*, 16 Wend. (N. Y.) 531, 538.

66. *Kieffer v. Imhoff*, 26 Pa. St. 438.

67. § 1391 *ante*, vol. 3.

The further question, now to be considered, is whether the public, as represented by the municipality, may authorize a use of the street by a public service corporation to convey travellers, freight, electric messages, water, gas, etc., as against abutting owners, without compensation by the company to such abutters. In other words, is an abutting owner entitled to recover compensation where the street is, by legislative or municipal permit, used in part for the tracks of a commercial or street railroad, or for an elevated or underground railroad, or for poles and wires of a telegraph, telephone, electric light, heat or power company, or where pipes are laid underneath the street for sewers, water, gas and the like?⁶⁸ Is such a use one incident to the right of passage so as to be a proper *street use*? Is the use a *taking* of, or *damage* to, the *property* of the abutting owner, within the constitutional provisions?⁶⁹

In determining this matter, it is sometimes important to consider whether the *fee to the street* is in the abutting owner or in the municipality, since the general rule

68. "In determining whether an additional servitude is imposed by the authorization of a new kind of use, the question is not whether the Legislature or the public authorities foresaw and contemplated the particular use in question, but whether it is fairly included in the purposes for which the property was originally taken to the public. Whenever a road is laid out, the officers who represent the public, and the persons whose property is taken, must be supposed to know that new modes of travel and new occasions for transporting peculiar kinds of property will be likely to come into existence. The primitive modes of locomotion along highways have largely

given place to new vehicles for horses, and to electric cars, bicycles, and automobiles. The question as to each one of these is whether, with reasonable regulations, the method of travel is a reasonable and proper use of the highway, having reference to other proper uses of it which the public may have occasion to make." *Eustis v. Milton St. Ry. Co.*, 183 Mass. 586, 67 N. E. 663.

69. It is sometimes said that the rights of public service companies to the use of streets as against the rights of abutting owners should be decided with reference to the wants of an advanced civilization, which is doing so much to render life more comfortable and attractive.

in some states, especially in New York, is that an abutting owner cannot recover damages, where the fee of the street is owned by the municipality, unless he has sustained special injury,⁷⁰ although the rule adopted in most states and the one supported by the better reasoning is that the ownership of the fee is immaterial, in so far as the right to recover damages is concerned.⁷¹

So it is important, at least in some jurisdictions in regard to certain uses of the way, to distinguish between cases holding that a certain use does not constitute an additional servitude where the way is outside the territorial limits of a municipality, and such decisions where the way is a street or alley within a municipality, since a use of a way outside a municipality is often held to be an additional servitude where a like use of a street or alley within a municipality would be held not an additional servitude. In other words, the public rights in a street in a municipality (and, it follows, the rights which the municipality may confer against the abutter) are much greater than in case of the public rights in a country road, as will be noticed in subsequent sections in this subdivision.⁷² But a highway has been considered urban, and not rural even when not included within the limits of a municipality, where located so near a municipality that in all its characteristics it partook of the essential nature of an urban road, and has been held subject to urban easements generally.⁷³ Conversely, a street and highway within the limits of an incorporated village has been held, because of

70. § 1701 *et seq.*, *post*.

71. § 1701 *et seq.*, *post*.

72. In New York, there is a clear recognition of distinction between rural and urban highways on the question of the extent of the public easement therein. *Richards v. Citizens' Water Supply Co.*, 125 N. Y. S. 116, 140 App. Div. 206, and cases cited.

In Massachusetts, however, rural and urban highways are apparently held subject to precisely the same public easements. *Lincoln v. Commonwealth*, 164 Mass. 1, 41 N. E. 112.

73. *Richards v. Citizens' Water Supply Co.*, 125 N. Y. S. 116, 140 App. Div. 206, and cases cited.

its physical characteristics and surroundings, to be rural, in its legal aspects, and not urban, in its subjection to public easements.⁷⁴

Ordinarily, persons whose land does not abut on a street used by a public service corporation cannot, in any event, recover damages,⁷⁵ and the owner of the fee of the half of the street on his side has no right of action for the obstruction of the street wholly on the other half of the street, so far as his rights depend on the ownership of the fee.⁷⁶

§ 1701. Commercial railroads.

The distinction between commercial railroads and street railroads is everywhere recognized. The former are defined as those employed in general freight and passenger traffic from one town to another, or between one place and another; the latter include all such as are constructed in public streets for the purpose of conveying passengers, with hand luggage, from one point to another on a street.⁷⁷

74. *Richards v. Citizens' Water Supply Co.*, 125 N. Y. S. 116, 140 App. Div. 206, and cases cited. See case 104 N. Y. S. 927.

75. See § 1382 *ante*.

76. *Haslett v. New Albany Belt & Terminal R. Co.*, 7 Ind. App. 603, 34 N. E. 845; *Beck v. Erie Terminal R. Co.*, 11 Pa. Co. Ct. Rep. 363; *Trustees of First Congregational Church v. Milwaukee & L. W. Ry. Co.*, 77 Wis. 158, 45 N. W. 1086; *Sinnott v. Chicago & N. W. R. Co.*, 81 Wis. 95, 50 N. W. 1097.

77. *Lewis, Eminent Domain* (2d Ed.), § 150.

"The distinction between commercial railroads and street railroads does not rest upon a difference in name—one being denominated a street railroad or a pas-

senger railroad, and the other a commercial or freight railroad—nor upon the motive power employed, nor upon the kind of rail used, nor upon the length of the railroad. It results from the nature of the business done by each of the two kinds of railroads, and the physical agencies and manner by which and in which that business is carried on. Those of the one are consistent with the use of the street by the lot owner and the general public, and if not directly beneficial to the abutting real estate, are not detrimental to it. They relieve the streets from some of the burdens of travel upon it, they facilitate travel between different parts of the city, and they enhance the value of abutting property by increasing

While the decisions in the various states vary more or less as to the ground for the decision, some being based entirely on the theory of an additional servitude while others are based on the theory of a "damaging" of private property for public use within the constitutional provisions relating to eminent domain, and many of the earlier decisions denied the right to recover,⁷⁸ it is al-

the convenience of access to it. The business of the other class of railroads, and the means by which it is necessarily carried on, require the service of entirely dissimilar agencies and methods. Great trains of cars moving along the streets or standing upon them are real and serious obstructions to all other uses of the highway. Such trains make a loud noise by day and by night, and disturb the quiet of neighborhoods. Access to abutting property is rendered difficult and dangerous, and the jarring and shaking of buildings is annoying to the occupants, and often injurious to the structures themselves. If the cars are propelled by steam, then there is the additional inconveniences of smoke, cinders, sparks, the blowing off of steam, the ringing of the engine bell, and the whistling of the locomotive. There are good and substantial reasons why compensation should be paid to the owners of abutting lots when a street in a city is used for such a purpose and in such a manner." *Mordhurst v. Ft. Wayne & S. W. Traction Co.*, 163 Ind. 268, 71 N. E. 642, 645.

The general rule is that a railway authorized to carry freight as well as passengers becomes a commercial railroad instead of a

street railroad, and such railroad, when laid in a street, becomes an additional burden on the fee. *Wilder v. Aurora, De Kalb & R. Electric Traction Co.*, 216 Ill. 493, 75 N. E. 194.

78. *Indiana*. *New Albany & S. R. Co. v. O'Dailly*, 12 Ind. 551.

Kansas. *Ottawa O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59.

New Jersey. *Morris & E. R. R. Co. v. Newark*, 10 N. J. Eq. 352; *Paterson & P. H. R. Co. v. Paterson*, 24 N. J. Eq. 158.

New Mexico. *New Mexico R. Co. v. Hendricks*, 6 N. M. 611, 30 Pac. 901.

Ohio. *Pelton v. East Cleveland R. Co.*, 10 Ohio S. & C. P. Dec. 545, 22 W. L. B. 67.

Pennsylvania. *Re Philadelphia & T. R. R. Co.*, 6 Wharton (Pa.) 25; *Faust v. Passenger R. Co.*, 3 Phila. (Pa.) 164.

Texas. *Houston & T. C. R. Co. v. Odum*, 53 Tex. 343.

West Virginia. *Yates v. West Grafton*, 34 W. Va. 783, 12 S. E. 1075.

Taking. The depreciation in value of property caused by laying railroad tracks in a street, on which it abuts, is not a "taking" of private property for public use

most universally held in this country at the present time that a commercial railroad laid in a street in a municipality of itself entitles abutting owners to recover dam-

where the tracks do not interfere with access to the property. *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126.

The earlier constitutions generally required compensation to be made in case of a "taking" of private property for public use, yet they did not require the payment of compensation where such property was merely "injured" or "damaged," and in the latter cases no recovery was allowed, but the later constitutions and amendments in a majority of the states provide not only for a recovery of damages where there is a "taking" but also where one's property is "injured" or "damaged" or the like. The earlier cases quite generally held that the use of a street in a municipality for a railroad was not a "taking" of private property so as to require compensation. But when the constitutions were amended, and under the constitutions of practically all of the states admitted into the Union since 1870, so as to permit a recovery where property was "taken" or "damaged" (or the equivalent) it was almost universally held that abutters could recover without regard to whether they owned the fee, and that the property was *damaged* if there was a decrease in value. "Where a railroal is laid down in a pub-

lic street or alley, the abutting property is damaged, within the meaning of the constitution, to the extent of the depreciation caused by the construction and operation of the road." Lewis, *Eminent Domain* (3d Ed.), § 351.

The decisions are somewhat confusing, however, because some of them holding that a recovery is permissible are based on the theory (1) that the use of a street for a commercial railroad is not a legitimate street, use, while others are based (2) on the constitutional provisions forbidding damaging private property for public use without compensation, while still others are based (3) on a statute expressly authorizing a recovery of damages where a commercial railroad is constructed in a street, and another class are those (4) where the recovery is allowed not because of the mere laying of the track and operation of trains but because of special injuries, other than mere depreciation in value, resulting to the abutter. On the other hand, the decisions denying a right to recover are for the most part confined to those where the title to the street is in the municipality and it is held for that reason that there is no taking, or damaging of the abutter's property merely because of the laying of the track.

ages from the company,⁷⁹ although in a few states the

79. *Alabama*. Western Ry. of Alabama v. Alabama Grand Trunk R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474.

Arkansas. See Little Rock & Fort Smith R. Co. v. Greer, 77 Ark. 387, 96 S. W. 129, following Hot Springs R. Co. v. Williamson, 45 Ark. 429.

California. Smith v. Southern Pac. R. Co., 146 Cal. 164, 79 Pac. 868, 106 Am. St. Rep. 17; Weyl v. Sonoma Val. R. Co., 69 Cal. 202, 10 Pac. 510. But see, as contra, Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89.

Colorado. Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714.

Florida. Seaboard Air Line Ry. v. Southern Inv. Co., 53 Fla. 832, 44 So. 351.

Georgia. Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., 125 Ga. 529, 547, 54 S. E. 736; Atlantic & Birmingham R. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148, reviewing at length the earlier cases in Georgia.

Indiana. Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222; Haslett v. New Albany Belt & Terminal R. Co., 7 Ind. App. 603, 34 N. E. 845; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; Chicago, I. & L. R. Co. v. Johnson, 45 Ind. App. 162, 90 N. E. 507.

Michigan. Ecorse Tp. v. Jackson, A. A. & D. Ry., 153 Mich. 393,

117 N. W. 89; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393, 11 N. W. 212; Redinger v. Marquette & W. R. Co., 62 Mich. 29, 28 N. W. 775; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306.

Minnesota. Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82 (Gil. 59), 88 Am. Dec. 59; Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215 (Gil. 188).

Nebraska. Hastings & G. I. R. Co. v. Ingalls, 15 Neb. 123, 16 N. W. 762; Burlington & M. R. R. Co. v. Reinhackle, 15 Neb. 279, 18 N. W. 69.

New Jersey. Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co., 20 N. J. Eq. 61; Bork v. United N. J. R. R. & C. Co., 70 N. J. L. 268, 57 Atl. 412, 103 Am. St. Rep. 808.

New York. Williams v. New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651, rev'g 18 Barb. 222; Wager v. Troy Union R. Co., 25 N. Y. 526.

Ohio. Lawrence R. Co. v. Williams, 35 Ohio St. 168.

Rhode Island. Taber v. New York, P. & B. R. Co., 28 R. I. 269, 67 Atl. 9.

South Carolina. South Bound R. R. Co. v. Burton, 67 S. C. 515, 46 S. E. 340.

Texas. Houston, O. L. & M. P. R. Co. v. Grossman (Tex. Civ. App., 1905), 89 S. W. 312, reversed on other grounds in Houston, O. L. & M. P. Ry. Co. v. Grossman, 99 Tex. 641, 92 S. W. 836, holding that depreciation in value of lot was recoverable.

contrary is held.⁸⁰ In some states the right of the abutter to recover damages is expressly conferred by statute.⁸¹

Virginia. *Hodges v. Seaboard & R. R. Co.*, 88 Va. 653, 14 S. E. 380.

Wisconsin. *Carl v. Sheboygan & F. D. L. R. Co.*, 46 Wis. 625, 1 N. W. 295.

Steam railroad an additional servitude. The fact that a municipality has granted a railroad company a right of way over a street does not preclude owners of land abutting on such street from recovering damages from the company because of the construction of the track thereon. *Pittsburg, C. C. & St. Louis R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791.

The railroad company is liable for damages resulting to abutters notwithstanding the grant of the use of the streets does not so provide. *Kaufman v. Tacoma O. & G. H. R. Co.*, 11 Wash. 632, 40 Pac. 137.

In Pennsylvania, the 1849 statute provided for compensation where land was actually taken or where injury resulted from the construction of a railroad in a street "by reason of any excavation or embankment made in the construction of the road." Under this statute a land owner has no right to damages because of the mere location of a steam railroad in a street. *Jones v. Erie & W. R. Co.*, 144 Pa. St. 629, 23 Atl. 251. Compensation is now secured by the new constitution adopted in

1874. *Willock v. Beaver Valley R. Co.*, 222 Pa. St. 590, 72 Atl. 237.

Measure of damages to abutting lot by construction of railroad in street, see *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326.

80. *Kansas, N. & D. R. R. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. 1051; *Seibel-Suessdorf Copper & Iron Mfg. Co. v. Manufacturer's R. Co.*, 230 Mo. 59, 130 S. W. 288.

Missouri. "In a long line of decisions, beginning with *Lackland v. Railroad*, 31 Mo. 180, and extending through the reports down to *DeGeofroy v. Merchants Bridge Ter. Ry. Co.*, 179 Mo. 698, it has been ruled by this court that it is lawful for a city to authorize the construction and operation of a railroad in a street, and that such use of the street is not a new servitude. On this proposition, whatever views may be entertained elsewhere, there is no further room for argument in this state." *Seibel-Suessdorf Copper & Iron Mfg. Co. v. Manufacturers' Ry. Co.*, 230 Mo. 59, 83.

In Oklahoma, a commercial railroad in a street is not an additional servitude where it does not cut off or materially interrupt the means of access to abutting owners. *Scrutchfield v. Choctaw, O. & W. R. Co.*, 18 Okla. 308, 88 Pac. 1048, 9 L. R. A. (N. S.) 496.

81. *Marquette & S. E. R. Co. v. Longyear*, 133 Mich. 94, 94 N. W. 670 (holding that the statute au-

Just what the law is in a particular state, and on what theory a recovery has been allowed or disallowed, can be ascertained only by a careful review of all the decisions pertaining thereto in such state. Here it is impracticable to review in detail the law, and the changes thereof from time to time, in each state, especially since the decisions of the same court at different times are in many instances conflicting and irreconcilable.

Even in those jurisdictions where it is held that a commercial railroad is not an additional servitude, yet if the railroad destroys or unreasonably impairs the public use of the street as a highway by unreasonable interference with the easement in the street, which abutting owners enjoy in going to and from their property, there is a taking of the property of the abutting owners, for which they are entitled to compensation.⁸² So if the

thorizes recovery although the track is laid on the opposite side of the street); *Fleishman v. Cleveland, C. C. & St. L. R. Co.*, 11 Ohio Dec. 543, 27 W. L. B. 302.

In Iowa, it is provided by statute that no railroad track can be laid on a street until the injury to abutting property has been ascertained and compensated for. *Middleton v. Mason City & Ft. D. R. Co.*, 127 Ia. 433, 103 N. W. 364 (holding property abutting on excavated streets to be abutting property); *Enos v. Chicago, St. Paul & K. C. R. Co.*, 78 Ia. 28, 42 N. W. 575. Prior to the statute an abutter, where the title to the fee of the street was in the municipality, could not recover where a railroad was laid in the street. *Davenport v. Stevenson*, 34 Ia. 225.

In Kentucky, the statute of 1893 now requires compensation where a commercial railroad is constructed in a street. Before

this time a commercial railroad was held not an additional servitude. *Pryse v. Louisville & A. R. Co.*, 31 Ky. L. Rep. 1119, 104 S. W. 698; *Lexington & O. R. Co. v. Applegate*, 38 Ky. 289, 33 Am. Dec. 497; *Fulton v. Short-Route Ry. Transfer Co.*, 85 Ky. 640, 4 S. W. 332; *Stein v. Chesapeake & O. R. Co.*, 132 Ky. 322, 116 S. W. 733.

82. *Stein v. Chesapeake & O. R. Co.*, 132 Ky. 322, 116 S. W. 733.

See *Robinson v. Springfield Southwestern R. Co.*, 143 Mo. App. 270, 126 S. W. 994, where right of access interfered with.

Cutting off free and unobstructed access to one's premises on one particular street in one direction is not such a special injury as to entitle the abutter to recover damages from a railroad company. *Scrutchfield v. Choctaw, O. & W. R. Co.*, 18 Okla. 308, 88 Pac. 1048, 9 L. R. A. (N. S.) 496.

railroad track has been constructed without authority from the municipality, abutters are entitled to damages.⁸³ If the ownership of the fee in the street is in the municipality and not in the abutting owner, the earlier cases held that the abutter could not recover damages merely because of the construction of a commercial railroad in the street,⁸⁴ and this is still the law in some states,⁸⁵ but the general rule at present is that such title is immaterial and that the abutter may recover damages although the fee title to the street is in the municipality.⁸⁶

Railroad near factory, interfering with unloading, is a taking of the property of the abutter so as to require compensation. *Cleveland Burial Case Co. v. Erie R. Co.*, 24 Ohio Cir. Ct. Rep. 107.

In Missouri, a steam railway so near an abutter's building line as to unreasonably deprive him of his right of access is an additional servitude. *Knapp, Stout & Co. v. St. Louis Transfer R. Co.*, 126 Mo. 26, 28 S. W. 627.

83. *Grand Rapids & I. R. Co. v. Heisel*, 47 Mich. 393, 11 N. W. 212.

84. *Willock v. Beaver Valley R. Co.*, 222 Pa. St. 590, 72 Atl. 237.

In Michigan, an abutter who owns the soil of the street may recover damages for the injury to the freehold, but one not owning such soil can only recover damages arising from such misconduct, as constitutes a nuisance. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

Prepayment of damages not required in Texas, where fee not in abutter, since occupation of street by railroad is not a "taking" within constitutional provision. *McCammon & Lang Lumber*

Co. v. Trinity & B. V. R. Co. (Tex., 1911), 133 S. W. 247.

85. *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

In New York, a steam railroad company authorized by the state to build its road and granted rights in the streets by the municipality, is not liable for damages for a reasonable use of the street to an abutter who does not own the fee of the street, but only has an easement therein. *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 24 N. E. 919, reviewing at length the earlier cases in the state of New York and explaining *Story v. Railroad Co.*, 90 N. Y. 122 and *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 10 N. E. 528. But an abutter who owns the fee to the center of the street may recover damages where a steam railroad company constructs its road in a street. *Trelford v. Coney Island & B. R. Co.*, 39 N. Y. S. 20, 5 App. Div. 464.

86. *Arkansas. Little Rock & Ft. S. R. Co. v. Greer*, 77 Ark. 387, 96 S. W. 129.

Georgia. See *Atlantic & Bir-*

§ 1702. Street railroads.

Laying down rails in a street, and running street cars over them for the accommodation of persons desiring to travel from one point to another in a municipality, *i. e.*, persons desiring to travel *on the street*, is merely a later mode of using the land as a way for the very purpose for which it was originally taken,⁸⁷ and does not,

Mirmingham R. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148, reviewing, at length, earlier cases in Georgia.

Minnesota. Lamm v. Chicago, etc. R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

Mississippi. Theobald v. Louisville, N. O. & T. Ry. Co., 66 Miss. 279, 6 So. 230.

Washington. Kaufman v. Tacoma, O. & G. H. R. Co., 11 Wash. 632, 40 Pac. 137.

United States. Mollandin v. Union Pac. Ry. Co., 14 Fed. 394, construing Colorado constitution.

Rule uncertain in many states. In many states, this question as to the right to recover where the fee of the street is in the municipality has never been considered, but the rulings have been made without any reference to the fee.

In Illinois, it was formerly held that an abutter could recover damages where a railroad was constructed in the street in front of his property if he owned the fee of the street, but not if the municipality owned the fee of the street. *Moses v. Pittsburg, Ft. W. & C. R. Co.*, 21 Ill. 516. But when the constitution was amended in 1870, so as to authorize recovery of compensation where private property was "damaged" as well as where "taken" for public use,

the abutter was held entitled to recovery although he did not own the fee of the street.

In North Carolina, a steam railroad is an additional servitude and the owner is entitled to damages whether the fee is in him or the municipality. *White v. Northwestern North Carolina R. Co.*, 113 N. C. 610, 18 S. E. 330, 37 Am. St. Rep. 639, 22 L. R. A. 627.

The fact that the title to the soil of a street is in the municipality does not give it a right to grant to a steam railroad the right to lay its track without compensation to abutting owners. *Staton v. Atlantic Coast Line R. Co.*, 147 N. C. 428, 61 S. E. 455.

87. See *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47.

Street railway not additional servitude. "Certain unpleasant, inconvenient, and disturbing features, from the point of view of an adjoining owner, naturally attend public travel upon a highway, if there is any considerable amount of it. This is distinctly true of highway used by street cars, and the greater the public demand and service, the greater these features almost certainly are. Dust cannot well be kept down, and vibration and noise in some measure is inevitable.

it is almost universally held, constitute an additional servitude so as to entitle abutting owners to compensation. This rule applies equally well, provided the road is for the transportation of passengers within the municipality, without regard to the nature

Such things as these and other annoyances and inconveniences which result from a user of a highway which is consistent with a legitimate and proper use of it as a public thoroughfare are among the penalties which a modern and busy life imposes upon those who come closest in contact with it. A user of a highway by a street railway forms no exception. Certain objectionable results are among its natural incidents. In so far as this is the case, and the consequences complained of flow naturally and normally from the conduct of the traffic under proper authority, in a reasonable manner and with due regard for the rights of others, one who conceives that he has been injured can have no redress. *State ex rel. Howard v. Hartford Street Ry. Co.*, 76 Conn. 174, 183, 56 Atl. 506; *Roebling v. Trenton Pass. Ry Co.*, 58 N. J. L., 666, 674, 34 Atl. 1090, 33 L. R. A. 129. 'If the line is operated with reasonable care, and so as to produce only that incidental inconvenience which unavoidably follows the occupation of the street by the operation of its cars with the noises and disturbances necessarily attending their use, no one can complain. Whatever

consequent annoyances may necessarily follow from the running of the road with reasonable care is *damnum absque injuria*.' *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 331, 2 Sup. Ct. 719, 728, 27 L. Ed. 739. But whenever annoying, disturbing, or other damage-producing conditions are created through a failure to regulate the conduct of the business with a reasonable regard for the rights of others, or through means which are not reasonably incident to it, then a right of action arises. *Joyce on Nuisances*, § 73." *Cadwell v. Connecticut Ry. & Lighting Co.*, 84 Conn. 450, 80 Atl. 285.

What is a street railroad. "There is a wide and well understood difference between a railroad organized for general traffic, and a street, horse, or dummy railroad. * * * A street railroad, as is well understood, is a road constructed on a street or highway for the purpose of conveying passengers living upon or having business on such street or highway, its main object being to accommodate street travel." *Harvey v. Aurora & Geneva Ry. Co.*, 174 Ill. 295, 307, 51 N. E. 163.

of the motive power,⁸⁸ and has been successively

88. **Motive power not controlling.** "So it follows that, in determining whether a street railroad is an additional burden upon the land already set aside for the public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road to be so constructed and operated, as to have the opposite effect." *La Crosse City Ry. Co. v. Higbee*, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923.

"It certainly can make no difference whether the cars of a railroad company are propelled by the agency of steam, or of gasoline, or of electricity, compressed air, liquified air, or any other agency which science and the inventive genius of man may in the future bring into use. Rather, the character of a railroad company is determined by the nature and extent and limits put upon its operation by law or otherwise, and by the character and object of its corporate creation as shown by its charter." *Diebold v. Kentucky Traction Co.*, 117 Ky. 146, 77 S. W. 674, 63 L. R. A. 637.

A street car company, granted the right to use streets of a municipality, may pass over the

lines of other railways that cross such streets, without being liable in damages to such other railway companies, without regard to what power the cars of the street car company are propelled by. *Southern Railway Co. v. Atlanta Ry. & Power Co.*, 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125.

"Whether or not a street or suburban railway constitutes a burden upon streets or highways in a city or country does not depend so much upon the motive power used in propelling the cars as it does upon the character and nature of business it transacts. For instance, what is known as a 'commercial railway,' which carries not only passengers, but quantities of freight, from one portion of the state to the other, and even from one state to another, in traversing public highways of the country or streets of a city would necessarily constitute a greater burden and servitude upon such highways or streets than an ordinary car of a street or suburban railway, whether propelled by steam, cable, electricity, or otherwise, which has for its purpose simply the transportation of passengers from one point to the other on the streets of a city, or to adjacent places in the contiguous country. A marked difference between the two systems is that the former often carries long trains of passengers and freight cars over its line, and is not intended at all for the accommodation of the public desiring to go

applied to street cars propelled by horses,⁸⁹ a cable

from one portion of the city to the other, while the latter ordinarily uses one car, and facilitates the transportation of passengers desiring only to go short distances between different points in the city." *Southern Ry. Co. v. Atlanta Ry. & Power Co.*, 111 Ga. 679, 36 S. E. 873, 877, 51 L. R. A. 125.

"The difference between street railroads and railroads for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly populated district to another, in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers,—is a street railroad, whether the cars are propelled by animal or mechanical power. The propelling power of such a road may be animal, steam, electricity, cable, fireless engines, or compressed air; all of which motors have been, and are now, in use for the purpose of propelling street-cars. *Encyclop. Britannica* (9th Ed.), tit. 'Tramway.' Doubtless other

methods of propelling the cars of street railroads will be discovered and applied." *Williams v. City Electric Street Ry. Co.*, 41 Fed. 556.

89. *Connecticut*. *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579.

Florida. *State v. Jacksonville St. Ry. Co.*, 29 Fla. 590, 10 So. 590.

Illinois. *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485.

Indiana. *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261, 41 Am. Rep. 561.

Maryland. *Hiss v. Baltimore & H. Pass. R. Co.*, 52 Md. 242, 36 Am. Rep. 371.

Massachusetts. *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264.

New Jersey. *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Citizens' Coach Co. v. Camden H. R. Co.*, 33 N. J. Eq., 267, 36 Am. Rep. 542; *Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. 859.

Ohio. *Sells v. Columbus St. Ry. Co.*, 11 Ohio S. & C. P. Dec. 643, 28 W. L. B. 172.

Texas. *Texas & P. R. Co. v. Rosedale St. R. Co.*, 64 Tex. 80, 53 Am. Rep. 739.

Horse railroads are distinguished from steam railways in the rails and construction of the track, the speed at which they run, the noise and vibration produced, the smoke and steam

system,⁹⁰ a steam motor,⁹¹ and electricity.⁹² The prevail-

emitted, the danger of driving horses, the danger of life, and the size and weight of cars and locomotives.

Horse railroad to transfer freight cars from the terminus of one railroad to another within a city is an additional servitude. *Carli v. Stillwater St. Ry. & P. Co.*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290.

90. *Clement v. Cincinnati*, 9 Ohio S. & C. P. Dec. 688, 19 W. L. B. 74; *Harrison v. Mt. Auburn Cable R. Co.*, 9 Ohio S. & C. P. Dec. 805, 17 W. L. B. 265; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 23 Atl. 884, holding it immaterial that vehicles cannot stand between curbing and tracks without interfering with the cars.

91. *Briggs v. Lewiston*, 79 Me. 363, 10 Atl. 47; *Williams v. City Electric Street R. Co.*, 41 Fed. 556; *Rische v. Texas Transp. Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324.

Steam as motive power. The right to use steam as a motive power to operate street cars was sustained, the evidence showing that the motor was so designed as not, in the operation of hauling street cars to be materially different from horse or electric power as regards interference with ordinary public travel, or with private rights. The court said that the test to be applied, in determining whether a railway constructed on a street and operated by the use of a steam motor is an additional burden upon the fee, is whether it is in fact a

street railroad as the term is commonly understood—a railroad constructed and operated in aid of passenger travel on the street over which it runs, by taking on and discharging passengers at street crossings—and whether it is constructed on the street grade and operated so as not materially to interfere with the ordinary common use of the street or with the access to abutting property. *Newell v. Ry. Co.*, 35 Minn. 112, 27 N. W. 839.

The fact that a street railroad company has in its charter authority to use steam as a propelling power for its cars is immaterial where the franchise granted by the city authorizes only the use of electric power, and there is nothing to indicate that the company ever intends to use anything else, although the use of steam instead of electricity would not necessarily make the railroad a commercial rather than a street railroad. *Southern Ry. Co. v. Atlanta Ry. & Power Co.*, 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125.

In Tennessee, however, a railway whose cars are propelled by a dummy steam engine (consisting usually of a small boxed engine and two coaches), and used for passengers only, is an additional servitude. *East End St. R. Co. v. Doyle*, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. Rep. 933.

92. *Alabama*. *Birmingham Traction Co. v. Birmingham Ry. & Electric Co.*, 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; *Baker v.*

ing judicial view is that the motive power of itself is not

Selma St. & S. R. Co., 130 Ala. 474, 30 So. 464.

Connecticut. Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107.

Delaware. Philadelphia, W. & B. R. Co. v. Wilmington City R. Co., 8 Del. Ch. 134, 38 Atl. 1067.

Florida. Randall v. Jacksonville St. R. Co., 19 Fla. 409.

Georgia. Southern R. Co. v. Atlanta R. & Power Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125.

Illinois. Chicago & W. I. R. Co. v. General Electric R. Co., 79 Ill. App. 569; Chicago B. & I. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008 (holding steam railroad company cannot enjoin street car company from laying its track along city street and across the tracks of the steam railroad company); Barsaloux v. Chicago, 245 Ill. 598, 92 N. E. 525.

Indiana. Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222.

Kentucky. Georgetown & Lexington Traction Co. v. Mulholland, 25 Ky. L. Rep. 578, 76 S. W. 148.

Maine. Taylor v. Portsmouth, K. & Y. St. Ry., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216; Parsons v. Waterville & O. St. Ry., 102 Me. 173, 63 Atl. 728.

Maryland. Lonaconing, M. & F. R. Co. v. Consolidation Coal Co., 95 Md. 630, 53 Atl. 420; Green v. City & Suburban R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288; Jeffers v. Annapolis, 107 Md. 268, 68 Atl. 361.

Massachusetts. Attorney General v. Metropolitan R. Co., 125 Mass. 515, 28 Am. Rep. 264; Howe v. West End St. R. Co., 167 Mass. 46, 44 N. E. 386; Eustis v. Milton, 183 Mass. 586, 67 N. E. 663.

Michigan. Austin v. Detroit, Y. & A. A. Ry., 134 Mich. 149, 96 N. W. 35; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Ecorse Tp. v. Jackson, A. A. & D. Ry., 153 Mich. 393, 117 N. W. 89.

Missouri. Placke v. Union Depot R. Co., 140 Mo. 634, 41 S. W. 915.

New Jersey. Mt. Clair Military Academy v. North Jersey St. R. Co., 70 N. J. L. 229, 57 Atl. 1050; Ehret v. Camden & T. R. Co., 61 N. J. Eq. 171, 47 Atl. 562; Kennelly v. Jersey City, 57 N. J. L. 293, 30 Atl. 531; West Jersey R. Co. v. Camden, G. & W. R. Co., 52 N. J. Eq. 31, 29 Atl. 423.

Ohio. Parrish v. Hamilton, G. & C. Traction Co., 23 Ohio Cir. Ct. Rep. 527.

Pennsylvania. Lockhart v. Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26.

Tennessee. Cumberland Tel. & Tel. Co. v. United Electric R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236.

Texas. Limburger v. San Antonio Rapid Transit St. R. Co., 88 Tex. 79, 30 S. W. 533; Galveston. H. & S. A. R. Co. v. Houston Electric Co., 57 Tex. Civ. App. 170, 122 S. W. 287.

Utah. Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229.

sufficient to class street railways with ordinary railroads respecting the question of an added burden upon the fee.

Virginia. Reid v. Norfolk R. Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. Rep. 708; Wagner v. Bristol Belt Line R. Co., 108 Va. 594, 600, 62 S. E. 391.

Wisconsin. La Crosse City R. Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923; Younkin v. Milwaukee Light, Heat & Traction Co., 120 Wis. 477, 98 N. W. 215.

United States. Ranken v. St. Louis & B. Suburban R. Co., 98 Fed. 479.

Electric street railways not additional servitude. Some of the cases included above relate to street railroads upon country roads, but it is clear that any decision holding that a street railroad on a country road is not an additional servitude would necessarily hold *a fortiori*, that a street railroad on a street in a municipality is not an additional servitude.

If a horse railroad is not an additional servitude, then an electric street railroad does not constitute a new servitude, and the change of a railroad propelled by horses to an electric road does not impose a new servitude. Pelton v. East Cleveland R. Co., 10 Ohio S. & C. P. Dec. 545, 22 W. L. B. 67; Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; Reid v. Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. Rep. 708. Contra, Jaynes v. Omaha St. Ry. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751 which is criticised

at length in La Crosse City Ry. Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923, and which seems to be the only case *contra*.

"The use of electricity as a motive power for street cars causes no greater obstruction to the streets, and imposes no greater burden upon them, than the ordinary horse railway, with the single exception of the posts and wires. But when the posts are placed at the side of the railway, and the wires sufficiently high to permit a free use of the street, they are not a material obstruction to travel, or a use of the street inconsistent with the purposes of its dedication. The electric car does not occupy as much space upon the street as do the cars with horses attached. Comparing the electric car with the horse car, the former is not more noisy, is cleaner, is started and stopped quicker, moves faster, is more readily controlled, and, by its more rapid carriage of passengers, relieves the street, to some extent, at least, of the general burden of travel. * * * After a full consideration of the various objections raised to the use of electricity, every court of last resort to which the question has been submitted has held that the electric street railway does not constitute a new servitude, and that the use of this motive power, when duly authorized, does not entitle abutting owners to compensation." Booth, St. Ry.

So the rule applies without regard to the ownership of the fee of the street,⁹³ except in New York where it is held that the abutting owner may recover damages if he owns the fee of the street but not if he has merely an easement in the street.^{93a}

Law, § 83. *Reid v. Norfolk City R. Co.*, 94 Va. 117, 26 S. E. 428.

The fact that a mere easement was taken in the original laying out of a street does not affect the rule that a street railroad is not an additional servitude. *Hester v. Durham Traction Co.*, 138 N. C. 288, 50 S. E. 711, 1 L. R. A. (N. S.) 981.

The motive power, of itself, is not sufficient to class an electric street railway with an ordinary railroad, as regards its being an added burden upon the fee. *La Crosse City Ry. Co. v. Higbee*, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923.

In Mississippi, it was held that a street railway is an additional servitude on the street, entitling an abutting owner to additional compensation, "and it can make no difference in principle whether the street be broad or narrow except as to the extent of the damage;" that a street railway is not a legitimate use of the street, and that there can be no difference between the damage done by a steam railway and a street railway, save in the degree of the damage. *Slaughter v. Meridian Light & R. Co.*, 95 Miss. 251, 48 So. 6. This opinion, however, was withdrawn and in place thereof it was held that the question whether the laying of an electric street railway in the streets of a city was an additional

servitude was not presented for decision by the record, but it was held that if only two inches of space was left between the body of the cars and the hubs of an ordinary standard wagon, the use of the street for all purposes, except for cars, was practically destroyed so as to authorize a recovery of damages by an abutting owner. *Slaughter v. Meridian Light & Ry. Co.*, 95 Miss. 251, 48 So. 1040.

In Michigan, in *Nichols v. Ann Arbor & Ypsilanti*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371, the main opinion written by Justice Long and concurred in by Justice Grant so held but the contrary is stated in the dissenting opinion of Justice Morse, concurred in by Justice McGrath, and Chief Justice Champlin states that it is not settled law "in this state that a street railway, operated by steam or electricity, is not an additional servitude upon a street or highway." However, the later cases in that state, cited above, establish the rule as stated in the text.

Spur track to car barns does not impose an additional servitude. *Donner v. Metropolitan St. R. Co.*, 133 Mo. App. 527, 113 S. W. 669.

93. *Ranken v. St. Louis & B. Suburban R. Co.*, 98 Fed. 479, based on Illinois law.

93a. In New York, if the abutter owns the fee of the street, but not

The weight of authority is that the same rule applies to country roads as to city streets.⁹⁴ Furthermore, a supporting *trolley wire pole* set in the street in front of the sidewalk is not an additional servitude if it is so placed as not materially to interfere with the right of access.⁹⁵

otherwise, he is entitled to compensation. *McCruden v. Rochester Ry. Co.*, 25 N. Y. S. 114, 5 Misc. Rep. 59; *Peck v. Schenectady R. Co.*, 170 N. Y. 298, 63 N. E. 357 (holding, on full review of the cases in New York, that the doctrine of the *Craig* case as to horse roads had become a rule of property which the court could not in justice overthrow with reference to an electric street railway, and that an abutter, owning the fee, could recover); *Rasch v. Nassau Electric R. Co.*, 198 N. Y. 385, 91 N. E. 785, aff'g 113 N. Y. S. 1143, 129 App. Div. 897; *Duncan v. Nassau Electric R. Co.*, 111 N. Y. S. 210, 127 App. Div. 252.

Horse roads. So where the fee of the street is in the abutting owner, a horse railroad is an additional servitude. *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404.

94. *Lewis, Eminent Domain* (3d Ed.), § 161.

95. *Iowa*. *Snyder v. Ft. Madison Street R. Co.*, 105 Ia. 284, 75 N. W. 179, 41 L. R. A. 345.

Massachusetts. *Howe v. West End St. R. Co.*, 167 Mass. 46, 44 N. E. 386.

Michigan. *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

New Jersey. *Roebing v. Trenton Pass. R. Co.*, 58 N. J. L. 666,

34 Atl. 1090; *Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. 859.

Rhode Island. *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205.

Wisconsin. *La Crosse City R. Co. v. Higbee*, 107 Wis. 389, 51 L. R. A. 923; *Linden Land Co. v. Milwaukee Electric R. & L. Co.*, 107 Wis. 493, 83 N. W. 851.

Poles. "The whole matter may be summed up in a single sentence—the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question that the poles and wires do not impose a new burden on the land, but must, on the contrary, be regarded, both in law and reason, as legitimate accessories to the use of the land for the very purposes for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the streets by means of street cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate. It would seem then to be entirely certain that the occupation of the street by the poles and wires takes nothing from the

On the other hand, the rule that the mere laying and operation of a street railroad does not entitle abutting owners to compensation does not mean that the abutter cannot recover damages from the railroad company in a proper case, as where the track is placed so near the

complainant which the law reserved to the original proprietor when the public easement was acquired. This view is in strict accord with the uniform current of judicial opinion on this subject. The question presented here for judgment has already been considered by the supreme court of Rhode Island, in *Taggart v. Railway Co.*, 19 Atl. Rep. 326, and, by the circuit court of the United States for the eastern district of Arkansas, in *Williams v. Railway Co.*, 41 Fed. Rep. 556, and by local courts in Kentucky, Ohio, and Indiana; and, in each instance, the decision has been that the placing of the poles and wires in the street for the purpose of propelling street cars by electricity did not impose a new servitude on the land, nor appropriate the land to a use not within the public easement. The decision in these cases was placed upon this manifestly just principle: That the question, whether a new method of using a street for public travel results in the imposition of an additional burden on the land or not, must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. The use is the test and not the motive power." *Halsey v. Rapid Transit Street-Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859, 863.

The fact that a pole for electric street railroad is set at the outer edge of the sidewalk, where not located so as to interfere with any driveway or other avenue used for passage to or from the street the property of the abutter outside of the street line, but merely preventing a person from stepping on or off the sidewalk at the precise point where the pole is located, does not show it to be such an unreasonable interference with private property as to violate the rule that a street railway cannot be so constructed as to interfere with access to abutting property, without the consent of the owner thereof. *La Crosse City Ry. Co. v. Higbee*, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923.

In *Nebraska*, however, it seems to be held that if an electric street railway on a city street moves its cars without occupying permanently any part of the street with poles or wires, as, for instance, by storage batteries, it does not constitute an additional burden, simply because the motive power is electricity, but that the planting of poles in the street constitutes an additional burden, for which compensation must be made. *Jaynes v. Omaha St. R. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751.

curb as to interfere unnecessarily with the owner's access to his property, or with his enjoyment of the privileges to which abutting owners are entitled in front of their premises,⁹⁶ or where the abutter otherwise suffers special damages.⁹⁷ Likewise, if the road carries freight,

96. *Budd v. Camden Horse R. Co.*, 70 N. J. L. 782, 59 Atl. 229.

97. *Cadwell v. Connecticut R. & L. Co.*, 84 Conn. 450, 80 Atl. 285.

If access to abutter's land or building is materially impaired, he may recover compensation therefor. *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194, 9 Am. Rep. 461.

If access to abutting premises is obstructed by a street railway making cuts and fills, an additional burden is imposed. *Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371.

Street railway in middle of street occupying only small part of the width of the street is not an additional servitude. *People v. Ft. Wayne & E. R. Co.*, 92 Mich. 522, 52 N. W. 1010.

If tracks for a street railroad are laid in a street already occupied by a double line of tracks, so as to prevent the proper use of the land of an abutting owner and cause a depreciation in its value, he is entitled to damages. *Limburger v. San Antonio Rapid Transit Street R. Co.* (Tex. Civ. App., 1894), 27 S. W. 198.

However, abutting owners cannot recover damages because wagons and teams cannot stand at right angles to the sidewalk between it and the track of a

street railroad to load and unload goods, and leave room for the cars to pass. *Taylor v. Bay City Street R. Co.*, 101 Mich. 140, 59 N. W. 447.

Construction of viaduct in a street by a street railroad company which prevents the use of the street by the abutter, is a taking of private property for public use. *Spencer v. Metropolitan Street R. Co.*, 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668.

"A steam motor may be of such construction, or operated in such a way as to create a public nuisance to the injury of the owners of abutting property; and where that is the case the legislative authority to construct the road will be no justification of the nuisance. If, however, the defendant's road is operated by the use of the improved steam motors generally used on street railroads, and the emission of smoke, gas, and steam, and the noise produced by blast, are no greater than necessarily attend the operation of such motors supplied with the improved appliances and contrivances in common use, then the plaintiff has no ground of complaint at law or in equity." *Williams v. City Electric Street Ry. Co.*, 41 Fed. 556.

In Maryland, it is held that a double street car track in a street, which is so narrow that

exclusively, or freight and passengers, although located wholly within a city, it is an additional servitude.⁹⁸

§ 1703. Same—elevated railroads.

Of course, if a surface commercial railroad entitles abutters to recover compensation, *a fortiori* an elevated commercial road also authorizes a recovery.⁹⁹ How-

there is not room for vehicles between the track and the curb, is not an additional servitude, where it will cause an increase in the value of the abutting property, since the street will not thereby be destroyed or seriously impaired for the ordinary uses of the public, inasmuch as vehicles can always pass unless the railway company blocks the street by permitting two of its cars, on different tracks, to remain stationary, and side by side. *Poole v. Falls Road Electric R. Co.*, 88 Md. 533, 41 Atl. 1069.

Injunction. Where the construction of railroad tracks in or across a street that affords the only reasonable means of access to property abutting thereon will materially impair and interfere with the owner's right of access to and egress from such property, or will materially depreciate the value thereof, the owner may enjoin the construction until the right is acquired under proceedings instituted against such owner for the appropriation of private property, or otherwise, although his property does not immediately abut upon that portion of the street over which the railroad tracks are proposed to be located. *Hall v. Pittsburg C. C. & St. Louis R. Co.* (Ohio St.),

97 N. E. 381, point one of official syllabi.

Change of grade. In Massachusetts, a street railroad company, which changes the grade of a highway for the construction of its road pursuant to the location granted by municipal officers, is not liable for damages to an abutting owner, the statute imposing liability in other like cases not imposing such a liability on street railways. *Hyde v. Boston & W. St. R. Co.*, 194 Mass. 80, 80 N. E. 517, following *Callender v. Marsh*, 1 Pick. (Mass.) 418, holding that no action of tort can be maintained for the changing of the grade, or raising or lowering the surface, of a highway by one authorized by law to do so.

98. § 1705 *post*.

99. Where a certain width is granted a railroad company for a right of way with power to slope the embankments and excavations so far beyond the lines of the strip as necessary to support the track, does not authorize the erection of a viaduct as against abutters. *Pape v. New York & H. R. Co.*, 77 N. Y. S. 725, 74 App. Div. 175, *rev'd* on other grounds in 175 N. Y. 504, 67 N. E. 1086.

But construction of a viaduct by steam surface railroad company to connect its trains with an ele-

ever, where a steam road is elevated by command of the legislature after its construction, in order to benefit general travel, it has been held that no recovery is permissible,¹ although the federal supreme court has held that if owners buy property in reliance on decisions that an elevated railroad cannot be built without compensation, as in New York, later decisions changing the rule impair the obligation of contracts.²

In New York City, Chicago, Boston, Philadelphia, and perhaps some other cities there are elevated railroads, supported by columns in the street, upon which cars are operated in trains, with stations at convenient distances, for the carriage of passengers. The question as to the right of abutting owners to recover compensation for the use of the streets by such roads was first authorita-

rated road, does not give an abutter a right to damages, where he had acquired his title through conveyances from the grantor of the railroad company, after the conveyance of a right of way in fee to the latter. *Bennett v. Long Island R. Co.*, 181 N. Y. 431, 74 N. E. 418, aff'g 85 N. Y. S. 938, 89 App. Div. 379.

In Missouri, which holds that a commercial railroad at the grade of the street, is a legitimate street use, an elevated railroad constructed on permanent arches in a street is an additional servitude, without regard to the statute. *De-Geofroy v. Merchants' Bridge Terminal Ry. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524.

In Kentucky, however, it was held that a commercial railroad about thirteen feet high, supported by iron pillars sixteen inches in diameter and from twenty-five to thirty feet apart, there being am-

ple roadway upon each side of them where they are in the street, and there being ample room for passage, where they are in the sidewalk, is not an unreasonable obstruction or exclusive appropriation of the street and not likely to materially interfere with the passage of either light or air. *Fulton v. Short Route R. T. Co.*, 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619.

1. *Keirns v. New York & H. R. Co.*, 173 N. Y. 642, 66 N. E. 1110; *Fries v. New York & H. R. Co.*, 169 N. Y. 270, 62 N. E. 358; *Welde v. New York & H. R. Co.*, 168 N. Y. 597, 61 N. E. 554. But see *Lewis v. New York & H. R. Co.*, 162 N. Y. 202, 56 N. E. 540.

2. *Muhlker v. New York & H. R. Co.*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872, rev'g 173 N. Y. 549, 66 N. E. 558.

See *Anderson v. New York C. & H. R. R. Co.*, 110 N. Y. S. 232, 58 Misc. Rep. 72.

tively passed upon in the now celebrated case of *Story v. New York Elevated Railroad Co.*,³ decided by the New York court of appeals in 1882. It was held therein that the right to light, air and access over a public street attaches to the ownership of abutting property and cannot be interfered with or taken without compensation, and that an abutting owner may recover compensation where an elevated railroad is constructed in the street in front of his property, although he does not own the fee of the street, thus establishing an exception in the New York law as to ownership of the fee being necessary to recover damages. The rules laid down in that case apply to streets without regard to how acquired or laid out, and to all abutting owners,⁴ and they remain the law today in the state of New York.⁵ In Illinois, it

3. 90 N. Y. 122, 43 Am. Rep. 146.

Earlier cases, see *Re East River Bridge & C. I. Steam Transit Co.*, 26 Hun (N. Y.) 490, 10 Abb. N. C. 245; *Glover v. Manhattan R. Co.*, 66 How. Pr. (N. Y.) 77; *Fifth National Bank v. New York El. R. Co.*, 28 Fed. 231.

4. *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268, 10 N. E. 528.

5. *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268, 10 N. E. 528; *Wagner v. Metropolitan Elev. R. Co.*, 104 N. Y. 665, 10 N. E. 535; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157, 12 N. E. 568; *Williams v. Brooklyn Elev. R. Co.*, 126 N. Y. 96, 26 N. E. 1048; *Salazar v. New York & H. R. Co.*, 49 N. Y. S. 1065.

Elevated viaduct. In New York, however, it is held that there is a difference between the rights of the public authorities to construct an elevated viaduct for general travel and the right of a

corporation to construct an elevated railway for the convenience of passengers under legislative permission. Elevated viaduct along 155th street in New York City, the fee to the street being in the city, does not entitle abutters to recover damages. *Sauer v. New York*, 180 N. Y. 27, 72 N. E. 579, 70 L. R. A. 717, aff'd in 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176.

Changing a street railway to an elevated railway in a city constitutes the imposition of an additional burden. *Welde v. New York & H. R. Co.*, 60 N. Y. S. 319, 29 Misc. Rep. 13, aff'd, without opinion in 66 N. Y. S. 1147, 53 App. Div. 637, and rev'd on other grounds in 163 N. Y. 597, 61 N. E. 554; *Rose v. New York & H. R. Co.*, 95 N. Y. S. 711, 108 App. Div. 206.

Cannot change from surface to elevated, where company has only a prescriptive right against an

is held that abutting owners are entitled to recover under the constitutional clause requiring compensation where property is *damaged*.⁶ In other jurisdictions, the abutter is also usually entitled to recover damages.⁷

abutter, without compensation. *Leffman v. Long Island R. Co.*, 105 N. Y. S. 487, 120 App. Div. 528, *aff'd* without opinion in 197 N. Y. 513, 90 N. E. 1160.

Depreciation of rental value as an element of damage where elevated railroad built in front of one's property, see *McElroy v. Manhattan R. Co.*, 39 N. Y. S. 497, 6 App. Div. 367; *Flynn v. King's County Elev. Co.*, 38 N. Y. S. 204, 3 App. Div. 254; *Conkling v. Manhattan R. Co.*, 12 N. Y. S. 846, 58 Hun (N. Y.) 611; *Woolsey v. New York Elev. R. Co.*, 9 N. Y. S. 133, 56 Hun (N. Y.) 642.

Where elevated railroad is built, owner may be allowed compensation for injuries to rental value of premises though the fee value has not been diminished. *Flynn v. Kings County El. R. Co.*, 38 N. Y. S. 204, 3 App. Div. 254.

Diminution in rents from elevated railroad cannot be recovered where caused by their increasing dilapidation from year to year. *McElroy v. Manhattan R. Co.*, 39 N. Y. S. 497, 6 App. Div. 367.

Title by prescription as defense by railroad company, see *Bremer v. Manhattan R. Co.*, 191 N. Y. 333, 84 N. E. 59.

6. In Illinois, an abutting owner, although he does not own the fee of the street, may recover damages resulting from the construction of an elevated railway in a street, under the constitutional provision that private prop-

erty shall not be *damaged* for public use without just compensation, and it is immaterial that the company had the right to construct the railroad and that it was so constructed as not to constitute a nuisance, and that the construction of the elevated railroad is not an additional servitude. *Aldis v. Union Elev. R. Co.*, 203 Ill. 567, 68 N. E. 95.

Not additional servitude, see *Winnetka v. Chicago & N. E. R. Co.*, 107 Ill. App. 117, *aff'd* in 204 Ill. 297, 68 N. E. 407; *Chicago & W. I. R. Co. v. General Electric R. Co.*, 79 Ill. App. 569.

7. *Rourke v. Holmes St. R. Co.*, 221 Mo. 46, 119 S. W. 1094, 133 Am. St. Rep. 468; *Pittsburg Junction R. Co. v. McCutcheon (Pa.)*, 7 Atl. 146; *State ex rel. v. Superior Court of King County*, 26 Wash. 278, 66 Pac. 385.

In Iowa, statute providing for compensating abutters on street in which a railway is laid, but not applicable to a street railway, applies to an elevated railway operated by steam. *Freiday v. Sioux City Rapid Transit Co.*, 92 Ia. 191, 60 N. W. 656, 26 L. R. A. 246.

In Maryland, under statute providing for a recovery of damages to private property lying upon or near a street on which tracks are laid, it was held that an elevated railroad company was liable to the lessee of property situated twelve feet beyond the end of the line, for the diminution in the

§ 1704. Same—interurban railroads.

“An interurban railroad, as commonly understood in the first decade of the twentieth century, means an electric railway operated through and between different cities and towns, and carrying only passengers, or passengers, light freight and express.”⁷⁸ These roads are usually operated within the municipalities upon the street railway tracks, and the cars differ from an ordinary street car only in that they are heavier and larger, very often run in trains of two or more cars, and sometimes carry mail, light freight and express. The growth of interurban roads has been phenomenal, and at present one system often extends a hundred miles or more, competing with commercial railroads, and in a few instances carrying sleeping cars. Furthermore it is apparent that the business is as yet in its infancy and that it is more than probable that in a few years the main difference between the commercial steam railroad of today and the

usable value of the premises. *Lake Roland El. R. Co. v. Webster*, 81 Md. 529, 32 Atl. 186. But erection of an abutment in a street to be used as an approach for elevated railway tracks is not a “taking” of property within the constitutional provision. *Garrett v. Lake Roland Elev. R. Co.*, 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396.

In Massachusetts, under a statute providing that the location of a railway in any public way shall be deemed an additional servitude and entitle persons having an estate in such way or in abutting premises, and who are damaged by reason thereof, to recover compensation, the word “damage,” although meaning a special and not general damage, excludes noise incident to the operation of the railway where such as to

constitute a private nuisance. *Baker v. Boston Elev. R. Co.*, 183 Mass. 178, 66 N. E. 711. See also *Peirson v. Boston Elev. R. Co.*, 191 Mass. 223, 77 N. E. 769. And a trestle erected by a street railroad company to carry its tracks over a railroad is an additional servitude. *Lentell v. Boston & W. St. Ry. Co.*, 202 Mass. 115, 88 N. E. 765.

Approach to a bridge held not to constitute an additional servitude. *Brown v. Multnomah County*, 38 Ore. 79, 60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389, 84 Am. St. Rep. 772.

8. *Lewis, Eminent Domain* (3d Ed.), § 165.

See *Nellis, Street Railways*, §§ 83, 84.

Defined by statute, see *Cedar Rapids & M. C. R. Co. v. Cummins*, 125 Ia. 430, 101 N. W. 176.

interurban road will be that the latter is run by electricity and does not carry heavy freight. The importance of the question of the rights of abutting owners is thus clear and moreover the law in regard thereto is far from being settled and undoubtedly will undergo changes as the interurban road becomes more and more the competitor of the steam commercial road. In so far as the right of an abutting owner within a municipality to recover damages is concerned, it has been held in Indiana and some other states that no additional burden is imposed and hence damages are not recoverable,⁹ but the

9. See *Jeffers v. Annapolis*, 107 Md. 268, 68 Atl. 361.

Rule in Indiana and reasons therefor. "The carriage of light express matter, passenger baggage, and mail matter upon street cars would not constitute ground of complaint on the part of abutting lot owners. If only one car is run, the street is occupied and obstructed by it to no greater extent than it would be by a street car. If two constitute a train, they will take up no more space and do no more injury than a motor car and trailer, which are commonly run upon street railroad tracks when the business of the company requires such additional car. The fact that light express matter, passenger baggage, and United States mail matter are carried on a car does not affect the property owner, nor injure his property. The transportation of articles of this kind does not create any resemblance between the interurban electric railroad and a steam railroad carrying ordinary goods and merchandise, and results in none of the annoyances and injuries which are

caused by either passenger or freight trains on such a railroad.

* * * It is apparent that every objection founded upon injury to his property rights which the plaintiff can justly urge against the use by the defendant of Fulton street in front of plaintiff's lots would apply with equal force to the use of that thoroughfare by an electric street railroad constructed and operated wholly within the city limits. But this court has held that such a street railroad is not an additional burden upon the street, and that the owners of abutting real estate are not entitled to compensation on account of such appropriation and use." *Mordhurst v. Ft. Wayne & S. W. Traction Co.*, 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222. Attention is called to a late decision in Indiana, rendered in 1907 (*Kinsey v. Union Traction Co.*, 169 Ind. 563, 81 N. E. 922), wherein the subject is considered in detail and it is held that an interurban road was not an additional servitude (Judge Jordan and Judge Montgomery dissenting), but that a recovery

contrary is held in Wisconsin,¹⁰ and in Illinois such a

was allowable for special damages sustained by an abutter, by reason of improper operation of the road. Compare *Miller v. Cincinnati, L. & A. Electric St. Ry. Co.*, 43 Ind. App. 540, 88 N. E. 102.

In Minnesota, a railroad extended about two miles within the city limits and thence for a further distance about eighteen miles to a lake resort. Cars were operated singly or in trains of from two to four cars by small steam engines entirely encased in cabs so that no part of the machinery was visible from the outside, except that the smoke pipe stood a little above the top of the cab. The steam was exhausted in the engine and neither smoke nor steam were often perceptible. The cars were run in the city at a speed of from three to four miles an hour. It was held that the railroad as operated in the city was a passenger street railway, and it was immaterial that outside the city limits it was not a passenger street railway. It was also held that the construction and operation of the road within the city did not impose any additional servitude, the railroad being operated in the city solely for the carriage of passengers and making stops within the city for city passengers. *Newell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303. In this case, however, there is a vigorous dissenting opinion by Justice Mitchell wherein he stated that the road did not differ materially from any ordinary com-

mercial railroad, "except that it uses the entire length of the street as its depot, at which it receives and lays off passengers. As operated it is, to a certain extent, in aid of travel on the street; but this is a secondary and incidental, and not its main and principal, purpose. The doctrine of the opinion will, it seems to me, lead to the insidious encroachments of any and all railroads upon the public streets by their simply adopting certain slight and merely colorable changes in their mode of operation."

Iowa. That city, in Iowa, may vacate street and grant a right of way along the strip to an interurban street railway company, see *Tomlin v. Cedar Rapids & I. C. R. & L. Co.*, 141 Ia. 599, 120 N. W. 93, 22 L. R. A. (N. S.) 530.

10. *Younkin v. Milwaukee Electric R. Co.*, 120 Wis. 477, 98 N. W. 215; *Abbott v. Milwaukee Light, Heat & Traction Co.*, 126 Wis. 634, 106 N. W. 523, 4 L. R. A. (N. S.) 202; *Gosa v. Milwaukee Light, Heat & Traction Co.*, 134 Wis. 369, 114 N. W. 815; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.*, 95 Wis. 561, 70 N. W. 678.

Interurban road — additional servitudes. "Counsel for the defendant argues that as a train or cars with passengers from Milwaukee might, at the city limits of Waukesha, change from such interurban cars to regular street cars, and then at the westerly limits of the city again change into interurban cars, that, therefore, it is substantially the same

road is an additional servitude where it carries freight.¹¹

as though the interurban train or cars should continue with its passengers directly through the city; especially as the ordinance expressly authorized the street railway to connect with the interurban railway. While such argument may be plausible, yet it is really begging the question. It might be argued on the same theory that a commercial railway passenger train, with the permission of the city, might be run over the street railway tracks without compensation to the abutting lot owners. We must hold that the running of such interurban trains and cars over the street railway tracks upon Lincoln avenue was an additional burden upon the lands of the plaintiffs as such abutting lot owners." *Younkin v. Milwaukee Light, Heat & Traction Co.*, 120 Wis. 477, 98 N. W. 215.

If street is used for city railway, and afterwards franchise is granted to use for urban and interurban railway, abutter may recover difference between fair market value of his property before user for interurban purposes and its value thereafter. *Murdock v. Beloit, D. L. & J. R. Co.*, 147 Wis. 100, 132 N. W. 979.

In Wisconsin, a traction company was incorporated for the purpose of carrying on the business of an interurban railway and also the business of a street railway, but before going on the streets of a city it succeeded to the rights of a street railway company which had obtained a grant from such city of the right

to use certain streets for street railway purposes only. The interurban cars were somewhat larger than ordinary street railway cars but otherwise the same in their construction and operation as electric street railway cars. The interurban company had no power to demand a right of way in the street before 1901, although it operated interurban cars over the tracks since 1898, at the same time doing a street railway business. It was held that the interest of abutters in a street was taken for interurban railroad purposes at the time the interurban company filed its petition for condemnation in 1904; that the laying of double tracks expressly authorized by amendment to the street railway franchise was not an additional burden so as to entitle abutters to compensation under the act of 1901, it being followed by no change in the former mode of operating the railway and no new notice to the abutters, and was not a taking for interurban purposes. *Brickles v. Milwaukee Light, Heat & Traction Co.*, 134 Wis. 358, 114 N. W. 810.

Damages where interurban railroad company seeks to condemn property where it takes the place of a street railway, see *Gosa v. Milwaukee Light, Heat & Traction Co.*, 134 Wis. 369, 114 N. W. 815.

11. A railroad company authorized to carry not only passengers and their ordinary baggage, but also United States mail, express matter, and milk, the road to

The reason supporting the doctrine that an interurban railway carrying baggage, mail and light express matter is an additional servitude, although a street railway operated by the same power is not an additional servi-

operate between certain cities, is not a street railroad company but a commercial railroad; and "the fact that the road is limited to the carriage of one kind of freight does not make it any the less a commercial railroad." *Wilder v. Aurora, De Kalb & R. Electric Traction Co.*, 216 Ill. 493, 75 N. E. 194.

In Kentucky, electric railroad company authorized to perform the duties of a carrier of freight and passengers between two cities in different states and all intermediate points is a *trunk railway* within the statute requiring franchises to be sold to the highest bidder but excepting a trunk railway. *Diebold v. Kentucky Traction Co.*, 117 Ky. 146, 77 S. W. 674, 63 L. R. A. 637, 111 Am. St. Rep. 230.

Contra in California. "The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street not contemplated in its dedication, and therefore the user cannot be indulged without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement

with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter. If there is any difference in the burden imposed upon the street it is in degree and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack-mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes, served all needed purposes; but, with the growth of inland commerce and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as means thereto, the highway as we know it, became a necessity. The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway sixteen feet in width, constructed for the transportation of burdens, while the paths of eight feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved." *Montgomery v. Railway Co.*, 104 Cal. 186, 190, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89.

tude, is that the interurban road is of no local benefit to the abutting property and does not aid in carrying forward the local travel or assist in the work of transportation, for which the street was designed, and that the passengers and goods carried by it would not, in its absence, have been brought upon the street at all. Here it is necessary to keep in mind the distinction between tracks on country roads and on city streets since a holding that the road is an additional servitude in so far as its operation on a country road is concerned does not necessarily mean that the same road is an additional servitude so far as it is constructed on the streets of a municipality.¹² The better rule would seem to be that if the cars carry light freight, and do not stop within the municipality for passengers desiring to go from one

12. Country roads. Electric interurban road on country highway is additional servitude. *Schaaf v. Cleveland, M. & S. R. Co.*, 66 Ohio St. 215, 64 N. E. 145; *Zehren v. Milwaukee Electric R. & L. Co.*, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. Rep. 844; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.*, 95 Wis. 561, 70 N. W. 678; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 167 Pa. St. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659.

"Besides, this company is authorized not only to carry passengers, but also to transfer over the road, 'baggage, packages, boxed and barreled freight, farm produce, express matter, and United States mail;' and, although it is required to run cars over its road at least three times each way daily, it is not limited as to the number of cars or trains for freight or passengers, or both com-

bined, or the size or make-up of the trains. All things considered, it is reasonably certain from the facts found that the practical operation of such a road, within its capacity, must necessarily produce annoyance and inconvenience to the plaintiffs, and interfere with their property rights as abutting owners, of the same general character that result from the operation of steam railroads, and become an additional burden on the public highway, and taking of the plaintiff's property in the same sense. * * * But the appropriation for this purpose cannot be constitutionally made without making compensation to the public for the injury thereby occasioned to its easement in the highway, and also making compensation to the owner of private property taken for the use indicated." *Schaaf v. Cleveland, M. & S. R. Co.*, 66 Ohio St. 229, 64 N. E. 145.

point to another within the city or village, the railroad more closely approaches a commercial railroad than a street railroad, and abutting owners, both within and without the municipal limits, should be entitled to recover compensation. On the other hand, if the road takes up and lets off passengers within the city limits, the same as an ordinary street railroad, and does not carry freight although it may carry mail and the morning and evening city papers in bulk, etc., there is no good reason, it seems, for drawing any line between such a road and a road operating wholly within the limits of the municipality, so far as the right of abutters to recover is concerned. In other words, if the road does not profess to compete with street railroads but is a competitor of commercial railroads engaged in the furtherance of commerce between cities and towns,—and this is undoubtedly the tendency of most of the interurban roads which are continually including more cities and villages in their line by extending their tracks,—then it would seem that it should be governed by the rules relating to commercial railroads. The argument to the contrary is well set forth in a very recent case in Indiana by Chief Justice Hadley in a concurring opinion.¹³

13. "And what about the freight or express car? It will be taken for granted that urban population need frequent communication with the country, and the country folk the city. Each has indispensable wants of exchange with the other. The cities require the products of the farm, as much as the residents of the country require the markets of the city. Primarily considered, these exchanges cannot be effected without the transportation of persons and property from one section to another, over the public highways provided for that purpose. A freight or express car,

propelled by electricity, of reasonable size, inclosed, neatly painted, and made attractive in appearance, sent into the country ten, twenty, or more miles, and loaded with milk, fruit, berries, and vegetables, and other products of the country, and while sweet and fresh hurried to the consumers in the city, passing over the streets at a rate of speed regulated by the city authorities, and allowed to the city cars of a similar size, will clear the streets of twenty or more unsightly wagons, that would be required to convey to the city the same amount of stuff contained in one

§ 1705. Same—street railroads carrying freight.

Whether an *interurban* road, carrying express and light freight, ranks with commercial railroads or with street railroads has already been considered.¹⁴ It has also been stated in a preceding section that a street railroad is one primarily for the carriage of passengers, and the motive power is immaterial so far as the right of abutting owners to compensation is concerned.¹⁵

A class of roads not yet considered are roads whose tracks are wholly or for the most part within a municipality but which are for the purpose of carrying freight in whole or in part. If the road is wholly for carrying freight it is a commercial railroad without regard to its length or location.¹⁶ On the contrary, if a street railroad is authorized to operate freight or express cars upon a street railroad, whether by express statute or otherwise, and it does operate freight cars, the question whether the road is an additional burden is one as yet undecided except in so far as the interurban cases al-

car. Assuming this to be a fact, I can see no reason why the running of such car over the streets should be adjudged inconsistent with the original design and purpose of the dedication, and a new burden to the street." *Kinsey v. Union Traction Co.*, 169 Ind. 563, 81 N. E. 923, 941.

14. § 1704 *ante*.

15. § 1702 *ante*.

16. *Carli v. Stillwater*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; *Rische v. Texas Transp. Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324.

Railroad wholly within city. A railroad which is a carrier of freight, although located within a city, is a commercial railway as distinguished from a street railway, and, in Texas, entitles an abutter to damages for any in-

juries not suffered in common with other property along the route. *Rische v. Texas Transp. Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324.

Contra. A railroad constructed along a street, exclusively within the limits of a city, for the purpose of conveying freight of a copper mining company, which would otherwise be conveyed thereon by teams, is not a commercial railroad and is not an additional servitude. *Kipp v. Davis-Daly Copper Co.*, 41 Mont. 509, 110 Pac. 237.

In Massachusetts, a railroad built by a stone quarry company from its quarry to a steam railway on a country road is not an additional servitude. *White v. Blanchard Bros. Granite Co.*, 173 Mass. 363, 59 N. E. 1025.

ready noticed may touch thereon, but a leading writer on the law of Eminent Domain has expressed his opinion that "since the street exists as much for the movement of freight as for the movement of persons, there seems to be no reason why the street freight car should not be put upon the same basis as the street passenger car, *in so far as concerns the mere movement of the car on the tracks and in so far as it carries freight which would otherwise be carried in vehicles on the streets.*"¹⁷

§ 1706. Same—subways for rapid transit.

Subways for street railroads are in operation in New York City and Boston and one is in course of construction in Chicago. It has been held in Massachusetts that the construction of a subway in a street in Boston to relieve the congestion in the streets by transporting passengers at a high rate of speed within the city underneath the surface of the street does not impose an additional servitude on lands previously taken for streets.¹⁸

17. Lewis, Eminent Domain (3d Ed.), § 166.

18. Sears v. Crocker, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 557.

Subways. "Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable. In the present case the travel which is being provided for is from place to place within the city. There are stopping

places on the subway at convenient points. In that respect it is different from a tunnel designed only or chiefly for travel for long distances. The new method is a substitution in part of a subterranean use of the streets for a use of their surface for the same general purpose. It is impracticable to have direct communication between the premises of abutters and the cars in the tunnel, but by going a short distance, access to them may be had from any place. We are of opinion that this use of the streets is within the purposes for which the lands were taken, and that no additional servitude is created by it." Sears v. Crocker, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 557.

On the other hand, the subway in New York City constructed for rapid transit purposes has been held not a street use but one foreign to the purpose for which the street was created, and hence is an additional servitude so that compensation must be made for the property actually taken and for injury to the remainder.¹⁹ It was also held in New York, where the distinction between abutters owing the fee of the street, and those having merely an easement therein, has been for the

19. Re Board of Rapid Transit Com'rs of New York City, 197 N. Y. 81, 90 N. E. 456, rev'g in part 112 N. Y. S. 619, 128 App. Div. 103.

Subway not proper street use. "The use made of the streets by the city in constructing the subway, and operating, or causing to be operated, a railroad therein, is not a street use as that term is known in the law. As we have recently said, 'There is a broad distinction between a municipal purpose and a street purpose.' *Palmer v. Larchmont Electric Co.*, 153 N. Y. 231, 235, 52 N. E. 1092, 43 L. R. A. 672. We have held that a subway of the kind in question is built for a city purpose, because it is necessary for the general welfare of the people of the municipality, is public in character, sanctioned by its citizens, and authorized by the Legislature, and hence the city has power to construct and pay for it. *Sun Printing & Publishing Ass'n v. Mayor, etc. of N. Y.*, 152 N. Y. 257, 267, 46 N. E. 499, 37 L. R. A. 788. A street purpose, on the other hand, is exclusively a highway purpose, and any use of the street, which improves or benefits it as a highway, is a proper street use. Sew-

ers, which drain surface waters, electric lights, which make traveling safer, and water mains, that may be used to sprinkle and clean, are all street purposes, as was shown by Judge Haight in the *Larchmont Case*." * * * "The subway occupies a part of the street which, although beneath the surface, might, by proper construction and change of grade, be used for ordinary highway purposes, and traveled upon freely, without license or recompense, by persons using their own vehicles or their own methods of transportation. The occupation of the subway and its trains of cars is exclusive, for no one may enter either without payment of fare. Highways are free and open to all the people; the subway is not. Highways are for the exclusive use of none; the subway is for the exclusive use of one. Highways are for travel by means under the exclusive control of the traveler; the subway is for travel by means under the exclusive control of its owner or operation." *Re Board of Rapid Transit R. Com'rs of New York City*, 197 N. Y. 81, 90 N. E. 456, 461.

most part rigidly observed, that an abutting owner, although he had no title to the street, nevertheless had a right to the lateral support of the land in the street, and could recover damages for the physical impairment of his property by the construction of the subway.²⁰

§ 1707. Telegraph or telephone poles and wires.

An important question, as to which there is some conflict of opinion, is whether telegraph and telephone poles or wires may be set up along streets without compensating abutting owners. In other words, are telegraph and telephone poles and wires an additional servitude? That there is one rule applicable to telegraph poles and wires and another rule applicable to telephone poles and wires

20. "The fee is of slight value, and of no value whatever except to support a theory leading to injustice, for the proximity of his land to the street is that which gives value to the abutter's property. 'By virtue of proximity,' said Judge Andrews in one case, and 'by reason of its situation,' said Judge Peckham in another, does the abutter have easements and rights in the street which are property entitled to the protection of the law. *Kane v. N. Y. Elev. R. R. Co.*, 125 N. Y. 164, 180, 26 N. E. 278, 11 L. R. A. 640; *Bohm v. Metr. Elev. Ry. Co.*, 129 N. Y. 576, 587, 29 N. E. 802, 14 L. R. A. 344." *Re Board of Rapid Transit R. Com'rs of New York City*, 197 N. Y. 81, 90 N. E. 456, 463.

"The measure of damages should be adapted to the actual injury. What is the nature of the injury inflicted upon abutting properties by building a subway? Obviously light, air, and access are not injured by an underground

road. The damages are owing to the disturbance of lateral support, which results in a settling of the soil, and thus causes physical injuries to the adjoining buildings. Therefore, when those physical injuries are properly valued in money, a simple, direct, and just measure of damages is applied. We think that the proper measure of damages is the full value of the fee taken, subject to the public easement of passage, and, both as to naked abutters and those who own fee, the amount, measured in money, of the physical injuries inflicted, and those which with reasonable certainty will be inflicted upon the abutting property by interference with lateral support through the proper construction and operation of the road, including the rental value of the premises during the period, if any, while they are actually untenable." *Re Board of Rapid Transit R. Com'rs of New York City*, 197 N. Y. 81, 90 N. E. 456, 464.

cannot be successfully contended.²¹ In those jurisdictions where it is held that such poles and wires are not an additional servitude,^{21a} the theory adopted is that

21. However, it has been said that the telegraph has never been employed as a means of intraurban communication, while the telephone is particularly useful in communications between the people within a city and it can be used for that purpose directly and by persons without special skill and it is more clearly a substitute for the old methods of communication of messages between persons within a city than the telegraph. *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

21a. *Alabama*. *Hobbs v. Long Distance Tel. & Tel. Co.*, 147 Ala. 393, 41 So. 1003, 7 L. R. A. (N. S.) 87.

Indiana. *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

Kansas. *McCann v. Johnson, etc. Co.*, 69 Kan. 210, 76 Pac. 870, (country road).

Kentucky. *Cumberland Tel. & Tel. Co. v. Avritt*, 120 Ky. 34, 27 Ky. L. Rep. 394, 85 S. W. 204.

Louisiana. *Irwin v. Great So. Tel. Co.*, 37 La. Ann. 63.

Maine. See *dicta* in *Taylor v. Portsmouth*, 91 Me. 193, 39 Atl. 560.

Massachusetts. *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7, leading case.

Michigan. *People v. Eaton*, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721, (country road).

Minnesota. *Cater v. Northwestern Exch. Tel. Co.*, 60 Minn.

539, 63 N. W. 111, (country road). But see *Willis v. Erie Tel. & Tel. Co.*, 37 Minn. 347, where the court was equally divided and the question was not discussed in the opinion.

Missouri. *Julia Bldg. Ass'n v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398.

Montana. *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mont. 102, 29 Pac. 883.

Pennsylvania. *Shinzel v. Bell Tel. Co.*, 31 Pa. Super. Ct. 221; *York Tel. Co. v. Keesey*, 5 Pa. Dist Ct. R. 366.

South Dakota. *Kirby v. Citizens' Tel. Co.*, 17 S. D. 362, 97 N. W. 3.

Tennessee. *Frazier v. East Tennessee Tel. Co.*, 115 Tenn. 416, 90 S. W. 620, 3 L. R. A. (N. S.) 323, 112 Am. St. Rep. 856.

West Virginia. *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410, (country road).

Telegraph and telephone poles not additional servitude. "It must be, however, that the contemplated uses should be deemed to have been, not only in the walking, riding upon horesback and in wagons or other vehicles drawn by animals, in the going and returning upon business, social, religious, or political missions, but also by such methods of travel and communication, in addition or in substitution for those as might come into vogue and be accepted and recognized as proper and important uses of the street

the easement of highway is, in the last analysis, intercommunication or the right to the use of the highway

in the varying needs and demands of commerce, and the relations of man to man socially and otherwise. If this were not true, the way originally dedicated for a suburban highway, but by the growth of population becoming a city street, or the dedication of a village or town street afterwards becoming the principal thoroughfare of a great city, would be limited to the uses in vogue at the time and suited to the country road or the village or town street; and the growth of population, the advancement of commerce, and the increase in inventions for the aid of mankind would be required to adjust themselves to the conditions existing at the time of the dedication, and with reference to the uses then actually contemplated. That a dedication or condemnation is deemed to comprehend uses not actually in the minds of the parties at the time is seen from the almost unvarying rule that the electric street railway systems are not a new use and an additional servitude, but are a new method of enjoying an old and ever existing use." *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

"The question, then, is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing

as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals — constituting, respectively, the '*iter*,' the '*actus*,' and '*via*' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owners of the land when the easement was acquired, and are more onerous to him than those then in use." *Cater v. Northwestern Telephone Co.*, 60 Minn. 539, 63 N. W. 111.

It is immaterial that telephone poles are not in motion as are ordinary instruments of travel. *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

In West Virginia, it is held

by the public generally for the purpose of intercommunication, and that its purpose has always been not merely travel and transportation, but also the transmission of intelligence, and that it has been used by the post-horse and the mail wagon as well as the coach and the cart, and when new means of communication are found, and the telegraph and telephone are only new methods of using an old easement, the public may use the highways for these, and if the old use remains unimpaired, the owner of the soil has no cause to complain.²²

that the erection of a telephone line along a street puts no additional burden on the fee, but it is the burden alone upon the permanent easement, "to which it is appurtenant and subservient. It may, however, be a damage, to a greater or less extent, to the abutting lot owner. For this he has his suit at law, unless such damage be equivalent to the actual taking of his lot," but the abutter is not entitled to an injunction against the erection of the telephone poles. *Maxwell v. Central District & Printing Tel. Co.*, 51 W. Va. 121, 41 S. E. 125.

Telephone line on railroad right of way. Erection of telephone poles and wires across the right of way of a railroad company along the railroad track of another company, pursuant to the consent of the latter company, does not impose an additional servitude on the former company. *St. Louis I. M. & S. R. Co. v. Cape Girardeau Bell Tel. Co.*, 134 Mo. App. 406, 114 S. W. 586.

Telephone line on railroad right of way as a taking of it, see *Canadian Pacific R. Co. v. Moosehead Tel. Co.*, 106 Me. 363, 76 Atl. 885 and cases cited.

22. *Keasbey, Electric Wires* (2d Ed.), § 89.

"On the one side, the theory is that a proper street purpose can only be something connected with the use of the street as a pass-way, for moving objects, people, animals, and vehicles, or with the maintenance of ingress and egress, to and from the houses upon the street, and the passage of light and air. Under this theory it is admitted that the use of the street cannot be confined to merely old and accustomed forms of transit, but that all new forms and methods of conveyance may be employed, not inconsistently with the reasonably comfortable and safe use of the street by all; commercial railways and dummy lines being excluded from classification for street purposes, on the ground of their noise, bulk, and danger, and the unavoidable inconvenience and interruption to other kinds of use, that their presence produces. Bicycles and automobiles are of course permitted, as constituting improved modes of convenience. Street cars are permitted for the same reason, and their poles and wires as necessary adjuncts; electric light lines, and

On the other hand, it is held in many jurisdictions that

gas pipes and lamp posts, because they are used in lighting the street, and, so, in making it comfortable and safe for passage at night; sewer pipes, because they are useful in draining the street of surplus water, and so preserving it, and likewise making it more convenient for use; water pipes, because the water must be used for sprinkling the streets in dry weather, and also for cleansing it. It is said that the telephone does not fall within any of the foregoing classifications, but that it is an entirely new and foreign use, and so constitutes an additional burden. *On the other side*, it is said that in the widest, and, likewise, the most correct sense, a street is a means of intercommunication between the people of a city, for traffic, and for the conduct of personal and social intercourse, and also for the convenient use of dwellings and business houses abutting thereon; that its primary purpose is for passage, it is true, but that such passage need not be, alone, that of people, animals, or wheeled conveyances, or of things that run upon the ground; that a message sent through the air upon electric wires, over the street, takes the place of one sent by a man or boy walking, or upon horseback, or conveyed by a vehicle, along the street; that not only is the same service performed by the telephone, but in a manner far better, and more quickly; that if the thousands of messages which go over such wires in a single day

had to be conveyed by men or vehicles, or both, the streets would be far more thronged than they now are, and hence rendered less comfortable, and less safe for use, and that in the course of a few months, or a year's time, the difference in the wear and tear of the streets would be very perceptible, because of such increased use; that the telephone is therefore but an improved method of subjecting the streets of a city to any old use, and that the poles and wires are just as necessary adjuncts to this new method as are the poles and wires of a street railway or an electric light plant, erected in substantially the same manner, and no more obstructive. *To this latter view*, it is replied that the same course of reasoning would justify the erection of a Marconi wireless plant in a city street, since this also transmits intelligence; but to this suggestion it is returned that the bulk of such a plant, and the noises necessarily attendant upon its operation would make its use impossible in such a situation, in addition to the cardinal fact that wireless messages are not used by the people of a city in communicating with each other within a city, but that such instruments are only for long distance communication. We are of the opinion that the second view is the sounder one." *Frazier v. East Tennessee Telephone Co.*, 115 Tenn. 416, 90 S. W. 620, 3 L. R. A. (N. S.) 323, 112 Am. St. Rep. 856.

telegraph and telephone poles and wires are an additional servitude.²³ The theory on which this latter class

23. *Illinois*. De Kalb County Tel. Co. v. Dutton, 228 Ill. 178, 81 N. E. 838, 10 Am. & Eng. Ann. Cas. 464; Union Electric Telephone & Tel. Co. v. Applequist, 104 Ill. App. 517; Burrall v. American Tel. & Tel. Co., 224 Ill. 266, 79 N. E. 705 (country road).

Mississippi. Stowers v. Postal Tel. Cable Co., 68 Miss. 559, 9 So. 356, 12 L. R. A. 864, 24 Am. St. Rep. 290.

Nebraska. Bronson v. Albion Tel. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426.

New Jersey. Nicoll v. New York & N. J. Tel. Co., 62 N. J. L. 733, 42 Atl. 583, 72 Am. St. Rep. 666, affg 62 N. J. L. 156, 40 Atl. 627.

North Dakota. Donovan v. Allert, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720; Tri-State Tel. & Tel. Co. v. Cosgriff, 15 N. D. 210, 124 N. W. 75 (country road).

Ohio. Burns v. Columbus Citizens' Tel. Co., 30 Ohio Cir. Ct. Rep. 74.

See Dailey v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578 (country road).

Texas. Southwestern Tel. & Tel. Co. v. Smithdeal, 103 Tex. 128, 124 S. W. 627; Southwestern Tel. & Tel. Co. v. Smithdeal (Tex. Civ. App., 1909), 126 S. W. 942.

Virginia. See Western Union Tel. Co. v. Williams, 86 Va. 896, 11 S. E. 106, 8 L. R. A. 429, 19 Am. St. Rep. 908, (country road).

Wisconsin. Krueger v. Wiscon-

sin Tel. Co., 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298.

Telegraph and telephone poles in a street impose an additional servitude because "they are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence, although our public highways have always been used for carrying the mails, and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone, differs so essentially in every material respect from their general and ordinary uses that the general current of judicial authority has declared that it was not within the public easement." Halsey v. Rapid Transit Street-Railway Co., 47 N. J. Eq. 380, 20 Atl. 859, 863.

The fact that a municipality has the right to use telephone poles for its fire alarm and police signal system is immaterial, so far as the additional servitude is concerned. De Kalb County Tel. Co. v. Dutton, 228 Ill. 178, 81 N. E. 838, 10 Am. & Eng. Ann. Cas. 464.

Municipality as abutter. Where city owns abutting land, and the state, by a general statute, grants telephone companies the right to construct their line over or under any streets, the city cannot recover for the use of the street by the telephone company, notwith-

of cases is decided is that streets were intended primarily for travel and transportation, and although also intended for the transmission of intelligence, and the telephone and telegraph are used for that purpose, yet the mode of use is so wholly different from the old one, and requires such permanent occupation of the soil, that it cannot be supposed that the landowner, in dedicating his land for purposes of a highway, or the public in condemning it, contemplated that it should be used by a telephone or telegraph company for erection of posts and stringing of wires.²⁴

In some jurisdictions the right of an abutting owner to recover damages because of the occupation of a street by telegraph or telephone poles and wires depends on the ownership of the fee in the street, and if the abutter does not own the fee he cannot recover;²⁵ but the pre-

standing a private person owning the fee of the street might recover in such a case. *State Line Tel. Co. v. Ellison*, 106 N. Y. S. 130, 121 App. Div. 499.

In Maryland, in *Chesapeake & P. Telephone Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219, a pole in front of plaintiff's warehouse obstructing the enjoyment of his premises was held to present a cause of action for a direct interference with the use of the warehouse and the question of the use of a street as an additional servitude was expressly held not to be involved.

In New Jersey, the statute authorizing the establishment of telegraph and telephone systems requires that the consent in writing, of the property owner, must be procured for the purpose, and where there is no such consent the poles and wires are an additional servitude. *Broome v.*

Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851.

Cutting trees, see *Bradley v. Southern New England Telephone Co.*, 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280.

24. *Keasbey, Electric Wires* (2d Ed.), § 90.

25. *De Kalb County Tel. Co. v. Dutton*, 228 Ill. 178, 81 N. E. 838, 10 Am. & Eng. Ann. Cas. 464; *Nicoll v. New York & N. J. Tel. Co.*, 62 N. J. L. 733, 42 Atl. 583, 72 Am. St. Rep. 666, aff'g 62 N. J. L. 156, 40 Atl. 627.

In Louisiana, the right of a telephone system to occupy the streets as a proper street use was based upon the rule that the abutting owner could not complain, since the fee in the streets was in the public. *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63.

In New York, if title of the streets is in the abutter, poles and wires are an additional servitude.

vailing tendencies of courts to eliminate distinctions, in so far as the rights of abutters are concerned, between abutting owners who own the fee of the street and those who have merely an easement therein, prevents this consideration being important in most jurisdictions.²⁶ The better rule, as held in the majority of the states in which the question has arisen, is that the poles and wires are not an additional servitude, following the reasoning set forth in a recent Tennessee case which is reprinted in a note in this section, without regard to whether the fee of the street is in the abutter or in the municipality, subject of course to the undisputed rule that the abutter may recover damages sustained by any substantial obstruction of the right of access, light or air.²⁷

Hudson River Telephone Co. v. Forrestal, 106 N. Y. S. 404, 56 Misc. Rep. 133; *Osborne v. Auburn Tel. Co.*, 189 N. Y. 393, 82 N. E. 428, rev'g 97 N. Y. S. 874, 111 App. Div. 702, 82 N. E. 428.

26. *Stowers v. Postal Telegraph-Cable Co.*, 68 Miss. 559, 9 So. 356, 12 L. R. A. 864; *Cook, Corporations* (6th Ed.) p. 3565.

Fee of street unimportant. It is said that "no distinction can permanently endure which makes a practical difference between two public streets with reference to the technical title to the soil. *

* * The decision of the question depends not on the nature of the title to the street, but on the question whether the rights and privileges of the abutting owner in the use and maintenance of the street as such are effective, and on the further question what is the scope of the uses and purposes of a public street." *Keasbey, Electric Wires*, (2d Ed.) § 102.

"At one time there was a tendency to attach some weight to the ownership of the fee of the street or highway; but it is becoming well settled, for obvious and convenient reasons, that that question is immaterial." *Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426.

In Texas, ownership of the fee in a street is immaterial, in so far as telephone lines being an additional servitude is concerned. *Southwestern Telegraph & Telephone Co. v. Smithdeal*, 103 Tex. 128, 136 S. W. 1049, rev'g in part (Tex. Civ. App., 1910), 126 S. W. 942.

27. See *Cook, Corporations* (6th Ed.) § 933, where fact that only nominal damages are ordinarily recoverable by the abutter is relied on as an argument.

Injury to shade trees, see § 1328 *ante*, vol. 3.

In some jurisdictions, it is held that there is no distinction, so far as the right of an abutter to compensation is concerned, whether the way is a country road or a street in a municipality;²⁸ while in other jurisdictions the rule is not necessarily the same where the way is a country road as it is where the way is a street in a municipality.²⁹ In the latter class of states, if telegraph and telephone poles and wires are held to be an additional servitude in a street in a municipality it follows, *a fortiori*, that they are an additional servitude where they

28. *Cumberland Tel. & Tel. Co. v. Avritt*, 120 Ky. 34, 27 Ky. L. Rep. 394, 85 S. W. 204, 8 Am. & Eng. Ann. Cas. 955.

In New York, there is no distinction, insofar as an additional servitude is concerned, between the use of a street in a city or village by a telephone company operating an ordinary local telephone exchange, and the use of a rural highway by a telephone company operating a long distance telephone system. *Osborne v. Auburn Tel. Co.*, 189 N. Y. 393, 397, 82 N. E. 428, rev'g 97 N. Y. S. 874, 111 App. Div. 702 on this point.

29. *Shinzel v. Bell Tel. Co.*, 31 Pa. Super. Ct. 221.

"Cases which hold that telegraph and telephone lines in country highways are an additional servitude cannot be given much weight in determining" the question whether they are an additional servitude where located in the streets of a municipality. *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

"A distinction is made between rural highways and city streets,

and it is suggested that the public uses for which the one is dedicated are different from those to which the other must be subject. The question resolves itself after all into the question of public necessity. Before the days of the telegraph the city street was, equally with the rural highway, free from obstruction by telegraph poles, and the dwellers on the one as well as on the other had no actual anticipation of the use of the street for this purpose. As a matter of fact, the telegraph is such that the country road is required for it as well as the city street. It is the later uses of electricity, the telephone or the electric light, that have filled up the city streets with poles and wires. Another difficulty is that it is hard to distinguish between a rural and an urban street, and that the nature of a street changes insensibly from the former to the latter, and a rule of property which depends on such a shifting and indefinite distinction is not likely to prove satisfactory." *Keasbey, Electric Wires* (2d Ed.), § 103.

are located on a country road, but it does not necessarily follow that because it is held that they are an additional servitude when located on a country road that a like holding would be made in case of their location on a street or alley in a municipality; and those cases which hold that the use of country roads by telegraph or telephone poles and wires are *not* an additional servitude apply to cases of streets in municipalities with greater force than to those of country ways.³⁰ The question whether telegraph or telephone poles and wires are an additional servitude, where erected on a rural highway, is not considered herein except incidentally.³¹

The fact that the damages of an abutter by reason of telegraph or telephone poles and wires in the street are small does not preclude the right to recover compensation.³² In one case it was intimated that wires without poles in front of an abutter's property were not an additional servitude,³³ but inasmuch as ownership of abutting land extends above and below the surface, no good reason appears for the distinction.³⁴

§ 1708. Electric light poles and wires.

Wires and poles for electric lighting are not always governed by the same rules as telegraph or telephone wires and poles, in so far as an additional servitude is concerned. The poles and wires for electric lighting have been held a proper use of a street on the ground

30. *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

31. Note on "Telephone or telegraph line as additional servitude upon rural highway," as distinguished from street in municipality, see 2 Am. & Eng. Ann. Cas. 163.

32. "We are aware that plaintiff's damages cannot be large in the present case, but if two poles may be erected on this street in

front of his residence, why not twenty? We cannot sanction the violation of a constitutional provision because the damages may seem insignificant." *Donovan v. Allert*, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720.

33. *Roake v. American Tel. & Tel. Co.*, 41 N. J. Eq. 35, 2 Atl. 618.

34. See *Keasbey, Electric Wires* (2d Ed.), § 97.

that the streets are lighted and their general uses thereby made safer and more expeditious,³⁵ and they are not an additional servitude, and an abutter cannot recover damages,³⁶ except, of course, where they seriously interfere with the right of access or otherwise specially injure the abutter. This doctrine, however, applies only to such public streets and alleys as are under the control of the municipality, and where the light to be transmitted by the wires or pipes is for the benefit of the public, as well as of property owners along the line of

35. *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

Electric light poles as additional servitude. 'It may be that some prejudice exists against wires strung on unsightly poles; but the statute empowers the citizens of the locality, through their duly-constituted authorities, to determine the manner and the regulations in and under which the wires should be constructed. They may specify, as was done in this case, the character of poles that shall be used, or they may require that the wires shall be placed in conduits under ground. The whole matter is left to their judgment and discretion. If the people of a town want light in their highways, and are willing to pay for it, no reason is apparent, founded upon public policy, morals, or law, why the courts should interfere to prevent it. If the highway be but a country road, lightly traveled, and no necessity exists for light, then a taxpayer has a right to object; but, until such objection is made, we think it may fairly be assumed

that the necessity for the light exists. *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, rev'g on other grounds 39 N. Y. S. 522, 6 App. Div. 12.

Compared to gas pipes. It has been said that the legal relations of electric light wires through the streets of a city must be analogous to those of gas pipes, upon the ground that both the electric light wires and the gas pipes are means of furnishing light from a central source of supply, and that, if the laying of gas pipes in a city is not an additional servitude on the land of the abutting owner, the same should be true of laying tubes for electric light wires, or placing posts in the ground for carrying the wires overhead. *Keasbey*, *Electric Wires* (2d Ed.) § 107.

36. *Loeber v. Butte Gen. Elec. Co.*, 16 Mont. 1, 6, 39 Pac. 912, 50 Am. St. Rep. 468; *People v. Thompson*, 65 How. Pr. (N. Y.) 407; *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672.

the street.³⁷ In some jurisdictions, however, it seems to be held that while an additional servitude is not imposed by poles and wires in a street to furnish lights for the streets of a municipality, yet an additional servitude is imposed in so far as the poles and wires are larger or more numerous than reasonably necessary for the purpose of public lighting, and hence if the object is also to furnish private lights or the transmission of power, or to carry electricity over the wires to districts outside of the municipality, there is an additional servitude for which compensation must be made.³⁸ Notwithstanding such decision, it may be suggested that ordinarily it would seem that if poles and wires used solely for public lighting give no right to abutters to recover compensation, poles and wires used in part for that purpose and in part for lighting private buildings should not be considered an additional servitude.³⁹ In some jurisdictions, a distinction is drawn between an erection of electric light poles in the part of the street devoted

37. *Carpenter v. Capital Electric Co.*, 178 Ill. 29, 52 N. E. 973, 43 L. R. A. 645, 69 Am. St. Rep. 286, holding rule not applicable to private alleys.

Private alley. Poles and wires in a private alley for the purpose of furnishing light to private persons and not for the purpose of furnishing light to the public constitute an additional servitude for which owners of the fee in the alley may demand compensation. *Carpenter v. Capital Electric Co.*, 178 Ill. 29, 52 N. E. 973, 43 L. R. A. 645, 69 Am. St. Rep. 286.

In Ohio, the placing by a private lighting company of poles at the curve in a street, and the stringing thereon of electric light cable lines and wires for the

purpose of furnishing light and energy to private takers is a taking of the property of the abutting owner, and compensation must be made. *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782, distinguishing electric lighting of the streets and for the municipality.

38. *Andreas v. Gas & Electric Co.*, 61 N. J. Eq. 69, 47 Atl. 555.

39. *Keasbey, Electric Wires* (2d Ed.) 112.

See *McWethy v. Aurora Electric Light Co.*, 202 Ill. 218, 225-228, 67 N. E. 9; *Gurnsey v. Northern Cal. Power Co.*, 7 Cal. App. 534, 117 Pac. 906.

to the use of vehicles and the erection of such poles in the part devoted to the use of the sidewalk.⁴⁰

In so far as the question of additional servitude is concerned, there is a difference, in most jurisdictions, between urban and rural highways, arising out of the necessary requirements of the public in the use made of them;⁴¹ but if the wires are used to light the country highway, it is held, in at least one jurisdiction, that there is no additional servitude even in a country highway.⁴²

The threatened destruction of shade or ornamental trees by electric companies in connection with their wires may be enjoined, in some jurisdictions, notwithstanding the existence of an action for damages.⁴³

§ 1709. Subsurface use of streets.

There are certain subsurface uses of a street which are uniformly held not to entitle the abutter to damages, since not imposing a new servitude. Included therein are the laying of *water pipes* to furnish a public supply of water,⁴⁴ the laying of *gas pipes* to furnish gas

40. *Halsey v. Railway Co.*, 47 N. J. Eq. 380, 387, 20 Atl. 859; *Andreas v. Gas & Electric Co.*, 61 N. J. Eq. 69, 47 Atl. 555.

41. *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, rev'g 39 N. Y. S. 522, 6 App. Div. 12.

42. In New York, it is held that the erection of electric light poles in a highway for lighting it, etc. is not an additional servitude, without regard to whether the highway is within the limits of a municipality. *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, rev'g on this ground 39 N. Y. S. 522, 6 App. Div. 12.

43. *Southwestern Telegraph & Telephone Co. v. Smithdeal*, 103 Tex. 128, 136 S. W. 1049, rev'g in

part (Tex. Civ. App., 1910), 126 S. W. 942.

Shade trees. Electric light company granted franchise over a street cannot cut down trees standing on edge of a side walk and not interfering with the use of the street or side walk without compensating abutters. *Brown v. Asheville Electric Light Co.*, 138 N. C. 533, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554, and see § 1328 *ante*, vol. 3.

44. *Maryland. Baltimore County Water & Electric So. v. Dubreuil*, 105 Md. 424, 66 Atl. 439, 9 L. R. A. (N. S.) 684.

New York. *Jayne v. Cortland Water Works Co.*, 95 N. Y. S. 227, 107 App. Div. 517, rev'g on other grounds 86 N. Y. S. 571, 42 Misc. Rep. 263; *Crooke v. Flat-*

for lighting the streets and houses,⁴⁵ the laying of *sewer pipes*,⁴⁶ etc. So it has been held that a *conduit* for telephone wires is not an additional servitude.⁴⁷

On the other hand, a corporation organized to *transport and sell natural gas for fuel* throughout a district not confined to the limits of the municipality cannot lay its pipes in streets without compensating abutting owners.⁴⁸ So it is generally held that water pipes in a *country road*, where the road is used merely as a means to reach a municipality where the water is to be distributed, the houses along the country road not being fur-

bush Water Works Co., 29 Hun (N. Y.) 245; *Witcher v. Holland Water Works Co.*, 65 Hun (N. Y.) 624, 20 N. Y. S. 560, 142 N. Y. 626.

Ohio. Cincinnati & A. Turnpike Co. v. Avondale, 9 Ohio S. & C. P. Dec. 813.

Oregon. Huddleston v. Eugene, 34 Ore. 343, 55 Pac. 868, 43 L. R. A. 444.

United States. Re Condemnation of Land at Nahant, 128 Fed. 185, rev'd in 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723.

45. *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492; *McDevitt v. People's Natural Gas Co.*, 160 Pa. St. 367, 28 Atl. 948, holding that sidewalks are a part of the street in so far as the rule against recovery is concerned.

46. *Massachusetts.* Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112; *Cabot v. Kingman*, 166 Mass. 403, 44 N. E. 344.

Michigan. Warren v. Grand Haven, 30 Mich. 24.

New York. Van Brunt v. Flatbush, 59 Hun (N. Y.) 192, 13 N. Y. S. 545.

Ohio. Cincinnati & A. Turnpike Co. v. Avondale, 9 Ohio S. & C. P. Dec. 813.

Oregon. Huddleston v. Eugene, 34 Ore. 343, 55 Pac. 868, 43 L. R. A. 444.

Sewers do not constitute an additional servitude because they afford means of drainage for the streets, notwithstanding one use is in carrying the waste from buildings of the citizens.

Storm Sewer not additional servitude. *Whitney v. Toledo*, 29 Ohio Cir. Ct. R. 74.

47. *Coburn v. New Tel. Co.*, 156 Ind. 90, 59 N. E. 324, 52 L. R. A. 671.

In *New York*, it has been held that the laying of a telephone conduit does not entitle the abutter to damages, even though his fee extends to the center of the street, (*Castle v. Bell Tel. Co.*, 63 N. Y. S. 482, 49 App. Div. 437, aff'g 61 N. Y. S. 743, 30 Misc. Rep. 28) but it would seem that this decision is in effect overruled by *Osborne v. Auburn Tel. Co.*, 189 N. Y. 393, 82 N. E. 428.

48. *Webb v. Ohio Gas Fuel Co.*, 9 O. S. & C. P. Dec. 662.

nished with water, constitute an additional servitude.⁴⁹ And it would seem that the same rule should apply where water pipes are laid through the streets of one municipality to furnish water solely to another municipality.⁵⁰ So the laying of gas pipes in a country highway has been held to authorize a recovery of damages by the abutting owners.⁵¹ For instance, it is held that a gas light company cannot lay its pipes in the county highway without compensation to abutters, where its pipes are not used for the lighting of the highway through which the company seeks to lay its pipes.⁵²

The use of the ground underneath a street for a rapid transit subway has already been noticed.⁵³

§ 1710. Additional track or other enlargement of use.

Where tracks are laid in a street by virtue of legislative or municipal grant of authority, and damages have

49. *Baltimore County Water & Electric Co. v. Dubreuil*, 105 Md. 424, 66 Atl. 439, 9 L. R. A. (N. S.) 684.

50. Whether an urban street, in which the fee is in the abutting owners, can be subjected to the use of underground water mains, where the water supply is not available by law but merely as a matter of favor to residents along the streets, is a question. *Richards v. Citizens' Water Supply Co.*, 125 N. Y. S. 116, 140 App. Div. 206, and cases cited. In the lower court, it was held that water pipes in a bare road in the country cannot be laid without compensation notwithstanding the territory has been incorporated within the city of New York, since such fact does not change its nature from a country to an urban road nor take away the right to compensation. *Richards*

v. Citizens' Water Supply Co., 104 N. Y. S. 927, 125 N. Y. S. 116.

51. *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602, 19 Am. St. Rep. 113; *Consumers' Gas & Trust Co. v. Huntsinger*, 14 Ind. App. 156, 42 N. E. 640.

In *Pennsylvania*, gas pipe line in a country highway, the fee of which is owned by abutters, authorizes a recovery of damages because a new taking. *Re Sterling*, 111 Pa. St. 35, 2 Atl. 105, 56 Am. Rep. 246.

52. *Bloomfield Gas Light Co. v. Calkins*, 62 N. Y. 386.

In *Massachusetts*, however, a pipe line of a gas company, although not intended for the use of the citizens of the municipality, is not an additional servitude. *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436.

53. § 1706 *post*.

been assessed and paid to the abutting owner, the latter is entitled to recover if an additional track is thereafter laid;⁵⁴ and the same rule as to a new burden ap-

54. *Rock Island, etc., R. Co. v. Johnson*, 204 Ill. 488, 68 N. E. 549; *Calumet & C. Canal & Dock Co. v. Morawetz*, 195 Ill. 398, 63 N. E. 165; *Maltman v. Chicago, M. & St. Paul R. Co.*, 41 Ill. App. 229.

The laying of a second track by a commercial railroad entitled an abutting owner to additional damages, when such additional tracks were not provided for or contemplated at the time of the original assessment of damages. *Henry v. Mason City & Ft. Dodge R. Co.*, 140 Ia. 201, 118 N. W. 310.

Railroad company must compensate abutting owners before additional side tracks may be laid in the street, although when the railroad was originally laid abutters had no rights to compensation under the law then in force. *Baker v. Chicago, R. I. & P. R. Co.* (Ia., 1912), 134 N. W. 587.

Raising street grade and changing from one track to several, practically covering the street, is not a mere increase of operation. *International & G. N. R. Co. v. Bell* (Tex. Civ. App., 1910), 130 S. W. 634.

Elevated railroad company may be enjoined from constructing an additional track in front of plaintiff's premises, where the right so to do has not been acquired by condemnation. *Stroub v. Manhattan R. Co.*, 15 N. Y. S. 135, 59 N. Y. Super. Ct. 505; *Auchincloss v.*

Metropolitan El. R. Co., 74 N. Y. S. 534, 69 App. Div. 63.

Outside city. Laying additional tracks by a commercial railroad outside of a municipality does not authorize additional damage to abutters. *Louisville & N. R. Co. v. Scomp*, 124 Ky. 330, 98 S. W. 1024.

Change of grade in Indiana. A railroad company has the right to change its road bed and raise or lower the grade thereof, when in its judgment any such change will improve the road or increase its efficiency, without being liable to respond in damages to an abutting property owner, but if in making any such change of grade the work is done in a careless and negligent manner, or the railroad company goes outside of its right of way to build approaches upon the highway necessarily raised on account of its having raised its track and road bed at such highway crossing, and damages result to the abutting property owner, the railroad company must answer for the damages sustained; but if the railroad company changes the grade of a street by authority of the municipality, to conform to the change in the railroad grade, and there is no negligence, the railroad company is not liable to abutters for damages sustained by reason of approaches and embankments. *Pittsburg, C. C. & St. Louis R. Co. v. Atkinson* (Ind. App., 1912), 97 N. E. 353,

plies to telegraph and telephone companies,⁵⁵ and other companies.⁵⁶ On the other hand, a mere increase in the business,⁵⁷ or the laying of a switch,⁵⁸ has been held

55. One who obtains title to property after the erection of telegraph and telephone lines in the street may recover damages resulting from any changes in the former construction of the lines or additions thereto, since his acquisition of the property, where the servitude is increased. *Southwestern Telegraph & Telephone Co. v. Smithdeal*, 103 Tex. 128, 136 S. W. 1049, rev'g in part (Tex. Civ. App., 1910), 126 S. W. 942.

But additional poles of a telegraph company erected between those originally planted, and necessitated by the weight of added wires, is not such an additional use as requires the payment of further compensation to abutters. *Western Union Telegraph Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465, rev'g 167 Fed. 231.

56. "The transmission of electric heat, light and power on the poles of a street railway, or the addition of another system of poles and wires to also transmit electric heat, light and power, is an added servitude." *Goddard v. Chicago & N. W. R. Co.*, 104 Ill. App. 526, 533, aff'd in 202 Ill. 362, 66 N. E. 1066.

57. Mere increase of traffic and operation of a larger number of narrow gauge trains do not constitute an additional servitude. *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122, 95 Pac. 343.

The mere fact that the freight business of a railroad company in-

creased does not amount to an additional servitude. *Birmingham Belt R. Co. v. Lockport*, 150 Ala. 610, 43 So. 819.

Third rail and increased size and frequency of trains, on elevated railway, not an additional burden. *Bremer v. Manhattan R. Co.*, 191 N. Y. 333, 84 N. E. 59, mod'g 99 N. Y. S. 1135, 113 App. Div. 905; *Gerken v. Interborough R. T. Co.*, 125 N. Y. S. 32, 68 Misc. Rep. 389.

In Texas, however, it is held that where a slight use of a single railroad track is increased by a use of it day and night as a part of a great system of railroads, an abutter may recover the damages resulting from the increase of traffic on the line. *Hutcheson v. International & G. N. R. Co.*, 102 Tex. 471, 119 S. W. 85, rev'g (Tex. Civ. App., 1908), 111 S. W. 1101, and followed in *Connor v. International & G. N. R. Co.* (Tex. Civ. App., 1910), 129 S. W. 196, in which case an additional track was laid.

If there is a railway track in a street and there is an additional use materially depreciating abutter's property, he may recover. *Badouh v. St. Louis, B. & M. R. Co.* (Tex. Civ. App., 1911), 140 S. W. 354.

58. Switch subsequently laid by a railroad company does not constitute an additional burden. *Indianapolis & St. Louis R. Co. v. Calvert*, 110 Ind. 555, 11 N. E. 476; *Chicago, B. & Q. R. Co. v.*

not a new burden such as to entitle the abutter to further damages. So a mere *change of the size of cars* used by a street railroad company, proper for the convenient carriage of passengers, does not entitle abutters to additional damages.⁵⁹ If the tracks in a street are moved so as to be nearer or farther from the curb, the abutting owner has been held not entitled to damages.⁶⁰

10. RULES OF COMPANY.

§ 1711. Power to make.

A public service corporation may adopt *reasonable* rules and regulations for the conduct of its business, provided such rules and regulations are applicable to all consumers alike;⁶¹ but a rule cannot be adopted which

O'Connor, 42 Neb. 90, 60 N. W. 326. Contra, see *Chambers v. Cleveland & S. W. Traction Co.*, 27 Ohio Cir. Ct. Rep. 193.

Where the owners of land, who platted it and sold lots to the public, reserved the fee in the streets and the right to use them for street railways and other purposes, and to authorize their use for such purposes, purchasers cannot urge the contention that the construction of a sidetrack by a railroad company authorized by the original owners to lay tracks on the streets, is an additional servitude upon the fee. *Brumit v. Virginia & S. W. R. Co.*, 106 Tenn. 124, 60 S. W. 505.

59. *Cotts v. Wheeling & E. G. R. Co.* (W. Va., 1908), 59 S. E. 766.

60. *Snyder v. Pennsylvania R. Co.*, 55 Pa. St. 340.

Contra, *Maltman v. Chicago, M. & St. Paul R. Co.*, 41 Ill. App. 229.

61. *Iowa. Phelan v. Boone Gas Co.*, 147 Ia. 626, 125 N. W. 208.

New Jersey. Johnson v. Belmar, 58 N. J. Eq. 354, 44 Atl. 166.

New York. Johnson-Kahn Co. v. Thompson, 130 N. Y. S. 216, 73 Misc. 103.

Tennessee. Harbison v. Knoxville Water Co. (Tenn. Ch., 1899), 53 S. W. 993.

Washington. State ex rel. v. Seattle Lighting Co., 60 Wash. 81, 110 Pac. 799.

United States. Louisville Water Co. v. Wiemer, 130 Fed. 257, 64 C. A. 503; *Hewlett v. Western Union Telegraph Co.*, 28 Fed. 181.

Rules of company. "The rule usually followed by the courts is to hold justifiable a regulation which is made by a company in good faith and enforced by it without discrimination unless it is plainly outrageous in its general operation. Whether the court might have itself done differently, or even if it sees hardship in particular cases, is not, as will be seen, enough to induce it to set the regulation aside or hold it no

relieves the company from the duties which it owes its patrons,⁶² nor one which is repugnant to the charter of the company;⁶³ and it has been held that rules of a private company directing the use of the supply of water after its delivery, or regulating its use on the streets, cannot be made, since this is a function of the municipality.⁶⁴ A well established *custom* of a public service corporation may have the force of a rule or regulation.⁶⁵

A *municipality which owns its own plant* may establish reasonable rules, the same as a private company.⁶⁶

§ 1712. Reasonableness of rules.

A rule of a public service company must be reasonable,⁶⁷ and the courts are invested with jurisdiction over

justification." Wyman, Public Service Corporations, § 860.

While a public service company cannot base a rule on the theory that the people as a whole are dishonest, yet it has the right to adopt a rule which, while giving the honest citizen what he pays for, will prevent the dishonest from getting that which he will never pay for. Cedar Rapids Gas-light Co. v. Cedar Rapids, 144 Ia. 426, 120 N. W. 966.

Effect of rules. "Without regulations a company may refuse to accede to particular requests, but it must then show that the particular request is unreasonable. But, with a general regulation, a service may be refused to any one notwithstanding his particular hardship, unless the whole rule is shown to be unreasonable." Wyman, Public Service Corporations, § 860.

62. Central Union Telephone Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

63. Bourke v. Olcott Water Co, 4 McQ.—41.

(Vt., 1911), 78 Atl. 715, 33 L. R. A. (N. S.) 1015, holding rule that company "will not collect rent from tenants." Such bills must be paid by owner of premises; invalid, where charter requires supply to be furnished to "every person" in the municipality.

64. Wiemer v. Louisville Water Co., 130 Fed. 251.

65. Phelan v. Boone Gas Co., 147 Ia. 626, 125 N. W. 208.

66. Where the supply is furnished by the municipality itself, provisions of its home rule charter constituting rules and regulations as to the furnishing of the supply have the force and effect of legislative enactments. State ex rel. v. Duluth Board of Water & Light Com'rs, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581.

See chapter 35 *post*.

67. People v. Monroe, 83 N. Y. S. 995, 41 Misc. Rep. 198.

Test of reasonableness is not whether some other rule would answer its purpose as well or better, but whether that adopted is

the question whether any rule or regulation is fair and just, or unreasonable and oppressive.⁶⁸

In determining whether the rules of a public service company are reasonable or unreasonable, no distinction is drawn in these pages between such rules and the *orders or regulations of a municipality which owns its plant* and fulfills the duties of a public service corporation, since it is believed that there is no difference between the two and that if a rule of a private company would be invalid as unreasonable, the same would be true of an ordinance or regulation of a municipality owning its plant, and *vice versa*. The reasonableness or unreasonableness of the rules of a public service company is to be determined by the same tests applied to the *reasonableness of municipal ordinances*, and there is no arbitrary rule for testing the reasonableness or unreasonableness of ordinances.⁶⁹

The following rules, among others, have been held reasonable:⁷⁰ rule that supply will not be furnished until

fairly and generally beneficial to the company and all its customers. *Hewlett v. Western Union Telegraph Co.*, 28 Fed. 181.

68. *Vanderberg v. Kansas City Gas Co.*, 126 Mo. App. 600, 105 S. W. 17.

69. *Jones v. Nashville*, 109 Tenn. 550, 557, 72 S. W. 985.

See § 724 *et seq.*, *ante*, vol. 2.

70. **Reasonableness of rules.** Rule that all governors shall be connected with gas pipes at least a foot from the meter is reasonable. *Foster v. Philadelphia Gasworks Trustees*, 12 Phila. (Pa.) 511.

Gas company may forbid attachment, by others, of governors to its meters, to regulate pressure of gas. *Blondell v. Consolidated Gas Co.*, 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

Bond. A rule of a municipal board controlling the city water supply that applicants for connections outside the municipality in a town must give bond conditioned on the annual receipt by the agency, for water consumed in the territory supplied, of ten per cent of the cost of the extensions, is not unreasonable on its face. *Hartford Board of Water Commissioners v. Bloomfield*, 84 Conn. 522, 80 Atl. 794.

Office hours of telegraph companies. Telegraph companies have a right to provide reasonable regulation as to hours during which it will do business, and the reasonableness of the regulations will depend largely upon the character of the business done, the locality of the office, and is often a mixed question of law and fact.

arrears are paid;⁷¹ rule fixing a different rate if payment is not made by a certain date of the succeeding month after the furnishing of the supply;⁷² rule of gas company requiring a *deposit as security* for the payment of gas bills;⁷³ requiring an *application for supply* to be made in writing and requiring the applicant to sign reasonable regulations;⁷⁴ rule of a telephone company that the *use of profane or indecent language* shall be ground for cutting off the service;⁷⁵ requiring use of particular kind of hydrant;⁷⁶ provision that no more

Western Union Telegraph Co. v. Hill, 163 Ala. 18, 50 So. 248, 23 L. R. A. (N. S.) 648; Western Union Telegraph Co. v. Ford, 77 Ark. 531, 92 S. W. 528 (office hours on holidays from eight to ten a. m. and from four to six p. m. is reasonable); Western Union Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 94 Am. St. Rep. 366; Carter v. Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274.

In a small town of a few hundred people, the office hours of telegraph company from seven a. m. to seven p. m. are reasonable. Western Union Telegraph Co. v. Gillis, 97 Ark. 226, 133 S. W. 833; Western Union Telegraph Co. v. Perry (Ala., 1911), 56 So. 824.

71. State ex rel. v. Duluth Board of Water & Light Com'rs, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581.

Rule adopted by a city prohibiting it from furnishing a supply to consumers until all indebtedness for previous supplies is discharged is reasonable and valid. Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985.

72. State ex rel. v. Duluth Board of Water & Light Com'rs,

105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581.

Requiring water rates to be paid quarterly, and adding a five per cent penalty in case of default in payment for ten days, is reasonable. Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. St. 316, 28 Pac. 516.

73. Phelan v. Boone Gas Co., 147 Ia. 626, 125 N. W. 208, 31 L. R. A. (N. S.) 319; Williams v. Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; Shepard v. Milwaukee Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479.

Rule of telegraph company requiring, where message sent requires an answer, a deposit sufficient to pay for a ten word reply, is reasonable. Western Union Tel. Co. v. McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296; Hewlett v. Western Union Tel. Co., 28 Fed. 181.

74. Shepard v. Milwaukee Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479.

75. Pugh v. City & Suburban Telephone Ass'n, 8 Ohio Dec. 644.

76. State ex rel. v. Goodfellow, 1 Mo. App. 495,

than one hundred and fifty gallons of water per day shall be used in any building without a special permit;⁷⁷ reserving the right of a water company to make all taps of its mains and pipes;⁷⁸ requiring the consumer to bear the *burden of making connections* between his premises and the main;⁷⁹ requiring applicant for water to keep his *hydrant closed* except when using water;⁸⁰ rule making owner liable for debt of his tenant;⁸¹ rule requiring the owner of a building occupied by several tenants having water in their several rooms, to pay the water rates, instead of the tenants where there is but one service pipe.⁸² rule of street railway company that change will not be given for a larger bill than two dollars;⁸³ rule of street railway company that *transfers* must be asked for when paying fares;⁸⁴ rule that transfers shall be good only at intersecting points.⁸⁵ So a rule requiring consumers to *repair service pipes* leading from the main pipe in the streets to the property of the consumer, is

77. *Brass v. Rathbone*, 40 N. Y. S. 466, 8 App. Div. 78.

78. *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. 518.

79. *Fisher v. St. Joseph Water Co.*, 151 Mo. App. 530, 132 S. W. 288.

§ 1696 *ante*.

Contra, *Consumers Co. v. Hatch*, 17 Idaho 204, 104 Pac. 670, *aff'd* in (U. S.), (decided April 1, 1912), 32 Sup. Ct. 465.

80. *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841.

81. *East Grand Forks v. Luck*, 97 Minn. 373, 107 N. W. 393, 6 L. R. A. (N. S.) 198.

However, where the charter of a water company provided that "every person" living within the village "shall be entitled to have and use an ample supply of water

over the mains of said company by paying a reasonable compensation therefor," the company cannot make a rule that rents will not be collected from tenants but that such bills must be paid by the owners of premises, since in conflict with the charter. *Bourke v. Olcott Water Co.* (Vt., 1911), 78 Atl. 715.

82. *Kelsey v. Board of Fire & Water Com'rs of Marquette*, 113 Mich. 215, 71 N. W. 589, 37 L. R. A. 675.

83. *Barker v. Central Park, N. & E. R. R. Co.*, 151 N. Y. 237, 45 N. E. 550.

84. *Ketchum v. New York City R. Co.*, 103 N. Y. S. 486, 118 App. Div. 248.

85. See *Percy v. Metropolitan St. R. Co.*, 58 Mo. App. 75.

valid, especially where the consumer consents thereto.⁸⁶

The following rules, *inter alia*, have been held to be unreasonable:⁸⁷ rule reserving to gas company the right at any time to cut off communication of the service pipe if it finds it necessary to protect its works against abuse or fraud;⁸⁸ rule authorizing the inspectors of gas company to have free access *at all times* to buildings to examine the apparatus;⁸⁹ rule that gas fittings must not be disconnected or opened either for alterations or repairs without a permit from the company;⁹⁰ rule requiring the payment of one dollar as a condition of turning on water after it has been turned off, in addition to all arrearages, as to the dollar;⁹¹ rule that water may be shut off if tenant refuses to pay arrearages due from the landlord or former occupants.⁹² At any event, a

86. *McClagherty v. Bluefield Waterworks & Imp. Co.*, 67 W. Va. 285, 68 S. E. 28.

87. **Unreasonable rule.** Condition imposed by corporation organized to supply electric light, steam and hot water heat, that no one who did not use the electricity could have steam, is unreasonable. *Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 111 Pac. 834.

Rule of telephone company doing general messenger business, that its instrument shall not be used for calling messengers except from its own office, is unreasonable. *People v. Hudson River Telephone Co.*, 19 Abb. N. C. (N. Y.) 466.

88. *Shepard v. Milwaukee Gas-light Co.*, 6 Wis. 539, 70 Am. Dec. 479.

89. *Shepard v. Milwaukee Gas-light Co.*, 6 Wis. 539, 70 Am. Dec. 479.

90. *Shepard v. Milwaukee Gas-light Co.*, 6 Wis. 539, 70 Am. Dec. 479.

91. *American Waterworks Co. v. State*, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610.

Contra. *Mansfield v. Humphreys Mfg. Co.*, 82 Ohio St. 216, 92 N. E. 233.

§ 1695 *ante*.

Electric lights. Requiring payment of penalty of fifty cents, in addition to payment of arrears, where electric light is turned on after having been turned off for failure to pay the bill is unjust, discriminatory and oppressive. *State ex rel. v. Jones*, 141 Mo. App. 299, 125 S. W. 1169.

92. *Burke v. Water Valley*, 87 Miss. 732, 40 So. 820, 112 Am. St. Rep. 468; *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874.

Regulation that a tenant shall not be furnished water until all

company cannot enforce a rule that the supply will be stopped unless all arrearages are paid, whether owing by the tenant in possession or by a former tenant, where the incoming tenant was not given notice and had no knowledge of such rule.⁹³

§ 1713. Same—payment in advance.

Rules requiring payment in advance are generally held to be reasonable and valid.⁹⁴ So a public service company may require rentals to be paid in advance or before a certain date under penalty of discontinuing the service or supply.⁹⁵

arrearages on the premises are paid and that subsequent purchasers of property shall not be entitled to water until all arrearages on the premises are paid are unreasonable, discriminatory, and invalid. *Houston v. Lockwood Inv. Co.* (Tex. Civ. App., 1912), 144 S. W. 685.

93. Knowledge of rule. *Miller v. Wilkes Barre Gas Co.*, 206 Pa. 254, 55 Atl. 974, in which case, Judge Dean, in discussing this question said:

"In case of a municipality the regulation must be by ordinance. Of this all have actual or constructive notice. In case of a *quasi* public corporation, such as this defendant, the regulation ought to be by resolution or by-law, or at least by actual notice. The incoming tenant must somewhere be able to find out, before he enters upon possession, his liability. If by merely entering into possession he assumes payment of another man's debts, he should have that knowledge, or the means of it. In the case before us there was no evidence of such

rule on part of this company. The first notice plaintiff had that he was held answerable for the former tenant's bill was the demand upon him for it when he offered to pay his own bill."

See § 727 *ante*, vol. 2.

94. *Hieronymus v. Bienville Water Supply Co.*, 131 Ala. 447, 31 So. 31; *Robbins v. Bangor Ry. & Electric Co.*, 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963; *Tyler v. New York City*, 7 N. Y. St. Rep. 265.

Requiring payment in advance. Regulations requiring a consumer to pay a month's rent in advance, or in default thereof the company will shut off the supply, or requiring the consumer to pay at the end of the month the rates for the preceding month, or in default thereof the company will shut off the supply, have generally been held reasonable and within the power of public service companies. *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670.

95. *Irvin v. Rushville Co-operative Tel. Co.*, 161 Ind. 524, 69 N. E. 258.

Requiring water rent to be paid three months in advance has been held reasonable,⁹⁶ and it has been held that a rule of a rural telephone company that telephone rent must be paid six months in advance is reasonable,⁹⁷ but it is doubtful if such a regulation as the latter would be held reasonable in a municipality. A rule that a consumer must pay a year in advance has been properly held to be unreasonable.⁹⁸

§ 1714. Same—shutting off supply.

Rules providing for cutting off of the supply for failure to pay rates, when due,⁹⁹ or allowing the company to shut off water if the consumer wastes it,¹ are reasonable. So a rule that if water is supplied to one or more parties through a single tap the supply may be shut off if any of the consumers fail to pay for his part of the supply is reasonable and valid.² And a public service company may enforce a rule requiring payment of amounts due on or before a certain date, or cutting off the service if not paid, notwithstanding that the patron claims the company is indebted to him on a collateral demand in a sum in excess of the amount due the company.³

96. *Harbison v. Knoxville Water Co.* (Tenn. Ch. App., 1899), 53 S. W. 993.

97. *Buffalo County Tel. Co. v. Turner*, 82 Neb. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693, 130 Am. St. Rep. 699.

98. Requiring payment of water rent for whole year without regard to whether water is actually used for that period is unreasonable. *Rockland Water Co. v. Adams*, 84 Me. 472, 24 Atl. 840, 30 Am. St. Rep. 368.

99. *Appeal of Brumm* (Pa.), 12 Atl. 855; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. 316, 28 Pac. 516, 28 Am.

St. Rep. 35, 14 L. R. A. 669 (after fifteen days default).

§ 1690 *et seq.*, *ante*.

A rule that *telephone* service shall be cut off if charges are not paid before the fifth of the succeeding month is reasonable. *Irvin v. Rushville Co-operative Tel. Co.*, 161 Ind. 524, 69 N. E. 258.

1. *Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320.

2. *Cox v. Cynthiana*, 29 Ky. L. Rep. 780, 96 S. W. 456.

3. *Irvin v. Rushville Co-operative Tel. Co.*, 161 Ind. 524, 69 N. E. 258.

§ 1715. Same—meters and meter rates.

A public service company or municipality owning its plant may charge for a supply according to the amount used, as shown by a meter, and this is so notwithstanding other consumers are charged a flat rate.⁴ So the company may designate the character of meter to be used by consumers,⁵ and may make a rule that where water meters have been placed in a house, they cannot be removed and the flat rate system adopted, unless by consent.⁶

Statutes in some jurisdictions authorize the use of meters only as to a certain class of consumers.⁷ So where a municipal ordinance authorized a water company to charge either flat rates or a meter rate, and fixes the maximum rate, a consumer who is being charged meter rates cannot object although they exceed the maximum flat rates.⁸ And in one case, it was held that a householder who had been paying the minimum meter

4. *Powell v. Duluth*, 91 Minn. 53, 97 N. W. 450; *Pond v. New Rochelle Water Co.*, 127 N. Y. S. 582, 143 App. Div. 69; *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149, 42 W. N. C. 160; *Lancaster Hotel Co. v. Lancaster*, 7 Pa. Super. Ct. 159, 42 W. N. C. 164.

§ 1697 *ante*; § 1727 *post*.

Meter rates. A rule requiring customers of a gas company, in buildings where it is necessary to install more than one meter, to provide for a separate meter room on each floor, or in the basement, where all meters may be installed, is a reasonable rule. *State ex rel. v. Seattle Lighting Co.*, 60 Wash. 81, 110 Pac. 799.

Water used in operation of cafe, restaurant, bar, billiard room, barber shop, and garage, in connection with an apartment house,

is used for "business consumption," within the regulations of water works in New York City authorizing water meters in such places. *Johnson-Kahn Co. v. Thompson*, 130 N. Y. S. 216, 73 Misc. 103.

Prohibiting use of hose except where premises are metered is reasonable. *Johnson-Kahn Co. v. Thompson*, 130 N. Y. S. 216, 73 Misc. 103.

5. *Anderson v. Berwyn*, 135 Ill. App. 8.

6. *Powell v. Duluth*, 91 Minn. 53, 97 N. W. 450.

7. *Foster v. Monroe*, 82 N. Y. S. 653, 40 Misc. Rep. 449.

8. *Charleston Light & Water Co. v. Lloyd Laundry & Shirt Mfg. Co.*, 81 S. C. 475, 62 S. E. 873; *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874.

rate of fifteen dollars a year for water could not enjoin the municipality which owned the plant from changing from a meter basis to a flat rate which would cost him nearly one hundred dollars a year.⁹

The fact that a meter rate costs the consumer more than a flat rate does not render the rate unreasonable.¹⁰

§ 1716. Effect of violations of rules; waiver.

For a violation of proper rules, the public service company may shut off the supply or discontinue the service.¹¹ And if a corporation authorized to establish a rule as a condition to furnishing service, has done so, and the patron is charged with notice of the rule and also of the fact that he has violated it, the corporation may refuse him service for such reason without informing him at the precise time of its refusal as to its reason therefor.¹² A public service corporation cannot, however enforce a rule, even if the rule is a reasonable one, where it is not resorted to in good faith but instead is enforced as a matter of retaliation.¹³

Whether *knowledge of the rules* is necessary to authorize their enforcement has been little discussed except in railroad cases.¹⁴ It may be questioned however,

9. Ladd v. Boston, 170 Mass. 332, 49 N. E. 627, 40 L. R. A. 171.

10. Powell v. Duluth, 91 Minn. 53, 97 N. W. 450.

Meter rate is not *per se* unreasonable. Herrmann v. O'Brien 123 N. Y. S. 752, 138 App. Div. 780; Johnson-Kahn Co. v. Thompson, 130 N. Y. S. 216, 73 Misc. 301.

11. Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320.

§ 1690 *ante*.

Owner cannot complain where tenant fails to comply with regulations, and supply is cut off. Brass v. Rathbone, 40 N. Y. S. 466, 8 App. Div. 78, *aff'd* in 153 N. Y. 435, 47 N. E. 905.

12. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

13. Phelan v. Boone Gas Co., 147 Ia. 626, 125 N. W. 208, holding that gas company could not require deposit of security for payment of gas from one who had paid his bills promptly merely because he had sued the company, owing to differences concerning the account.

14. Knowledge of rules. Reasonable regulations are binding although patrons have no knowledge thereof. Western Union Telegraph Co. v. McMillan (Tex. Civ. App., 1895), 30 S. W. 298.

whether it is not going too far to hold, as has been decided in at least one case, that a patron is not bound by a rule where he is not shown to have assented thereto.¹⁵ Such rules may, however, be *waived* by the public service corporation;¹⁶ but failure to enforce the rule against some does not necessarily preclude the right to enforce it against a particular person.¹⁷

11. CONTRACTS BETWEEN GRANTEE AND MUNICIPALITY.

§ 1717. In general.

The franchise, considered as a contract, and conditions in the franchise, are elsewhere considered in this chapter. So the general rules as to municipal contracts are set forth in a preceding volume.¹⁸ Herein are included certain rules as to contracts as particularly applied to contracts between a public service company and a municipality to supply the latter with water or light or the like, for use by the municipality; but not including contracts fixing the rates for a supply to be furnished the *inhabitants* of the municipality,¹⁹ nor contracts between a municipality and others where the municipality owns its own water or light plant.²⁰ So contracts between a municipality and a public service company for the purpose of the plant of the latter by the municipality are considered in the chapter which follows.

15. *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 48 N. E. 670, holding that a rule of a telegraph company which is printed on a delivered dispatch, requiring all claims for damages to be presented in writing within sixty days, is not binding on the receiver of a telegram where he has not assented thereto.

16. *Citizens' Gas & Oil Mining Co. v. Whipple*, 32 Ind. App. 203, 211, 69 N. E. 557.

See *State ex rel. v. Seattle*

Lighting Co., 60 Wash. 81, 110 Pac. 799.

Regulations may be waived either expressly or by custom. *Wyman, Public Service Corporations*, § 864.

17. *Irvin v. Rushville Co-operative Tel. Co.*, 161 Ind. 524, 69 N. E. 258.

§ 1697 *ante*.

18. § 1163 *et seq.*, *ante*, vol 3.

19. § 1738 *post*.

20. See chapter 35 *post*.

“Contracts on the part of a municipality for the supply to the municipality and to its citizens of water and light are not made in the exercise of the *governmental* powers vested in the municipal council, but of its proprietary or *business* powers. It is acting for the private benefit of itself and its inhabitants, and its contracts of that character are governed by the same rules that govern contracts of private individuals.²¹

21. Little Falls E. & W. Co. v. Little Falls, 102 Fed. 663.

See also Omaha Water Co. v. Omaha, 147 Fed. 1, 77 C. C. A. 267; Illinois Trust & Sav. Bank v. Arkansas City, 76 Fed. 271, 34 L. R. A. 518. But see Lehigh Water Co.'s Appeal, 102 Pa. St. 515.

The operation of water works and furnishing its inhabitants with water by a municipal corporation is not an exercise of its power of sovereignty, but it is a business which is public in its nature, and belongs to that class of occupations or enterprises upon which public interest is impressed. Chicago v. Northwestern Mutual L. Ins. Co., 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770; Wagner v. Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

Light. The power of municipal corporations to contract for lighting the streets and alleys is not a legislative power, but purely a business power, and is discretionary. Gosport v. Pritchard, 156 Ind. 400, 59 N. E. 1058.

A contract by a municipal corporation with a company for lighting its streets is in the exercise of its contractual, its private, proprietary or business powers, and not of its governmental or delegated legislative powers; and the execution of such a contract for a

term of years does not operate as a surrender of the legislative power of the city. Denver v. Hubbard, 17 Colo. App. 346, 368, 68 Pac. 993.

Termination. Contracts entered into from year to year with a water company confer no right on the company after their expiration. Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232, 59 C. C. A. 236.

Successors as bound by contract. If one public service company succeeds to the rights of another, with the consent of the municipality, the contracts of the former with the municipality are binding upon both the new company and the municipality. Austin v. Bartholomew, 107 Fed. 349, 46 C. C. A. 327.

Impairment of contracts. Of course, if a contract is entered into between a municipality and a public service corporation, based on a valuable consideration, whereby the company agrees to furnish certain supply or service free to the municipality, the contract cannot be impaired by subsequent legislation. Kenosha v. Kenosha Home Tel. Co. (Wis., 1912), 135 N. W. 848, where contract was not a part of any franchise granted or attempted to be granted.

§ 1718. Same—power to make contracts.

The power of a municipality to make contracts in general has already been discussed at length.²²

Contracts for water supply. As a rule, the power to provide a water supply is expressly conferred on municipal corporations by the legislature.²³ However, power

22. §§ 1167-1177 *ante*, vol. 3.

Contract to furnish electricity to street railway company. Where a municipality is given the power by statute to acquire and own street railways, gas and other works for light and heat, it has implied power to acquire electricity by contract not only for lighting but also to operate street railways, although it does not own any appliances for a street railway, and where it has contracted for such a supply to be used "in any way it sees fit," it may make a sub-contract with a street railway company to furnish it a certain amount of electric power to operate its street railway. *Riverside & A. R. Co. v. Riverside*, 118 Fed. 736, 745.

23. *Murphy v. Waycross*, 90 Ga. 36, 15 S. E. 817; *Dutton v. Aurora*, 114 Ill. 138, 28 N. E. 461; *Walter v. McClellan*, 99 N. Y. S. 78, 113 App. Div. 295.

A town has power to contract for the laying of water mains in its streets. *Bennett v. Mount Vernon*, 124 Ia. 537, 100 N. W. 349.

Power to rent hydrants. Power "to provide the city with water for the extinguishment of fires and for the convenience of the inhabitants generally," leaving the manner of such provision to the city, includes such power to rent hydrants. *Lexington v. Lafayette*

County Bank, 165 Mo. 671, 65 S. W. 943.

Power to provide does not include power to buy site. A statute authorizing a municipal corporation to contract with a party to supply the municipality with water and machinery, and connecting pipes for supplying the water, does not authorize the municipal corporation to purchase a site upon which to erect the water-works. *People ex rel. v. McClintock*, 45 Cal. 11.

In New Jersey, the statute of 1888 authorizing municipal authorities to contract "for the obtaining and furnishing of a supply, or a further or other supply of water, to such municipal corporation, for the purpose of extinguishing fires and for such other lawful uses and purposes as may be deemed necessary or convenient," does not authorize a municipality to enter into a contract with a corporation whereby the latter is to furnish a supply of water to the inhabitants and collect rentals from such inhabitants but merely authorizes the municipality to receive the water from the contracting party and then furnish it to the inhabitants. *Passaic Water Co. v. Paterson*, 65 N. J. L. 472, 47 Atl. 462.

Supply to another municipality. A city having purchased a supply

to make contracts for water need not be *expressly* conferred on a municipality,²⁴ and where the authority is not expressly delegated, it is ordinarily implied from very general powers delegated to the municipality;²⁵

of water for its own use, cannot contract to supply another municipality with a supply. *Rehill v. Jersey City*, 71 N. J. L. 109, 58 Atl. 175. But see next chapter as to sale of surplus where municipality owns plant.

Power of municipality owning plant to furnish supply outside municipality, see chapter 35 *post*.

24. *San Diego Flume Co. v. Souther*, 104 Fed. 706, 44 C. C. A. 143.

25. **Power of a city to contract for water for public and private use** in the city, is an incidental power. *Gadsden v. Mitchell*, 145 Ala. 137, 157, 40 So. 557.

"The city of New Orleans, by virtue of her inherent police powers, then, had a right to contract with reference to a water supply for the public health, and to extinguish fires." *Conery v. New Orleans Water Works Co.*, 41 La. Ann. 910, 7 So. 8.

"Contrary to the decisions of this court in the earlier cases in which this question was considered, it is now established by the later decisions that the supplying of water and lights by a city or town is a 'necessary expense,' and that this power, even in the absence of express grant, is a power necessarily and reasonably implied in its general grant of powers, and can be exercised by its governing authorities, unless expressly forbidden by the provisions of its charter." *Hen-*

derson Water Co. v. Henderson Graded Schools, 151 N. C. 171, 65 S. E. 927.

A municipal corporation has implied power, under its police power, to provide a supply of water on its public square. *Liv- ington v. Pippin*, 31 Ala. 542.

"Authority to make provisions within lawful limitations for securing or furnishing to a city and its inhabitants an abundant supply of good water for all purposes is a usual and necessary power of a municipality, and such power may be included in powers given in general terms, where there is nothing in the enumeration of particular powers conferred to limit in this particular the operation of the general powers conferred." *State ex rel. v. Tampa Waterworks Co.*, 56 Fla. 858, 47 So. 358, 360.

The charter of the city of Anoka confers upon the municipality in substance: (a) power to make and establish public pumps, wells, cisterns and hydrants, and to provide for and control the erection of waterworks for city and its inhabitants; (b) power to provide for lighting the city with electricity, gas, or other means, and to control the erection of any works for that purpose and to grant to any corporation or person the right to occupy its streets for that purpose. Such provisions of the charter invest the municipality with power and authority to

and, in at least some jurisdictions, it is well settled that a municipality has the power under the "*general welfare*" clause in its charter to enter into contracts for water supply for the inhabitants for domestic use and for fire protection.²⁶ So authority conferred as to *ex-*

enter into contracts with private individuals for the purposes stated. *Reed v. Anoka*, 85 Minn. 294, 38 N. W. 981.

But a civil district having power to pass ordinances respecting the police and to preserve the public health, but having power to levy taxes for no other purpose than for keeping roads in repair, has no authority to contract for water for fire protection. *South Covington Dist. v. Kenyon Water Co.*, 117 Ky. 489, 25 Ky. L. Rep. 1592, 78 S. W. 420.

Power "to provide the city with water," includes the power to contract with some other corporation having power to so contract, or with some person, to supply the water. *Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143.

Municipal authority to provide the city with water and to erect hydrants, etc., includes power to rent hydrants of a water company. *Austin v. Bartholomew*, 107 Fed. 349, 354, 46 C. C. A. 327.

Power to "provide for supply." Power conferred upon a municipality to *provide for a supply* of water confers by implication the power to furnish the supply, by contract. *Atlantic City Water Works Co. v. Atlantic City*, 39 N. J. Eq. 367, 1 Atl. 459. Charter authority "to provide for supplying city with water" includes au-

thority to agree upon the price of water furnished by a public service company. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, 729.

Street sprinkling. A municipal corporation empowered to care for and improve its streets, and to pay for water necessary for public purposes, may contract for water for street sprinkling. *McAllen v. Hamblin*, 129 Ia. 329, 105 N. W. 593, 5 L. R. A. (N. S.) 434.

In Georgia, the doctrine is broadly stated that a municipal corporation, having the usual powers expressly granted by charter or legislative act, has the power to make all such contracts in its corporate capacity as the local authorities may deem necessary for the welfare of the city which are not in conflict with the constitution and laws of the state or of the United States. In this case the city entered into a contract for the construction of a system of waterworks, and it was held that the grant of power was broad enough to cover the contract. *Rome v. Cabot*, 28 Ga. 50.

26. *Dyer v. Newport*, 123 Ky. 203, 29 Ky. L. Rep. 656, 94 S. W. 25; *Mercantile Trust & Deposit Co. v. Columbus*, 161 Fed. 135, 141, following Georgia law.

General welfare. Charter powers to provide "for the health and welfare of the city" confers power

tinguishing fires has been held to confer by implication power to contract for a supply of water.²⁷ Likewise,

to contract for a supply of water, to suppress fires, etc. *Webb City & C. W. W. Co. v. Webb City*, 78 Mo. App. 422.

"The general power in respect to police regulations, the preservation of the public health, and the general welfare includes the power to use the usual means of carrying out such powers, which includes municipal water and lighting services." *Ellinwood v. Reedsburg*, 91 Wis. 131, 134, 64 N. W. 885.

27. Authority to enact ordinances "to prevent and extinguish fires," carries with it power to contract for a supply of water for that purpose. *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784; *Saleno v. Neosho*, 127 Mo. 627, 641, 30 S. W. 190.

Power as to preventing fires. Power to provide necessary apparatus and means for the prevention and extinguishment of fires confers power to contract for a supply of water to extinguish fires and to furnish all necessary hydrants in a system for the extension of the water works. *Utica Water Co. v. Utica*, 31 Hun (N. Y.) 426.

So the general grant, "the mayor and board of aldermen shall have power by ordinance to prevent and extinguish fires," and "to pass ordinances in maintaining the peace and good government, health and welfare of the city," etc., confers the implied power to contract with a water company to supply the

city and its inhabitants with water, thus rendering the city liable on such contract for fire hydrant rents. The decision is put upon the ground that, as the city was given the power to prevent and extinguish fires, without the power to procure water for this purpose, the express grant would be inefficacious; that unless the power to procure water be implied in the express grant, the latter must remain vain and nugatory; that whatsoever the law necessarily implies in a statute is as much a part or parcel thereof as if expressly stated therein. Therefore, the power to extinguish fires fairly and necessarily implies the power to effectuate the intent involved in the grant by the execution of its incidents. "Science, so far as we know, has not yet suggested any means of extinguishing great fires without the application of water. * * * A fire engine without water would be quite a useless machine in the hands of a city government. Water is quite as indispensable in extinguishing fires as a fire engine. When there is a system of water-works having proper pressure, fire engines can be dispensed with, but in no case can the grant of power be made efficacious without a supply of water. It is apparent that the reasons why the grant of power to suppress fires should carry with it the power to procure water to extinguish fires are much more co-

authority conferred on a municipality to provide for the *erection or purchase of waterworks* includes power to contract for a supply of water and is not limited to the construction of a plant by the municipality.²⁸ Power conferred on a municipality to *make provision* for an adequate supply of water for the use of the municipality and its inhabitants confers on the municipality the choice of means for securing such supply and it may either build a plant itself or contract with a water company for a supply.²⁹ And power conferred on a municipality to contract for a supply of water or light is not affected by a subsequent grant of power to own a plant for such a supply.³⁰

Contracts for light. While generally the power to make contracts for lighting the municipality is expressly

gent than those which sustain the power to purchase the fire engines." *Webb City, etc. Waterworks Co. v. Webb City*, 78 Mo. App. 422, 427, 428.

Charter power "to provide the city with water * * * for the extinguishment of fires and the convenience of the inhabitants generally," leaving the manner of such provision to the corporate authorities, confers such power. As the water cannot be provided without expense, the power to incur the expense is implied, and as means to meet the expense can only come from taxation, the power to levy the tax is implied. *Lexington v. Lafayette Co. Bk.*, 165 Mo. 671. 679, 65 S. W. 943.

28. *Jack v. Grangeville*, 9 Idaho 291, 74 Pac. 969; *Hackensack Water Co. v. Hoboken*, 51 N. J. L. 220, 17 Atl. 307; *Anoka Water-works, E. L. & P. Co. v. Anoka*, 109 Fed. 580, 582; *Illinois*

Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 279, 22 C. C. A. 171, 34 L. R. A. 518; *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782, 10 C. C. A. 60.

Power to construct works to furnish the city with water. authorizes the city to contract to furnish its *inhabitants* with water. *Scott v. Laporte*, 162 Ind. 34, 47, 68 N. E. 278, 69 N. E. 675.

In Missouri, however, power conferred by charter authorizing a city to purchase or construct a water works does not authorize the making of a contract to rent hydrants. *Lexington ex rel. v. Lafayette County Bank*, 165 Mo. 671, 65 S. W. 943.

29. *State ex rel. v. Tampa Water Works Co.*, 56 Fla. 858, 47 So. 358.

30. *Oconto City Water-Supply Co. v. Oconto*, 105 Wis. 76, 80 N. W. 1113.

conferred,³¹ yet the power may exist by implication where it is not expressly granted;³² and a city having power to provide light for its streets, has implied power to purchase the light of others, and to enter into a contract for that service.³³ So power "to light the streets"

31. The fact that the use of electricity for lighting a city's streets will render useless a lighting equipment owned by the city, is no reason for enjoining the city from contracting for such light. *McMaster v. Waynesboro*, 122 Ga. 231, 50 S. E. 122.

Cannot enter into contract during life of valid ten year contract with company. *Morrice v. Sutton*, 139 Mich. 643, 103 N. W. 188.

But a municipal corporation has no power to contribute money as a bonus to secure a private company to erect an electric lighting plant. *Morrice v. Sutton*, 139 Mich. 643, 103 N. W. 188.

32. *Heilbron v. Cuthbert*, 96 Ga. 312, 23 S. E. 206; *Hequem-bourg v. Dunkirk*, 49 Hun (N. Y.) 550, 2 N. Y. S. 447; *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885.

Power to contract for light. Statutes empowering boroughs to manufacture electricity for the use of its inhabitants are held to authorize a contract with an electric light company, giving it the exclusive right to furnish light for ten years, with the privilege of the borough to renew the contract at the end of the term or purchase the plant. *Muncy Elec-*

tric Light, H. & P. Co. v. Peoples' Electric Light, H. & P. Co., 218 Pa. 636, 67 Atl. 956.

33. *Illinois*. *East St. Louis v. East St. Louis Gas Light & C. Co.*, 98 Ill. 415, 435.

Iowa. *Davenport Gas & El. Co. v. Davenport*, 124 Ia. 22, 28, 98 N. W. 892.

Kentucky. *Newport v. Newport Light Co.*, 89 Ky. 454, 11 Ky. L. Rep. 840, 12 S. W. 1040; *Newport v. Newport Light Co.*, 84 Ky. 166.

New Jersey. *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651.

New York. *Hendrickson v. New York*, 160 N. Y. 144, 54 N. E. 680.

Power to light streets is inherent. "So far as lighting the streets, alleys and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and the financial condition of the corporation." *Crawfordsville v. Braden*, 130 Ind. 149, 157, 158, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214.

includes power to *contract* for lighting with electricity.³⁴ And power to erect and maintain gas works includes power to contract with others to furnish gas for lighting the streets.³⁵

§ 1719. Same—validity of contracts.

The general rules relating to the validity of municipal contracts, and the effect of *ultra vires* contracts, are elsewhere noticed,³⁶ such as that the contract may be valid in part and invalid in part,³⁷ and that the public service company, by receiving the benefits of the contract, may be *estopped* to deny its validity,³⁸ etc.,³⁹ apply equally

34. *Wade v. Oakmont*, 165 Pa. St. 479; *Seitzinger v. Electric Ill. Co.*, 187 Pa. St. 539.

35. *Newport v. Newport Light Co.*, 84 Ky. 166, 175.

36. §§ 1168-1173, 1246-1252 *ante*, vol. 3.

Contracts as binding successors, § 1254 *ante*, vol. 3.

37. § 1250 *ante*, vol. 3.

Distinct contract invalid as creating a monopoly does not affect separate contracts for hydrant rental. *Tyler v. L. L. Jester & Co.* (Tex. Civ. App., 1904). 74 S. W. 359, *aff'd* in 97 Tex. 344, 78 S. W. 1058.

38. Contract between a municipality and a public service company, is void in its inception, where the company agreed to pay the city \$50,000.00 in installments to induce the mayor to sign a franchise ordinance, where the company thereafter was granted the franchise and proceeded to construct its road on one of the streets. Company held estopped to deny the validity of the contract. *Potter v. Calumet Electric Street R. Co.*, 158 Fed. 521, 530.

§ 1276 *ante*, vol. 3.

39. Validity of contracts.

Power of municipality to contract for water supply held not limited in amount to money that might be realized from a special tax. *Creston Waterworks Co. v. Creston*, 101 Ia. 687, 70 N. W. 739.

Reasonableness. A contract for city lighting must be reasonable, else it is invalid. *Feber v. West Allis*, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917.

Clause in a contract for lighting which forbids the city from decreasing the number of lamps is not so unreasonable as to raise presumption of fraud. *Parfitt v. Kings County Gas and Illuminating Co.*, 12 Misc. Rep. 278; *Parfitt v. Ferguson*, 33 N. Y. S. 1111, judgment affirmed 38 N. Y. S. 166, 3 App. Div. 176.

Amount. May agree to pay more than can be raised by a special tax expressly provided for such purpose by statute. *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424, 60 Pac. 196.

Where fifty dollars a hydrant is shown to be a reasonable charge.

well to the contracts herein considered, and will not be reiterated.

While, in a general sense, the power of a city to contract for a water or light supply for public use is a discretionary one, still it cannot be so exercised as to create a corporate debt beyond that limited by law, nor to sur-

but an ordinance required the city to pay ninety-five dollars a hydrant for twenty-three years, the hydrant contract will be held invalid where it appears that it was made to evade the provision as to limit of municipal indebtedness so as to acquire the plant of a water-works in consideration of hydrant rentals. *Hall v. Cedar Rapids*, 115 Ia. 199, 88 N. W. 448.

Contract as loaning of credit. A contract between a municipal corporation and a lighting company for the lighting of the streets for a term of years, is not void as being a loaning of its credit to a corporation. *Reid v. Trowbridge*, 78 Miss. 542, 29 So. 167.

Option to purchase. In making a contract with a gas company to furnish light the municipal authorities cannot contract away the city's right to purchase the works under a law which forbids conferring exclusive privileges for using the streets by one company, but such contract is not invalid which does not secure to the city the right to purchase the works of such gas company. *Lima Gas Co. v. Lima*, 4 Ohio Cir. Ct. Rep. 22.

Provisions as to termination. Contracts made by the city should be fair and reasonable to the city. This is especially true in contracts for lighting, water supplies, etc.

A contract for lighting the city for a period of five years reserving to the city the right to terminate the contract on three months' notice, if unsatisfactory, is reasonable. *Hartford v. Hartford Electric Light Co.*, 65 Conn. 324, 32 Atl. 925.

Reimbursement for damages resulting from public improvements. The fact that a contract for a gas supply provides that the gas company shall be reimbursed by the city for any expenses incurred in making changes in the gas mains, pipes or lamp posts, made necessary by changes in the grade of streets after the company has entered on the performance of the contract, does not invalidate such contract. *Parfitt v. Ferguson*, 38 N. Y. S. 466, 3 App. Div. 176.

Provision for renewal. A provision in the contract between a municipality and a public service company, for a renewal of the contract at the end of the term if the option to purchase the plant was not accepted by the municipality at that time, "on terms as mutually agreed on at that time," the renewal provision is valid, and if the parties cannot agree on the terms of renewal, terms should be fixed by the court. *Slade v. Lexington*, 141 Ky. 214, 132 S. W. 404.

render or suspend legislative power.⁴⁰ A contract is not invalid merely because it is somewhat uncertain.⁴¹ In some jurisdictions, contracts between the municipality and designated public service companies must be *ratified by the voters* of the municipality.⁴² A contract for water is valid although the supply is not to be carried to every part of the municipality but the cost of obtaining it will be borne by all the taxpayers.⁴³

A contract between a municipality and a public service company to *pay the taxes* for a certain period, in consideration of a supply furnished to the city by the company,⁴⁴ is not invalid as an attempt to exempt the property of the company from taxation.⁴⁵ Unless pro-

40. Valparaiso v. Gardner, 97 Ind. 1.

See § 382 *ante*, vol. 1.

Debt limits, see vol. 5.

41. A contract by a city for a water supply, which fails to specify the source of supply, is not necessarily void. The fact that there is a possibility of the supply being obtained outside the state, which might prevent the city from exercising its option to purchase the waterworks, will not render it void. Brady v. Bayonne, 57 N. J. L. 379, 30 Atl. 968.

Telephones. The argument that a contract between a city and a telephone company, whereby the latter was to put telephones in municipal buildings free of charge for as long as the company should maintain a telephone system in the city is unenforceable so far as executed because no time is specified with reasonable definiteness for its duration was held not tenable. Superior v. Douglas County Tel. Co., 141 Wis. 363, 122 N. W. 1023.

42. Harrodsburg v. Harrodsburg Water Co., 23 Ky. L. Rep. 956, 64 S. W. 658.

43. Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717; State v. Summit Tp., 52 N. J. L. 483, 19 Atl. 966.

44. **Construction**, see Washburn v. Washburn Waterworks Co., 120 Wis. 575, 98 N. W. 539.

Contract with a water company may be for a sum equal to the annual taxes. See Mt. Clair Water Co. v. Mt. Clair (N. J. Eq., 1911), 79 Atl. 258.

45. Ludington Water Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558.

Contra. An agreement on part of a city to pay the taxes of an electric light company in consideration of light to be furnished the city is invalid as attempting to exempt property from taxation in violation of a constitution requiring all property not exempt to be taxed *ad valorem* at its actual cash value. Board of Councilmen v. Capital G. & El. L. Co., 29 Ky. L. Rep. 1114, 96 S. W. 870.

hibited by the constitution, the legislature may empower a municipality to contract for payment to it by a street railroad company of fixed sums in lieu of the performance of certain duties or of the payment of license fees.⁴⁶

A contract whereby a public service company is given the *exclusive* right to supply the municipality for a term of years, as distinguished from an *exclusive franchise to use the streets*, is generally held to be valid and not objectionable as creating a monopoly,⁴⁷ although the contrary is held in some states, under constitutional provisions.⁴⁸ But a contract between a municipality and a gas company to supply the town with gas is invalid in so far as it provides that no other gas company shall be given the *right to use the streets* during the term of the contract, since its tendency is to destroy competition and create a monopoly not only of street lighting but also of supplying light to public and private buildings.⁴⁹

46. A city, under statutory authority, may contract with a street railway company to accept fixed sums in lieu of the performance of certain duties or of the payment of license fees or charges imposed by general law or ordinance or the railway charter, and to select a certain number of directors to act in conjunction with the directors elected by the stockholders. *Brode v. Philadelphia*, 230 Pa. 434, 79 Atl. 659.

47. *Colorado*. *Denver v. Hubbard*, 17 Colo. App. 346, 68 Pac. 993.

Indiana. *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

Mississippi. *Reid v. Trowbridge*, 78 Miss. 542, 29 So. 167.

Pennsylvania. *Baily v. Philadelphia*, 184 Pa. St. 594, 39 Atl. 494, 39 L. R. A. 837, 63 Am. St. Rep. 812.

United States. *Bartholomew v. Austin*, 85 Fed. 359, 29 C. C. A. 568.

Where a municipality is given the power by statute to contract for lights for a certain period of years, a contract therefor is not void because it is exclusive. *Davenport Gas & Electric Co. v. Davenport*, 124 Ia. 22, 98 N. W. 892.

48. *Texas*. A contract in which a city agreed with a water company not to grant any other person the right to furnish water for fire hydrants during the existence of the contract, was invalid as a monopoly, in violation of a constitutional provision prohibiting the granting of a perpetuity or monopoly. *Hartford Fire Ins. Co. v. Houston*, 102 Tex. 317, 116 S. W. 36, rev'g (Tex. Civ. App., 1909), 110 S. W. 973, 102 Tex. 317.

49. *Parfitt v. Ferguson*, 38 N. Y. S. 466, 3 App. Div. 176.

§ 1720. Same—duration of contract.

Contracts with a water or light company, for a supply of water or light, are generally made for a term of years and tend to create a monopoly. Nevertheless, a contract for a *reasonable* term is valid,⁵⁰ unless a shorter time is fixed, or a contract for a term of years forbidden, by the constitution or statutes; and it is immaterial that the contract extends beyond the term of office of the municipal officers who act in behalf of the municipality.⁵¹ The provision in the charter of a municipality forbidding it to make any contract for street lighting for more than a year, or any contract for electric light at a higher rate

50. § 1253 *ante*, vol. 3.

Duration of contract. A municipal corporation has no implied power to enter into a contract by which a monopoly for a long series of years should be given to a water company in supplying water to the municipal corporation and its inhabitants. *Greenville Water Works Co. v. Greenville* (Miss., 1890), 7 So. 409.

Contract for twenty-one years. A contract between a municipal corporation and a water company to supply the municipal corporation and inhabitants with water for twenty-one years, and binding the municipal corporation to pay a fixed price during that time for "at least" a certain number of gallons, such "rentals" to be paid to the trustees of the city's bondholders, and pledging the city's power of taxation that such rentals shall be paid, is unreasonable and *ultra vires*. *Scott v. Laporte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.

Fifty years. Contract for water for fifty years is unreasonable in length. *Le Fever v. Northwestern*

Heat, Light & Power Co., 119 Wis. 608, 97 N. W. 203.

Perpetual contract. A contract of a city with a water company for water purporting to bind the city to levy annual taxes forever to pay for same, is *ultra vires* and void in the absence of express legislative sanction. And such contract will not be treated as valid for the period for which the company is chartered. *Westminster Water Co. v. Westminster*, 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. Rep. 424.

Vote of people. In some states municipal corporations cannot contract for a water supply for a period longer than one year except upon being authorized by popular vote at an election. *Dawson v. Dawson Water Works Co.*, 106 Ga. 696, 32 S. E. 907, and see § 1253, note 98 *ante*, vol. 3.

In Iowa, a statute expressly grants power to a municipality to contract for lights for a period of twenty-five years. *Davenport Gas & Electric Co. v. Davenport*, 124 Ia. 22, 98 N. W. 892.

51. § 1254, p. 2728 *ante*, vol. 3.

than the minimum price charged to any other consumer, cannot be evaded by a so called lease of the appliances of the company to the city for a term of years, where clearly a scheme to evade the provision of the charter.⁵²

§ 1721. Same—construction and operation of contracts for supply or service.

Where a contract is entered into between a public service corporation and a municipality, the contract is to be construed the same as any other contract,⁵³ subject to

52. *Edison Electric Co. v. Pasadena*, 178 Fed. 425, 431.

53. *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 96 S. W. 622.

Construction of particular contracts.

Arkansas. Lackey v. Fayetteville Water Co., 80 Ark. 108, 96 S. W. 622.

California. Henry v. Sacramento, 116 Cal. 628, 48 Pac. 728; *Los Angeles Water Co. v. Los Angeles*, 55 Cal. 176.

Colorado. Grand Junction Water Co. v. Grand Junction, 14 Colo. App. 424, 60 Pac. 196.

Illinois. Gold v. Peoria, 65 Ill. App. 602.

Kentucky. Lexington Hydraulic & Mfg. Co. v. Oots, 119 Ky. 598, 84 S. W. 774, 27 Ky. L. Rep. 233, rehearing denied in 119 Ky. 598, 86 S. W. 684, 27 Ky. L. Rep. 739; *Owensboro Water Co. v. Duncan's Adm'r (Ky.)*, 32 S. W. 478, 17 Ky. L. Rep. 755.

Maine. Skowhegan Water Co. v. Skowhegan Village Corporation, 102 Me. 323, 66 Atl. 714; *Public Works Co. v. Old Town*, 102 Me. 306, 66 Atl. 723.

Michigan. Gregory v. Lake

Linden, 130 Mich. 368, 90 N. W. 29.

Missouri. Sedalia Brewing Co. v. Sedalia Water Works Co., 34 Mo. App. 49.

New Jersey. Boonton v. Boonton Water Co., 69 N. J. Eq. 23, 61 Atl. 390, aff'd in 70 N. J. Eq. 692, 64 Atl. 1064.

New York. Nicoll v. Sands, 131 N. Y. 19, 29 N. E. 818, aff'g 60 Hun (N. Y.) 580, 14 N. Y. S. 448.

North Carolina. Wilson v. Charlotte, 110 N. C. 449, 14 S. E. 961.

Pennsylvania. Ephrata Water Co. v. Borough of Ephrata, 20 Pa. Super. Ct. 149; *Hallock v. Lebanon City*, 224 Pa. St. 359, 73 Atl. 333 (tests by city engineer).

Virginia. Vinton-Roanoke Water Co. v. Roanoke, 110 Va. 661, 66 S. E. 835 (provision as to free water not applicable to fish sheds).

Fire hydrants. Construction of contracts for fire hydrants. *State v. Philipsburg*, 23 Mont. 16, 57 Pac. 405; *Mt. Holly Water Co. v. Mt. Holly Springs*, 10 Pa. Super. Ct. 162; *Monroe Water Works Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685; *Washburn v. Washburn*

the rules already set forth in regard to the construction of contracts made with a municipal corporation.⁵⁴ In construing a contract contained in a franchise, the provisions of a statute relating to such franchises must be considered as a part of the contract,⁵⁵ and provisions of the constitution or statutes are as much a part of any contract between the municipality and the corporation as if they had been written into the contract.⁵⁶

Water Works Co., 120 Wis. 575, 98 N. W. 539.

Generally construction placed on contract by parties will govern. *State v. Mountain Spring Co.*, 56 Wash. 176, 105 Pac. 243.

Construction of water contract as to rate per gallon for residences, see *Birmingham Water Works Co. v. Keiley* (Ala., 1911), 56 So. 838.

Source of supply. Construction of contract between city and water company as to source of supply. *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 57 Pac. 210, 571; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, aff'd in 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886.

Contract to supply water from artesian wells not complied with by supplying equally good water from other sources. *Foster v. Joliet*, 27 Fed. 899.

Free water to extinguish fires. Contract to furnish water free to extinguish fires held not to include water to be used in a special private system of a private corporation. *Cox v. Abbeville Furniture Factory*, 75 S. C. 48, 54 S. C. 830.

Free water to public schools. Construction of contract agreement to furnish free water to public schools. *Henderson Water Co. v. Trustees of Henderson Graded School* (N. C., 1909), 65 S. E. 927.

What is pure water. The contract requiring the furnishing of "pure and wholesome water" requires the water to be at least reasonably pure and wholesome. *Meridian Water Works Co. v. Meridian*, 85 Miss. 515, 37 So. 927, and see § 1694 *ante*.

House of correction not a public institution entitled to free water. *Detroit v. Board of Water Com'rs of Detroit*, 108 Mich. 494, 66 N. W. 377, 31 L. R. A. 463.

School buildings not "public buildings of the city" so as to be entitled to free water. *National Water Works Co. v. Kansas City School District*, 23 Mo. App. 227.

54. § 1268 *ante*, vol. 3.

Construction of franchises, § 1652 *ante*.

55. *Los Angeles R. Co. v. Los Angeles*, 152 Cal. 242, 92 Pac. 490.

56. *Pocatello v. Murray* (Idaho, 1912), 120 Pac. 812.

§ 1722. Same—liability of municipality for supply or services furnished to it.

If the municipality contracts with a public service company for a supply or services, and the latter fulfills its part of the contract, it can recover the amount fixed in the contract,⁵⁷ or if no amount is fixed it may recover the reasonable value of the services or supply,⁵⁸ precisely the same as in case of other municipal contracts.⁵⁹

57. Counterclaims. In an action against a municipality for the price of water furnished it, damages sustained by individuals on account of property destroyed by fire, owing to the insufficiency of water supplied, cannot be counterclaimed. *Montgomery v. Montgomery Waterworks*, 79 Ala. 233.

58. Where the agreement is merely that hydrant rentals shall not be more than a certain sum for each hydrant, the amount recoverable is the value of the use of the hydrants. *Valparaiso v. Valparaiso City Water Co.*, 30 Ind. App. 316, 65 N. E. 1063.

After contract terminated. Where a company's franchise, which contained, among other things, a grant of right to light the city with gas at a certain price for twenty years, has expired, it can recover only the reasonable value of lighting the city thereafter, in the absence of any other agreement. *Keokuk Gas-Light, etc. Co. v. Keokuk*, 80 Ia. 137, 45 N. W. 555.

Eight per cent on the cost of a water plant which would furnish adequate fire protection, held measure of recovery, in absence of agreement, for use of hydrants

for fire protection. *Grand Haven v. Grand Haven Waterworks*, 119 Mich. 652, 78 N. W. 890.

Amount expended for hydrants. Where the costs and expense of putting in hydrants was to be paid by the municipality, it was liable only for the actual sum expended by the company in putting in the hydrants, as distinguished from the reasonable value of the work. *Bull v. Quincy*, 155 Ill. 566, 40 N. E. 1035, aff'g 52 Ill. App. 186.

59. § 1274 *ante*, vol. 3.

Liability of municipality for water furnished it.

Colorado. *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424, 60 Pac. 196.

Georgia. *Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907.

Indiana. *Valparaiso v. Valparaiso City Water Co.*, 30 Ind. App. 316, 65 N. E. 1063.

Minnesota. *Industrial Trust Co. v. St. Cloud*, 88 Minn. 437, 93 N. W. 114.

Missouri. *Joplin Waterworks Co. v. Joplin*, 177 Mo. 496, 76 S. W. 960.

Nebraska. *North Platte Water Works Co. v. North Platte*, 50 Neb. 853, 70 N. W. 393.

The rules relating to liability on *implied contracts*,⁶⁰ and the rules as to ratification of the contract and estoppel to deny its validity after the receipt of benefits thereunder,⁶¹ apply to the same extent as in case of other municipal contracts; and hence if the municipality has *no power* to enter into a contract with a public service company for a supply or services, the latter cannot recover on an express or implied contract with the municipality, after furnishing the supply or rendering the services.⁶² But if the power to make the contract exists, although no contract is in fact made, the furnishing of the supply or the rendition of services authorizes a recovery on an implied contract.⁶³ So if the contract is *void*, but the power to contract existed, the reasonable value of the

New Jersey. Jersey City v. Jersey City Water Supply Co., 70 N. J. Eq. 514, 61 Atl. 714; East Newark v. New York & N. J. Water Supply Co., 64 N. J. Eq. 265, 57 Atl. 1051, aff'd in 68 N. J. Eq. 783, 64 Atl. 1132.

Pennsylvania. Hyndman Water Co. v. Hyndman, 7 Pa. Super. Ct. 191, 42 W. N. C. 257.

Duty of municipality to levy special tax. State v. Great Falls, 19 Mont. 518, 49 Pac. 15.

Hydrant rentals. Liability of city for hydrant rentals. Ellensburg Water Supply Co. v. Ellensburg, 13 Wash. 554, 43 Pac. 531; Illinois Trust & Savings Bank v. Arkansas City Water Co., 67 Fed. 196.

60. §§ 1262-1267 *ante*, vol. 3.

Recovery for the reasonable value allowed. Harrodsburg Water Co. v. Harrodsburg, 24 Ky. L. Rep. 2193, 73 S. W. 103°.

61. §§ 1255-1261 *ante*, vol. 3.

62. If the municipality has no authority to make such a con-

tract, it is not liable to pay for the supply although it has used it. People v. Sisson, 77 N. Y. S. 376, 75 App. Div. 138, aff'd without opinion in 173 N. Y. 606, 66 N. E. 1115.

63. **Implied contract.** A municipality which has power to contract for a supply is liable for the value of water, gas or electricity furnished it, notwithstanding no contract was made therefor. New Jersey Suburban Water Co. v. Harrison, 72 N. J. L. 196, 62 Atl. 490; Port Jervis Waterworks Co. v. Port Jervis, 151 N. Y. 111, 45 N. E. 388.

See also Spring Brook Water Co. v. Pittston, 203 Pa. 223, 52 Atl. 249.

Supply after termination of contract. A supply furnished the municipality after the termination of the contract makes it liable upon a *quantum meruit*. Willson v. Charlotte, 110 N. C. 449, 14 S. E. 961.

supply ordinarily may be recovered,⁶⁴ except where the contract was entered into in violation of express provisions of the charter or statute.⁶⁵

Performance of its part of the contract by the public service company is generally a condition precedent to the right to recover for a supply actually furnished the municipality,⁶⁶ or at least a recovery on the express contract;⁶⁷ but it is held in some cases that if the contract has been substantially performed, the acceptance of the supply by the municipality with knowledge of the breach is a waiver thereof, and the breach cannot be set up as a defense,⁶⁸ or at least not as a defense to an action to re-

64. *Higgins v. San Diego*, 118 Cal. 524, 555, 45 Pac. 824.

65. § 1181 *ante*, vol. 3.

66. **Dependent covenants.** Covenants of water company to add various improvements to the plant, contained in a contract granting a franchise to use the streets and including an agreement to pay a certain hydrant rental for water furnished the municipality, are dependent covenants so that their performance is a condition precedent to a recovery by the water company of the rentals. *Daly v. Carthage*, 143 Mo. App. 564, 128 S. W. 265.

Quality of water. If a recovery is sought on the contract, and the consumer alleges that the quality of the water was not according to contract, the company must show performance as to the quality of the water. *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714.

"The continuing character of the obligation to furnish an adequate supply of wholesome water, as we have before suggested, is not met by showing that such a

supply has been furnished at times, nor is the nonperformance of the agreement excused by the occurrence of conditions which are likely to occur in a climate of long, dry summers. Nor is such a contract fulfilled by showing that, at the time of completion of the works, the company was able to carry out the contract. Ability to carry out the agreement must be maintained." *Columbus v. Mercantile Trust & Deposit Co.*, 218 U. S. 645, 31 Sup. Ct. 105, 54 L. Ed. 1193.

If water furnished is utterly unfit for domestic purposes, no recovery can be had therefor. *Brymer v. Butler Water Co.*, 172 Pa. 489, 33 Atl. 707, 37 Wkly. Notes Cas. 400.

67. *Antigo Water Co. v. Antigo*, 144 Wis. 156, 128 N. W. 888.

68. *Sykes v. St. Cloud*, 60 Minn. 442, 62 N. W. 613; *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685 (holding conduct of city a waiver of counterclaim for insufficient service at fires); *McGonigale v. Defiance*, 140 Fed. 621, *aff'd* in *Defiance v.*

cover the reasonable value of the supply.⁶⁹ But a sup-

McGonigale, 150 Fed. 689, 80 C. C. A. 425.

See also *Greenville v. Greenville Waterworks Co.*, 125 Ala. 625, 27 So. 764.

Waiver of nonperformance. The right to insist that a contract was abandoned by the public service company because of failure to comply with a condition therein, may be waived by the action of the municipality in accepting the supply without attempting to terminate the contract or take possession of the plant, which was expressly authorized in such a case by the contract. *Joplin Waterworks Co. v. Joplin*, 177 Mo. 496, 527, 76 S. W. 960.

Where a contract for the erection of a water works is not performed by the contractor in the time specified, acceptance by the city council is binding on the city, in the absence of fraud. *Neosho Water Co. v. Neosho*, 136 Mo. 498, 508, 38 S. W. 89.

Municipality cannot insist on a forfeiture because of the failure of the company to supply water, where it has been receiving water under the contract from the receiver acting in behalf of the company, and such forfeiture cannot be set up as a defense to an action against the city to recover for water furnished under the contract. *Illinois Trust & Savings Bank v. Burlington*, 79 Kan. 797, 101 Pac. 649, holding also that damages provided for in contract, for shutting off water supply, were liquidated damages.

Contract to furnish ample sup-

ply of water to a borough for fire hydrant for a certain number of years at an annual rental is severable so as to authorize a recovery for the service actually rendered notwithstanding at times the supply was inadequate. *Hyndman Water Co. v. Borough of Hyndman*, 7 Pa. Super. Ct. 191, 42 W. N. C. 257.

Purity of water. The objection that the water was not pure cannot be first urged as a defense to an action for hydrant rentals. *Burlington Waterworks Co. v. Burlington*, 43 Kan. 725, 23 Pac. 1068; *Lamar Water & Electric Light Co. v. Lamar*, 140 Mo. 145, 39 S. W. 768.

Municipality may waive a condition in the contract with a public service company that the supply shall be pure, by accepting the supply and paying therefor during an unusual season, so as to preclude such defense in an action on the contract. *Creston Waterworks Co. v. Creston*, 101 Ia. 687, 70 N. W. 739.

Use of supply after terminating contract. If the supply has been used by the municipality after revoking a contract therefor, it cannot escape liability by urging for the first time defective or insufficient service. *Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson*, 130 Fed. 152.

69. *Central Electric Co. v. Street Lighting District*, 71 N. J. L. 403, 406, 58 Atl. 1080.

Implied contracts. Where a water company contracted to pro-

ply not up to the standard fixed by the contract is insufficient, and its mere occasional use by the municipality, without a fair opportunity to examine it, does not constitute an acceptance.⁷⁰ And the acceptance of benefits by a municipality, under a contract with a public service company, does not require it to pay for what has been received, where there has been a breach of the contract, and the contract itself provides that for any breach thereof the municipality may suspend payment for rentals until the broken condition shall be complied with, and that is all that the municipality has attempted to do.⁷¹

vide fire protection in consideration of annual hydrant rentals and to maintain a specific pressure, company is not entitled to recover the contract price for the time during which it failed to maintain the required pressure, but may recover the reasonable value of such service where the service was accepted by the municipality. *Brockport-Holley Water Co. v. Brockport*, 203 N. Y. 399, 96 N. E. 745.

Where there is a partial performance by a public service company of a contract to furnish a supply, the company may ordinarily recover the reasonable value thereof. *Skowhegan Water Co. v. Skowhegan Village Corp.*, 102 Me. 323, 66 Atl. 714.

Occasional bursting of pipes of water company is not a complete defense in an action against a city for hydrant rentals. *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424, 60 Pac. 196.

70. *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714.

71. *Daly v. Carthage*, 143 Mo. App. 564, 128 S. W. 265.

Contract provisions against liability. Provision in a franchise that if the company fails to furnish to the inhabitants water fit for drinking and domestic purposes, the municipality may give notice, and if the company does not correct the matter by filtering processes the municipality shall be relieved from paying hydrant rentals, is valid as a provision for liquidated damages (*Illinois Trust & Savings Bank v. Pontiac*, 113 Ill. App. 545, *aff'd* in 212 Ill. 326, 72 N. E. 411); and a contract between a municipality and a water company providing for a suspension of all water rentals during the default of the company in failing to supply good and wholesome water sufficient for domestic and other purposes for a period exceeding sixty days, is enforceable (*State Trust Co. of New York v. Duluth*, 70 Minn. 257, 73 N. W. 249).

Other defenses which may be set up in an action to recover for a supply furnished or services rendered ⁷² are governed by the rules relating to all contracts. It is no defense that the franchise is invalid,⁷³ nor that the company has failed to do certain acts pertaining entirely to the continuance of the franchise and in no way affecting the furnishing of the supply,⁷⁴ nor that the contract is invalid because for too long a term of years,⁷⁵ nor that the contract or franchise is invalid so far as exclusive.⁷⁶ In short, it is no defense that the *executory* parts of the

72. Assignment of contract. Defense to action for hydrant rents that contract was not assignable without consent of city is not tenable where city had recognized validity of assignment. *Marion Water Co. v. Marion*, 121 Iowa 306, 96 N. W. 883.

Failure to use supply. Where agreement is to pay so much a year for hydrants, it is no defense that the municipality actually used no water. *Montgomery v. Montgomery Waterworks Co.*, 77 Ala. 248.

Insufficient pressure as defense. *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Ia. 250, 90 N. W. 746.

Defense that contract provided that gas should be furnished under a pressure of eight ounces and in fact the pressure was much less than that, see *Wilson v. Rushville Mining & Gas Co.*, 126 N. Y. S. 830, 142 App. Div. 297.

73. Nicholasville Water Co. v. Nicholasville (Ky.), 18 Ky. L. Rep. 592, 36 S. W. 549.

74. Kaukauna Electric Light Co. v. Kaukauna, 114 Wis. 327, 89 N. W. 542.

75. East St. Louis v. East St.

Louis Gas Light & Coke Co., 98 Ill. 415, 426, 38 Am. Rep. 97.

Defenses—duration of contract. But where the contract between a public service company and a municipality for a supply directly evades the charter of the municipality prohibiting the making of contracts for a longer period than a year, the acceptance of benefits by the municipality does not authorize a recovery for the value of the supply. *Edison Electric Co. v. Pasadena*, 178 Fed. 425, 431.

Furthermore, a public service company, even if its contract with a municipality for water for a long term of years is beyond the power of the municipality because of the duration of the contract, cannot recover for the performance of its own obligation for the time the contract has been executed, as on a *quantum meruit*, for water furnished public schools, where the contract expressly stipulated that water should be furnished free for such purposes. *Henderson Water Co. v. Henderson Graded Schools*, 151 N. C. 171, 65 S. E. 927.

76. § 1262, p. 2751, note 80, ante, vol. 3.

contract, where separable, are invalid.⁷⁷ So the municipality cannot defend an action on the contract to supply water to it on the ground of mere informality in complying with statutory requirements as to municipal consent to the formation of the company and inspection of the proposed water supply, where there has been a substantial compliance therewith.⁷⁸ And the failure of a water company to supply sufficient pressure of water for fire purposes is no defense to an action against the municipality for payment of rent, where the contract guaranteed a sufficient pressure "if required," and no demand was shown.⁷⁹

§ 1723. Same—rescission or modification of contract.

Like other contracts, a contract between the municipality and a public service company may be modified by mutual consent,⁸⁰ but cannot be rescinded except for cause.⁸¹ However, where the contract between a municipi-

77. *East St. Louis v. East St. Louis Gas Light Co.*, 98 Ill. 415, 426, 38 Am. Rep. 97.

Where a city has made a contract for a water supply for a term of years and thereafter repudiated it, it is estopped to allege that the contract is void because the grant was exclusive or was for an unreasonable time or was an unwise one. *State ex rel. v. Great Falls*, 19 Mont. 518, 531, 49 Pac. 15.

78. *Cunningham v. Cleveland*, 98 Fed. 657, 39 C. C. A. 211.

79. *Wilson v. Charlotte*, 108 N. C. 121, 12 S. E. 846.

80. *Asher v. Hutchinson Water, Light & Power Co.*, 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52.

§ 1272 *ante*, vol. 3.

Modification of contract by statute. *Turners Falls Fire Dist. v. Millers Falls Water Supply*

Dist., 189 Mass. 263, 75 N. E. 630.

In Wisconsin, a municipality, as a state agency, has no power to enter into a contract not subject to amendment by the public utility law. *Kenosha v. Kenosha Home Tel. Co.* (Wis., 1912), 135 N. W. 848.

81. § 1270 *ante*, vol. 3.

Rescinding contract. Contracts with a public service company for the supply of water or light cannot be revoked by municipality. *Anoka Waterworks Electric Light & Power Co. v. Anoka*, 109 Fed. 580.

An unaccepted offer to enter into a new contract is not a rescission of the old contract. *Ephrata Water Co. v. Ephrata*, 20 Pa. Super. Ct. 149, 24 Pa. Super. Ct. 353.

Time for revoking. Where a contract for a term of years is entered into between a public

pality and a public service company fixes no time for its termination but provides that the municipality shall pay at a certain rate so long as the company shall furnish a supply, and there is no clause in the contract binding the company to continue to furnish a supply, the municipality may terminate the contract on giving reasonable notice.⁸² The municipality may sue to rescind the contract where the service is inadequate.⁸³

§ 1724. Same—review by courts.

Contracts between municipalities and public service corporations, with reference to the operation of such corporations, are necessarily subject to the supervision of the courts,⁸⁴ although they are not ordinarily subject to

service company and a municipality for a supply of water, and after the expiration of the term the supply is continued and the agreed rental paid, the contract could not be revoked by either party or changed except at the end of a year and after notice. *Appleton Waterworks Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44.

Continuous performance. Where a waterworks company makes a contract to furnish a sufficient supply of water for the municipality, the agreement is a continuing one and the municipality may revoke the contract, although an adequate supply is furnished *at times*, and the improvements of the works and the acceptance of the improved conditions from time to time does not estop the municipality to revoke the contract where such improved conditions did not result in the furnishing of a continuous and sufficient supply of water. *Columbus v. Mercantile Trust & Deposit Co.*, 218 U. S. 645, 31 Sup. Ct. 105, 54 L. Ed. 1193.

Evidence of. A rescission of a contract must be evidenced by proper corporate action. *Greenville v. Greenville Waterworks Co.*, 125 Ala. 625, 27 So. 764.

82. *Risley v. Utica*, 179 Fed. 875, 885.

83. *Grand Haven v. Grand Haven Waterworks*, 99 Mich. 106, 57 N. W. 1075; *Light, Heat & Water Co. of Jackson v. Jackson*, 73 Miss. 598, 19 So. 771; *Galesburg v. Galesburg Water Co.*, 34 Fed. 675, *aff'd* in 133 U. S. 174, 10 Sup. Ct. 322, 33 L. Ed. 573, holding city not estopped to sue.

84. *McKnight v. Broadway Inv. Co.* (Ky. App., 1912), 145 S. W. 377.

Contracts subject to control of courts. In *Slade v. Lexington*, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201; *Central Trust Co. v. Wabash R. R. Co.*, 29 Fed. 546, and *Schmidt v. L. & N. R. R. Co.*, 101 Ky. 441, 41 S. W. 1015, the opinion of the court is rested upon the fact that these contracts involved matters of pub-

review by the courts as to the price paid for a supply, etc., unless there is such a gross abuse of discretion as to show bad faith.⁸⁵ If the municipality possesses the power to make a contract with a public service company for a supply or services, the quantity and kind of the supply or service, the price, etc., are matters within the discretion

lic interest, and, being such, they were subject to the control of the courts, and the agreements, when the original contracts were entered into for extensions or renewals, upon stipulated or agreed terms, were enforced because necessarily subject to the supervision of the court. A distinction is made between contracts between private citizens, dealing with matters of purely personal or private interest, and contracts between municipalities and public service corporations with reference to the operation of the latter. In the former class of cases the court has no power to interfere with the exercise by the parties of their free judgment in the making of their contracts; whereas, in the latter class of cases, the interests of the public demand that all such contracts be made with due regard to the interest and welfare of the public, and hence are to a greater or less degree necessarily subject to the supervision of the court.

Reasonableness of contract between a municipality and a public service company is to be determined with reference to the conditions surrounding the parties at the date of the contract. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, aff'd in 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 896.

85. *Wade v. Oakmont*, 165 Pa. St. 479, 30 Atl. 959; *Fidelity Trust & Guaranty Co. v. Fowler Water Co.*, 113 Fed. 560.

Scope of review by courts. Usually the only question for judicial determination in reviewing a contract for water supply, in the absence of fraud or gross abuse of discretion on the part of the municipal authorities, is whether there has been a violation of legal principles, or a neglect of any prescribed formalities affecting the substantial rights of the city. *Van Reipen v. Jersey City*, 58 N. J. L. (29 Vroom.) 262, 33 Atl. 740.

The power given municipalities to make contracts for light and water supply confers upon the local authorities large discretionary powers in respect thereto, with the exercise of which the courts will not interfere unless such contracts are tainted with fraud or illegality or are unreasonable, inequitable and unfair. *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 881.

Where a city has power to contract for light of its streets, etc., and the object of the city council is to procure light as cheaply as possible, it may select that course it deems advisable in securing the same. *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622.

of the corporate authorities,⁸⁶ which ordinarily will not be interfered with by the courts at the suit of taxpayers.⁸⁷

If the contract of a municipality with a public service company does not overreach the current revenues, no objection can be lawfully made to it however great the indebtedness of the municipality may be,⁸⁸ provided the indebtedness does not exceed the limit prescribed by constitution or statute.⁸⁹

12. RATES.

a. *General Considerations.*

§ 1725. Limitations on amount.

One of the rights possessed by a public service company is that of charging reasonable rates,⁹⁰ but if the

86. *Conery v. New Orleans Water Works Co.*, 41 La. Ann. 910, 7 So. 8.

87. See chapter on Taxpayers' Suits in vol. 5.

88. *Appeal of Erie*, 91 Pa. St. 403.

89. See chapter on Indebtedness in vol. 5.

90. *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829.

Water rent which may be collected by municipality as owner of its plant, where water was turned off from a hotel in 1898 and was turned on again in 1901 to enable the owners to repair their pump, and where it remained in that condition until 1905 and the meter was disconnected in 1904 and remained in that condition for over a year and thereafter the meter was again installed. *Hoover v. Deffenbaugh*, 83 Neb. 476, 119 N. W. 1130.

In New York City, no charge can be made for water used dur-

ing the time the meter does not work, caused by neglect of officials of city. *People v. New York*, 114 N. Y. S. 312, 129 App. Div. 551.

Water rents on vacant lots are invalid where imposed without regard to special benefits or valuation. *Jersey City v. Vreeland*, 43 N. J. L. 638.

Sprinkling. A water company may charge for sprinkling connections for use in case of fire. "So long as water supplied for protection against fire is a purely public service, under the control and management of municipal authorities generally, and under the fire department specifically, no direct charge to individuals is proper. When, however, a sprinkling connection is made with private premises, the situation is materially different." *Gordon & Ferguson v. Doran*, 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1049.

rates are fixed by a valid ordinance or contract or otherwise, a sum in excess thereof cannot be charged.⁹¹

A public service company cannot charge more than the price fixed by its contract with the municipality,⁹² nor more than the price fixed by law.⁹³ But if rates are fixed by a company which are less than the maximum rate fixed by the municipality, the consumers are bound thereby.⁹⁴ So a public service company may *increase* its

91. *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958; *Lanning v. Osborne*, 76 Fed. 319, *aff'd* in *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961.

Effect of sending too small bill, by mistake, in advance, as fixing rate. *Sweeny v. Bienville Water-Supply Co.*, 121 Ala. 454, 25 So. 575.

Water furnished by municipality to state, where plant constructed at joint expense—cannot charge a profit. *Danvers v. Commonwealth*, 184 Mass. 502, 69 N. E. 320.

Evading rate limits. Where a telephone company was granted a franchise to use the streets on condition that it would not increase the rates for telephone service either as to present or future subscribers, the company cannot indirectly evade the condition by charging a higher and different rate for a better and more satisfactory service under what are called "special service contracts," where the improved service is merely the form of service furnished by telephone companies in general who keep up with the improvements in that business. *People ex rel. v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E.

245, where information charged telephone company with having misused and abused its franchise by demanding and receiving unlawful rates for telephone service and otherwise.

Discontinuing sale of strip tickets. Where present "rates of fare" of street railway could not be changed without the consent of both parties to the contract, the company then charging five cents and selling six tickets in strips for twenty-five cents, company may discontinue sale of tickets in strips, since a total charge of twenty-five cents for six rides is not a "rate of fare." *Philadelphia v. Philadelphia Rapid T. Co.*, 228 Pa. St. 325, 77 Atl. 501.

92. *Levy v. New Orleans Waterworks Co.*, 38 La. Ann. 25.

May charge regular rate for water reasonably necessary and maximum rate for water wasted. *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273.

93. *San Diego Land & Town Co. v. National City*, 74 Fed. 79.

94. *Griffith v. Vicksburg Water Works Co.*, 88 Miss. 371, 40 So. 1011.

Price fixed by statute. If the price of water or light is fixed by a statute, a private person or a municipality purchasing it can-

rates, where not prohibited by statute, charter or contract.⁹⁵

Independent of statute, contract, or municipal regulation, the rates fixed by a public service company, or a municipality owning its own plant, must be *reasonable*; ⁹⁶

not claim, in an action to recover for a supply furnished, that the price is unreasonable where under the maximum price fixed by the statute. *Brooklyn Union Gas Co. v. New York*, 188 N. Y. 334, 81 N. E. 141, aff'g 100 N. Y. S. 625, 115 App. Div. 69.

95. *Osborne v. San Diego Land & Town Co. of Maine*, 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961, aff'g 76 Fed. 319.

Increase in rates. Where city has no power to revise water rates without the consent of the company, and the city agrees to an increase in the rate on condition that no meter rental charge be made, but the company refuses to accept such condition, its rejection of the condition precludes it from raising rates. *Independence v. Independence Waterworks Co.*, 153 Mo. App. 693, 135 S. W. 956.

New Jersey statute as to increase of rates. "When any public utility as herein defined shall increase any existing individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates, or change or alter any existing classification, the board shall have power either upon written complaint or upon its own initiative to hear and determine whether the said increase, change or alteration is just and reasonable. The burden of proof to show

that the said increase, change or alteration is just and reasonable shall be upon the public utility making the same. The board shall have power pending such hearing and determination to order the suspension of the said increase, change or alteration until the said board shall have approved said increase, change or alteration, not exceeding three months. It shall be the duty of the said board to approve any such increase, change or alteration upon being satisfied that the same is just and reasonable." Public Laws, N. J. 1911, c. 195.

96. *Goebel v. Grosse Pointe Waterworks*, 126 Mich. 307, 85 N. W. 744, holding it proper to base rate on size of connecting pipe.

Rates must be reasonable. Where a company is granted the right to use the streets of a municipality to furnish water or light, the grant carries by implication the obligation to furnish it at a reasonable price, without regard to any statute, charter provision or ordinance in regard thereto, and it cannot charge more than a reasonable rate. *Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 264, 108 N. W. 65.

and a municipality which owns its own plant cannot impose arbitrary charges under penalty of forfeiture of the right to use the supply.⁹⁷ Fixing a smaller rate where a large amount of water is used is not unreasonable.⁹⁸

§ 1726. Rates as fixed by contract.

Rates may be fixed by a contract between the municipality and the public service company, (1) as an incident to the grant of the franchise to use the streets, provided the municipality has power to so fix the rates,⁹⁹ (2) by a contract based on a valuable consideration, after the granting of the franchise to use the streets, provided the municipality has power to make such a contract, or (3) so far as a particular consumer is concerned, by a contract between him and the public service company.

§ 1727. Power to charge meter rates.

It is well settled that a public service company, or a municipality owning its own plant, in the absence of a statute or contract to the contrary, may charge a rate according to the amount used, which is called a meter rate,¹

97. *Culver v. Jersey City*, 45 N. J. L. 256.

"The city cannot arbitrarily establish its rates; but they must be, to a certain extent, uniform, reasonable, and just." *Chicago v. Northwestern Mutual L. Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770.

98. *Silkman v. Yonkers*, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827.

§ 1697 *ante*.

99. § 1738 *post*.

1. *Hill v. Thompson*, 48 N. Y. Super. Ct. 481; *Hill v. Thompson*, 50 N. Y. Super. Ct. 165.

Power of municipality to change to. *Penn Iron Co. v. Lancaster*, 25 Pa. Super. Ct. 478.

Approval of certain kind. *People v. Monroe*, 79 N. Y. S. 956, 39 Misc. Rep. 369, *aff'd* in 82 N. Y. S. 603, 84 App. Div. 241.

Where an individual wastes water, he may be compelled to pay reasonable meter rates. *Robbins v. Bangor Railway & El. Co.*, 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963.

An ordinance fixing rates may permit the grantee of the franchise, in case it becomes dissatisfied with the flat rate, to install a meter at its own expense and to require the consumer to pay at the rates fixed for measured water. *Wilson Water & Electric Co. v. Arkadelphia*, 95 Ark. 605, 129 S. W. 1091.

and this is so although other customers are charged a flat rate.²

§ 1728. "Minimum charges."

The term "minimum charges," as here used and as usually employed in connection with the meter system, signifies a rate of compensation for the expense and labor of being ready to supply water or electricity or gas or telephone service, at the will of the customer, even though the supply is not used at all.³ The question is whether a public service company, whose maximum rates are fixed, can charge more than such rate by fixing a minimum sum per month which must be paid even though there is not enough of the supply used to amount to such sum, at the regular meter rates. This charge is sometimes referred to as *meter rent* but it is to be distinguished from the payment of rent of a meter in addition

2. § 1715 *ante*.

3. Cox v. Abbeville Furniture Factory, 75 S. C. 48, 54 S. E. 830.

Minimum charges as reasonable. Requiring prospective customer using eleven electric lamps to agree to pay a minimum charge

of \$1.50 a month is reasonable where each lamp attached to the circuit requires an investment of twenty dollars by the company. Gould v. Edison Electric Illuminating Co., 60 N. Y. S. 559, 29 Misc. Rep. 241.

May change from an annual to a meter rate. Robbins v. Bangor Ry. & Electric Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963.

Cannot compel furnishing of water through *single* meter to place of business, residence and four tenant cottages. Specht v. Louisville Water Co., 117 Ky. 414, 78 S. W. 142, 25 Ky. L. Rep. 1506.

Exercise of option. Mere setting of meters held insufficient to show exercise by municipality of option to charge meter rate,

where it sent bill for flat rates, although by mistake. Jones v. Bloomfield, N. J. Eq. (1908), 69 Atl. 1106.

Option of consumer. An ordinance giving consumers the option to require a meter is not objectionable for uncertainty where the rates, both flat and meter, are fixed. Spring Valley Waterworks v. San Francisco, 82 Cal. 236, 22 Pac. 910, 1046, 16 Am. St. Rep. 116, 6 L. R. A. 756,

to the meter rate without regard to the amount consumed.⁴

As explained, *minimum charges* are held unauthorized in Alabama⁵ and Kentucky,⁶ while the contrary has been held in Arkansas,⁷ Florida,⁸ Kansas,⁹ and Missouri.¹⁰

§ 1729. Incidental charges, including rent for meters.

If the price of the supply is fixed by contract or otherwise, the company has no right to require consumers to pay meter rent in addition to the regular rate.¹¹

4. § 1729 *post*.

In New York, statute forbidding gaslight companies to "charge or collect rent on its gas meters, either in a direct or *indirect* manner," precludes a minimum charge. *Buffalo v. Buffalo Gas Co.*, 80 N. Y. S. 1093, 81 App. Div. 505.

5. Where a gas company is required by its franchise to supply gas at certain prices per cubic feet, the company is not authorized to charge a minimum amount of a certain sum per month as meter rent, when the consumer does not consume during the month enough gas to equal such amount of money. *Montgomery Light & Water Power Co. v. Watts*, 165 Ala. 370, 51 So. 726, 26 L. R. A. (N. S.) 1109.

6. *Louisville Gas Co. v. Dulaney*, 100 Ky. 405, 38 S. W. 703, 36 L. R. A. 125.

7. In Arkansas, the 1905 statute relating to electric light companies held not to forbid fixing by electric company of minimum charge per month. *Little Rock Ry. & Electric Co. v. Newman*, 91 Ark. 92, 120 S. W. 824.

8. *Wilson v. Tallahassee*

Waterworks Co., 47 Fla. 351, 36 So. 63.

9. *Cunningham v. Iola*, 86 Kan. 86, 119 Pac. 317.

10. *Carney v. Chillicothe Water & Light Co.*, 76 Mo. App. 532; *State v. Sedalia Gaslight Co.*, 34 Mo. App. 501.

11. *Capital Gas & Electric Light Co. v. Gaines*, 20 Ky. L. Rep. 1464, 49 S. W. 462.

Rent for meter. However, gas company may refuse gas to one who will not pay rent for a meter and does not consume enough to pay for the rent of a meter, notwithstanding other consumers are furnished meters free of charge. *Smith v. Capital Gas Co.*, 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769.

"Objection has previously been taken to the making of a charge for equipment employed, such as meter rent. It is believed that a public service company ought to provide all the facilities necessary for rendering the service it undertakes, and upon its total investment therein base its general rates. In accordance with this theory, meter rent as a charge for facilities furnished should never be charged. But many supply

So where the rates are fixed, they cannot be indirectly increased by charging a certain sum for taking readings of meters.¹²

§ 1730. Payment of cost of meter.

The cases are conflicting as to whether the public service company (or municipality where it owns its own plant) must pay for meters supplied consumers or whether it can compel the consumer to provide a meter or pay for one furnished by the company or municipality. Ordinarily, however, it is held that charging consumers with the cost of a meter is not authorized,¹³ although

companies term the price which they require their customers to pay at all events 'meter rent' when upon the whole facts it is really a minimum charge; and many courts in permitting the charging of such meter rent are really on the facts only justifying a minimum charge. It is therefore necessary to make the distinction between what is truly a meter rent and what is really a minimum charge very carefully. A dollar meter charge would be added to each bill regardless of consumption; the dollar minimum charge would not only be made if actual consumption was below that amount, while if it was above, the actual measurement would alone be charged. Therefore while an equipment charge is essentially wrong (and is indeed so regarded by most authorities which have had this distinction called to their attention) a minimum charge is essentially right. The one makes a charge for the provision of facilities as such, which is wrong; the other is designed to compensate for the essential costs of small service,

which is right." Wyman, Public Service Corporations, § 1251.

In New York, it is provided by statute that "no gas light corporation shall charge or collect rent on its gas meters either in a direct or indirect manner." *Buffalo v. Buffalo Gas Co.*, 80 N. Y. S. 1093, 81 App. Div. 505.

Kansas. It has been held that a municipality furnishing gas may charge a rental of twenty cents a month for meters furnished for the use of tenants, and also provide that owners of tenanted property, and not their tenants will be dealt with, unless separate service pipes are supplied for each tenant using the gas. *Cunningham v. Iola*, 86 Kan 86, 119 Pac. 317.

12. *Bancroft v. Wall*, 29 Wkly. Law Bul. (Ohio) 306, 6 S. & C. P. Dec. 22.

13. *Smith v. Birmingham Waterworks Co.*, 104 Ala. 315, 16 So. 123; *Wilson Water & Electric Co. v. Arkadelphia*, 95 Ark. 605, 129 S. W. 1091; *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116.

many decisions have held the contrary,¹⁴ more or less influenced by the facts of the particular case.¹⁵ Thus, a

Cost of meter. Where a municipality owning its plant is expressly given power to fix and collect charges for the use of meters, it cannot compel a consumer to purchase a meter and put it in at his own expense, as a condition to being furnished a supply. *Albert v. Davis*, 49 Neb. 579, 68 N. W. 945.

If ordinance regulating rates permits the public service company, if dissatisfied with the flat rate to install meters at its own expense and to require consumers to pay for measured water, the cost of the meter cannot be charged to the consumers. *Wilson Water & Electric Co. v. Arkadelphia*, 95 Ark. 605, 129 S. W. 1091.

Municipality which owns its own plant cannot charge certain consumers with expensive meters put in to regulate the rent to be paid. *Red Star Line S. S. Co. v. Jersey City*, 45 N. J. L. 246.

"As to these typical municipal services, the writer is rather inclined to go to some length in favor of the consumer, insisting that the supply company should deliver to him what is sold, usable electricity at the house, measured gas at the cellar. These companies are engaged in a public service, and all the equipment necessary to perform that service, it would seem, should be provided by the supply company within reasonable limits." *Wyman, Public Service Corporations*, § 825.

14. *State v. Gosnell*, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33.

See also *Swanberg v. New York City*, 108 N. Y. S. 364, 123 App. Div. 774.

Cost of meter held proper charge. A public service company may prescribe the use of a particular kind of meter and install them at the consumer's expense. *Mallon v. Board of Water Com'rs*, 144 Mo. App. 104, 128 S. W. 764.

Ordinance providing for purchase and use of meters by water consumers, sustained. *Sackett v. Morris*, 149 Ill. App. 152.

Regulation that all water taken from mains of city plant for private fire protection should pass through a meter to be furnished by city and paid for by the owner, is valid, the water being furnished free for such purpose. *Shaw Stocking Co. v. Lowell*, 199 Mass. 118, 85 N. E. 90, 18 L. R. A. (N. S.) 746.

Water company held to have right to require installation of meters at expense of city as a condition to permitting the city to connect its service pipes to furnish water for its sewer system, notwithstanding city paid flat rate for water use. *Portsmouth, Berkley & Suffolk Water Co. v. Portsmouth* (Va. 1911), 70 S. E. 529.

15. It is not unreasonable for a city to require a meter to be attached to private fire service water-pipes at the expense of the owner, even though it intends

rule, where the municipality owns its plant, requiring the furnishing of certain kinds of meters ordered by the municipality and payment therefor by the consumer, is valid, since it is reasonable to require each consumer of water to pay for his individual meter, instead of all the tax payers of the municipality paying for all the meters used.¹⁶

§ 1731. Rates must be definite and certain.

The rates fixed by a municipality to govern a public service company must be definite and certain.¹⁷ But the fixing of water rates by a municipality for "*domestic purposes*" and according to the number of "*rooms*" is not invalid for uncertainty in failing to define the quoted words.¹⁸

A stipulation in an ordinance that water shall be furnished at the *average price* paid therefor in other cities of the United States having efficient waterworks operated by private companies, and that if the city and company cannot agree the rate shall be left to arbitrators, has been held void for indefiniteness.¹⁹ So where the

to make no charge for the water so used for fire purposes. The object being to prevent the drawing off of water from such pipes for other purposes. *Shaw Stocking Co. v. Lowell*, 199 Mass. 118, 85 N. E. 90, 18 L. R. A. (N. S.) 746.

Optional with consumer to pay flat rate, in particular case, or buy meter. *State ex rel. v. Joplin Waterworks*, 52 Mo. App. 312.

16. *Cooper v. Goodland*, 80 Kan. 121, 102 Pac. 244, 23 L. R. A. (N. S.) 410.

17. *San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.

18. *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

19. *Des Moines v. Des Moines Waterworks Co.*, 95 Ia. 348, 64 N. W. 269.

Contract to furnish gas "at two-thirds of the lowest average price at which gas shall or may be furnished" in five named cities. *Cincinnati v. Cincinnati Gaslight & Coke Co.*, 53 Ohio St. 278, 41 N. E. 239.

Construction. An ordinance granting a gas company the right to use the streets for its pipes, provided that the company should "furnish the city and citizens with gas as cheap as is furnished in Boston, New York and Baltimore," meant gas as cheap as it was furnished at the same time in the specified cities, and not as cheap as it was furnished in those cities at the time of the passage of the ordinance. *Worcester Gas Light Co. v. Worcester*, 110 Mass. 353.

franchise provided that at a certain time the company could be required to fix rates equivalent to an *average rate* prevailing in certain other cities for the same service, but because the rates in such other cities were based on radically different classifications and methods of computation it was practically impossible to ascertain an average schedule of rates, the provision authorizing the municipality to require the fixing of such average rates is invalid.²⁰

§ 1732. Construction of rates in general.

It is not the intention here to detail at length the holdings of the courts in a multitude of cases, construing what rates are applicable to particular patrons, the amount of such rates, etc.²¹ In contracts as to rates,

20. *Denver v. Denver Union Water Co.*, 41 Colo. 77, 91 Pac. 918.

21. *Florida*. See *Wilson v. Tallahassee Waterworks Co.*, 47 Fla. 351, 36 So. 63.

Kentucky. *Berends v. Bellevue Water & Fuel Gaslight Co.*, 119 Ky. 8, 82 S. W. 983, 26 Ky. L. Rep. 912.

Minnesota. *Allen v. Duluth Gas & Water Co.*, 46 Minn. 290, 48 N. W. 1128 (water rate as including bath, closets, heater, etc.).

Missouri. *St. Louis Brewing Ass'n v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; *Carney v. Chillicothe Water & Light Co.*, 76 Mo. App. 532.

New Hampshire. *Haverhill Aqueduct Co. v. Page*, 52 N. H. 472.

Wisconsin. *State v. Manitowoc Waterworks Co.*, 114 Wis. 487, 90 N. W. 442.

Additional charge for extra faucets. *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

Where water is "taken." *Jersey City v. Morris Canal & Banking Co.*, 41 N. J. L. 66.

Where a minimum charge for water was sixty cents a month, and "each consumer" was required to be supplied with a separate pipe, and water was supplied to three tenant houses occupied by three separate families, through a single pipe, a minimum charge of \$1.80 a month was proper. *Thompson v. Goldsboro*, 151 N. C. 189, 65 S. E. 901.

What is room. Where rate for dwelling is fixed by number of rooms, *reception hall* not counted as a *room*. *Birmingham v. Birmingham Waterworks Co.* (Ala., 1906), 42 So. 10.

Lawns. Water rate for domestic purposes does not preclude charging extra for lawns. *Ward v. Birmingham Waterworks Co.*, 152 Ala. 285, 44 So. 570.

Extensions as within rates fixed. So an ordinance regulating the rates of a street railway com-

rules of the public service company as to rates, and regulations of rates by the municipality after the granting of a franchise to use the streets, certain words and terms have been construed by the courts, and in most cases it is unimportant whether such words are contained in a contract, a rule of the company, or a rate regulation ordinance.²² For instance, the question has arisen often as to what is a *dwelling*.²³ So far as water rates are concerned, it is held in Maine that a building is not a "dwelling house containing a family," as distinguished from a *boarding house*, because the boarding house keeper and his wife and children live in the building while the business of keeping a boarding house is being carried on.²⁴ On the other hand, it is held in Alabama that a house is a *dwelling* although a public boarding house.²⁵

If the rates are limited by ordinance to those charged in an adjoining city, it has been held not applicable after the latter city has purchased the private plant pursuant to an option²⁶

pany applies to extensions constructed or purchased within the limits of the municipality as thereafter extended. *People v. Detroit United Ry.*, 162 Mich. 460, 125 N. W. 700, 127 N. W. 748.

22. "Hotel." *Cromwell v. Stephens*, 3 Abb. Pr. N. S. (N. Y.) 26, 2 Daly 15.

"House"—"large consumers." *Berends v. Bellevue Water & Fuel Gaslight Co.*, 119 Ky. 8, 82 S. W. 983, 26 Ky. L. Rep. 912.

"Tenement." *Young v. Boston*, 104 Mass. 95.

23. *Smith v. Birmingham Waterworks Co.*, 104 Ala. 315, 16 So. 123.

What is a dwelling. It was stated by way of *dictum* in an English case, to the effect, that any house in which water is re-

quired for domestic purposes, although no one sleeps or takes meals there, is a dwelling house within the meaning of a statute providing that water shall be furnished to dwellings for domestic purposes at a certain rate. *Cooke v. New River Co.* (L. R., 1888), 38 Ch. Div. 56.

24. *Robbins v. Bangor Ry. & Electric Co.*, 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963.

25. *Birmingham v. Birmingham Waterworks Co.*, 152 Ala. 306, 44 So. 581, 11 L. R. A. (N. S.) 613; *Birmingham Waterworks Co. v. Truss*, 135 Ala. 530, 33 So. 657 (house occupied as dwelling and boarding house is a dwelling).

26. *Armour Packing Co. v. Metropolitan Water Co.*, 130 Fed. 851, 65 C. C. A. 335.

Where condition is imposed in the ordinance granting the franchise, as to rates, such condition applies to *territory thereafter annexed* to the municipality, and in which the public service company is exercising its franchise, where there is nothing in the ordinance or the acceptance thereof to restrict the condition to the existing city limits.²⁷

b. *Power to fix rates.*

§ 1733. Power to contract as to rates as distinguished from power to regulate rates.

The power of a municipality to prescribe the rates of a public service company by *contract* is to be distinguished from the *legislative power to regulate rates*.²⁸

27. *People ex rel. v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245.

See § 293 *ante*, vol. 1; § 657 *ante*, vol. 2.

Rates outside limits. Where a public service company was granted the right to use the streets of a city "and additions thereto," and the rates were fixed by the franchise, the subsequent inclusion of outside districts within the city limits did not affect the rates fixed by contract between the company and the consumer in such districts. *Denver v. Denver Union Water Co.*, 41 Colo. 77, 106, 91 Pac. 918.

See § 657 *ante*, vol. 2.

28. *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197.

"This power to legislate within the authority delegated to them by law is distinct from the power to contract, although exercised by the same corporation. They cannot by contract delegate or restrict their legislative power, nor

can they merely by their legislative power make a contract. *These two powers need not be confounded.* The exercise of the legislative power requires the consent of no person except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that when the city of Indianapolis made the contract in question with the gaslight company (a contract like that involved in this case) it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy within the limits of its franchise." *Indianapolis v. Gaslight & Coke Co.*, 66 Ind. 396.

"The power to fix' and regulate

§ 1734. Power of state to regulate rates.

The regulation of prices to be charged by a corporation entrusted with a franchise of a public utility character is within the sovereign power of the *state* that grants the franchise or that suffers it to be exercised within its borders,²⁹ unless forbidden by the state con-

the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes of the nature of a governmental power and also of that of a business power. Are the inhabitants of a city paying rates not fixed by contract to *quasi* public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power which the state or city may exercise, but may not renounce. Is a city without waterworks and hence without rates at which anyone will furnish water therefrom to the municipality or its inhabitants? The making of a *contract* for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the *business* powers of the corporation. *The purpose of such a contract is not to regulate rates*, for there are no rates to regulate. It is to procure water and to get rates for the city and for its inhabitants." *Omaha Water Co. v. Omaha*, 147 Fed. 1, 5, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736.

29. *Danville v. Danville Water*

Co., 180 Ill. 235, 54 N. E. 224; *State ex rel. v. Missouri & K. Tel. Co.*, 189 Mo. 83, 88 S. W. 41; *Bluefield Water Works & Imp. Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759; *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 264, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 116 Am. St. Rep. 944.

In *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, the leading case in this country, which was in regard to regulating the charges of grain elevators, "it was held that in England from time immemorial, and in this country from its first colonization, it was customary to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers, and many other matters of like nature, and, where the owner of property devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public. Probably the most familiar instances with us are the public mills, whose tolls are fixed by statute, and railroad, telegraph, and telephone companies, for the regulation of whose conduct and charges there is a state commission, established by law. There have been reiterated decisions in

stitution, but such power may be with wisdom and propriety delegated to a municipal corporation.³⁰

This power to regulate rates is sometimes conferred on the legislature by express constitutional provisions, but the power need not be so conferred since it is inherent in the legislature. However, the power is *limited* by the provisions of the federal constitution as to due process of law and impairment of contracts, as will be hereafter noticed, and hence the rates fixed are invalid if *confiscatory* or if they *impair* the obligation of a contract.³¹

the United States supreme court and in the several states affirming the doctrine laid down in *Munn v. Illinois*, *supra*, and as to every class of interest affected with a public use; among others, water companies. *Spring Valley v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173." *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

Three cent street car fares. Constitutionality of statute limiting fares of street railway company to three cents, see *Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337.

30. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 523, 65 N. E. 451, 59 L. R. A. 631; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, *aff'd* 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702; *Danville v. Danville Water Co.*, 180 Ill. 235, 54 N. E. 224; *State ex rel. v. Missouri & K. Tel. Co.*, 189 Mo. 83, 88 S. W. 41; *San Diego L. & T. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43

L. Ed. 1154, *aff'g* 74 Fed. 79; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, *aff'g* 178 Ill. 571, 53 N. E. 363; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

Delegation of power to regulate rates. Where charter of public service company contains a provision expressly subjecting it to alteration, modification or repeal by any future legislature, the reserved power may be delegated by the legislature to the city council, so far as the power to regulate the rates of the company is concerned. *State ex rel. v. Cincinnati Gas-Light & Coke Co.*, 18 Ohio St. 262, 298.

31. §§ 1737, 1744 *et seq.*, *post*.

The charter of a gas company is a contract between the company and the state, and the authority therein conferred on the company to fix the price of gas can not be diminished by subsequent legislation whether state or municipal. *State ex rel. v. Laclede Gaslight Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789.

The function of rate making is purely legislative in its character, whether exercised directly by the legislature itself or by some subordinate or administrative body to whom the power of fixing the rates in detail has been delegated.³²

§ 1735. Same—delegation to a commission.

The power to fix maximum charges for gas, electricity, and the like may be delegated by the legislature to a commission.³³ However, a statute authorizing the fixing by a commission of maximum rates for gas and electricity furnished by any public service corporation, and providing that the price so fixed shall be the maximum price for a term of three years and until after the price is again fixed after the three years on complaint filed by certain municipal officers or customers, is invalid, since there is no provision whereby the company itself can obtain a change of the rates after the expiration of the three years, notwithstanding a change in conditions making the rates confiscatory and unreasonable.³⁴

In the state of New York, a public service commission law was enacted in 1907.³⁵ Under that law the

32. Per Mr. Justice Moody in *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

33. *Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 107 N. Y. S. 341, 122 App. Div. 203, rev'd on other grounds in 191 N. Y. 123, 83 N. E. 693.

Surrender of regulation of rates to a public service commission, subject to judicial review, is a proper exercise of legislative authority by the state. *State ex rel. v. Superior Court of King County* (Wash., 1912), 120 Pac. 861.

In Georgia, the railroad commission of the state has the right

to fix the rates to be charged by telephone companies for the use of their telephones in sending and receiving messages within the state. *Dawson v. Dawson Telephone Co.* (Ga., 1911), 72 S. E. 508.

34. *Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, rev'g 107 N. Y. S. 341, 122 App. Div. 203.

35. See *Ivins & Mason, Control of Public Utilities*, where statute is annotated and reproduced in full.

In New York, the 1905 statute establishing a commission of gas and electricity (later abolished by

state is divided into two districts and a commission of five appointed for each district. Their powers extend to control over railroads, street railroads, all common carriers, and gas and electric companies, in so far as charges, the furnishing of safe and adequate service, and discriminations, are concerned.

In some municipalities, the public service commission is a municipal body, while in other municipalities the state commission has control. In some states where there are public service commissions, it is elective with municipalities within the state as to whether the public service companies within their limits shall be under the control of the state board or shall be regulated by a local municipal board.

§ 1736. Power of municipality to regulate rates.

The power to *regulate* rates, as distinguished from the power to *contract* as to rates on granting a franchise to use the streets, has already been noticed,³⁶ and must always be kept in mind in reading the decisions. As to the former, the regulation of rates for public service belongs to the police power of the state, and inasmuch as municipal corporations have only such portions of the police power as are granted to them by the legislature in express terms or by necessary implication,³⁷ a municipality has no power to regulate rates for public service otherwise than by contract with the corporation or person rendering such service, unless the power to regulate has been delegated by the legislature either *expressly* or by *necessary implication*,³⁸

the public service commission act of 1907), and giving it authority to fix, after hearing, the maximum price for gas and electricity, not unconstitutional as delegating legislative powers to an administrative body. *Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713.

4 McQ.—44

36. § 1733 *ante*.

37. § 894 *ante*, vol. 3.

38. *Bluefield Water Works & Improvement Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759.

General powers conferred upon municipalities do not include authority to regulate rates, since such power cannot be exercised by a

as will appear from an examination of the numerous judicial decisions set out in the notes. To employ a

municipality unless the power has been expressly delegated by the legislature or results from a fair implication from a power expressly granted. *Mills v. Chicago*, 127 Fed. 731.

Street railways. A statute authorizing city of Chicago to regulate and prescribe the compensation of hackmen, omnibus drivers, cabmen and "all others pursuing like occupations," and to prescribe their compensation includes street railway companies and gives the city the power to regulate the rate of fare to be charged by them. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

A municipality has no authority to fix the rates of fare of street railway companies because of a charter provision authorizing it "to pass all by-laws concerning * * * carriages, wagons, carts, drays," etc., "and every by-law, ordinance and regulation that it may deem proper for the health, order or good government of said city"; nor because of a provision in the charter "that the rates of fare and freight upon said railroad shall be subjected to the approval" of the municipality; nor because of a statute providing that the company shall be liable to such regulations as are other railroads incorporated by separate act or acts by the laws of the state, where the charter of one street railroad incorporated by separate act authorized the city to regulate rates of fare thereon;

nor because of a reservation made by the city in the ordinance authorizing the company to use the streets, wherein it was provided that the company should be "subject to all the laws and ordinances now in force and such as may be hereafter made." *Old Colony Trust Co. v. Atlanta*, 83 Fed. 39.

In Indiana, the statute of 1887 providing that municipalities shall have power to provide by ordinance reasonable *regulations* for the safe supply, distribution, and consumption of *natural gas* within the limits of the municipality, does not confer power to fix reasonable maximum rates that may be charged to consumers. *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734, overruling *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Noblesville v. Noblesville Gas & Imp. Co.*, 157 Ind. 162, 166, 60 N. E. 1032.

Transfers. Power conferred upon a municipality to fix the rate of fare to be charged by street railway companies includes power to require them to furnish transfers to connecting lines of the same company without additional payment. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

Tickets at certain price for sale on cars during rush hours. A reservation in the ordinance granting the franchise of the right "to make such further rules, orders or regulations as may

different form of expression, a municipality has *no inherent power* to regulate rates,³⁹ and it exists only (1) where the right so to do is reserved in the franchise or contract with the company, or (2) where such right has been delegated either expressly or by implication to the municipality by the legislature.⁴⁰

from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public," includes the right to pass an ordinance requiring the company, for the accommodation of the public, to keep tickets for sale upon its cars to be good for transportation over its entire route or any portion thereof, "traveling continuously either way," between certain hours, at a rate prescribed. Such ordinance may make each day's neglect to comply therewith an offense punishable by fine and may provide for the collection of such fine in an action at law. *Detroit v. Ft. Wayne & Belle Isle Ry. Co.*, 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79, 35 Am. St. Rep. 580.

Requiring sale of tickets on cars. *Rice v. Detroit, Y. & A. A. Ry.*, 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84.

Place of sale of street car tickets. Power "to fix and determine the fare charged," necessarily carries with it all incidents necessary to carry the power into effect, including power to require by ordinance tickets to be kept for sale by each conductor of a street car. "A street railway has no depots. Its stations are the street corners, and its business with the public is conducted on its cars. * * * The question is one of power, and the power of

the city over the street railway is full and ample, and the requirement is reasonable, and the company must perform on its part." Per Maxwell, C. J., in *Sternberg v. State*, 36 Neb. 307, 54 N. W. 553, sustaining Lincoln ordinance.

Telephones. A municipal regulation that bills for telephone service shall become due on the first of the month following the rendition of service, and that they shall be subject to a discount of ten per cent if payment is made on or before the tenth of the following month, is reasonable. *Southwestern Tel. & Tel. Co. v. Dallas* (Tex. Civ. App., 1910), 131 S. W. 80.

39. *Lewisville Natural Gas Co. v. State*; 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734; *Wabaska Electric Co. v. Wymore*, 60 Neb. 199, 82 N. W. 626; *Ball v. Texarkana Water Corp.* (Tex. Civ. App., 1910), 127 S. W. 1068; *Minneapolis General Electric Co. v. Minneapolis*, 194 Fed. 215, 218.

40. **Implied authority to regulate rates.** Statute giving to cities incorporated under the general laws the right "to provide or to cause to be provided, the city with water, to make, to regulate and establish public wells, reservoirs, etc., in the streets or elsewhere within the city, * * * for the extinguishment of fires and the convenience of the in-

Express power. Power to fix rates is often expressly conferred on municipalities by statute,⁴¹ and in many states the public utility act grants to municipalities the power to fix by ordinance the rates for public service companies within authorized limits.⁴² So a municipality may fix rates at the end of a certain number of years where the grant of the franchise reserves the right to fix

habitants" does not by implication authorize the city to fix the compensation to be charged by a water company. *Ball v. Texarkana Water Corp.* (Tex. Civ. App., 1910), 127 S. W. 1068.

"The power to forfeit for failure to comply with the terms of the grant, or for failure to comply with the reasonable provisions of any ordinance regulating the use of the streets, does not, we think, carry with it the implied power to fix maximum rates for telephones." *Jacksonville v. Southern Bell Tel. & Tel. Co.*, 51 Fla. 374, 49 So. 509, 511.

41. See *Jack v. Grangeville*, 9 Idaho 291, 74 Pac. 969; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679, aff'g 186 Ill. 179, 57 N. E. 862; *Danville Water Co. v. Danville*, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696, aff'g 186 Ill. 326, 57 N. E. 1129.

Gas. *State v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262; *Cincinnati Gaslight & Coke Co. v. Avondale*, 43 Ohio St. 257, 1 N. E. 527 (holding statute does not authorize contract between municipality and gas company leaving to other parties for indefinite period the regulation of the price); *State v. Cleveland Gaslight & Coke Co.*, 3 Ohio Cir. Ct. 251;

Toledo v. Northwestern Ohio Natural Gas Co., 5 Ohio Cir. Ct. Rep. 557.

Power as vested in court of common pleas, as to water companies incorporated prior to 1874. *Schroeder v. Scranton Gas & Water Co.*, 20 Pa. Super. Ct. 255.

Council or board of public works as body to fix rates. *State v. Gosnell*, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33.

Power of municipality to fix rates does not extend to company furnishing water to its stockholders only. *McFadden v. Los Angeles County Sup'rs*, 74 Cal. 571, 16 Pac. 397.

Misdemeanor. Under statutory authority, municipality, in fixing a maximum rate, may declare it a misdemeanor punishable by fine and imprisonment to collect a higher rate. *Denninger v. Recorder's Court of Pomona*, 145 Cal. 629, 79 Pac. 360.

Constitutionality. Ordinance lowering telephone rates is not unconstitutional as a violation of existing contracts with patrons for higher rates. *Southwestern Tel. & Tel. Co. v. Dallas* (Tex. Civ. App., 1910), 131 S. W. 80.

42. *Home Telephone Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547.

the rate after the lapse of a certain number of years.⁴³ In California, the *constitution* provides that *water* rates shall be fixed *annually* by the board of supervisors or other governing body of the municipality.⁴⁴

Implied power. Power conferred on a municipality to *regulate the use of its streets* does not authorize it to regulate the charges of a public service company,⁴⁵ nor does power to regulate *the manner of construction*,⁴⁶ nor does the power to regulate public service companies, coupled with the *power to license and tax* them,⁴⁷ nor can a municipality regulate rates because of a *general welfare clause* in its charter.⁴⁸ So, since the power to

43. *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. 185, holding that in such case, in fixing the price, the municipality may consider the earnings of the company in the past.

44. *Jacobs v. San Francisco Sup'rs*, 100 Cal. 121, 34 Pac. 630.

45. *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278.

Implied power to regulate rates. Statutory authority conferring on municipalities power to provide for the lighting of streets and giving gas companies the right to lay down pipes in the streets "subject to such regulations as any such city or village may by ordinance impose" is not a delegation of power to regulate rates. *Mills v. Chicago*, 127 Fed. 731.

The power to "regulate" does not include the right to alter rates. *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 47 So. 40.

Power to regulate and control the use of, does not confer power to fix rates. *Tacoma Gas & Electric Light Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655.

46. In *Oklahoma*, telephone rates of companies doing business therein prior to statehood cannot be fixed by municipalities which have granted the rights to use the streets, since the power to *regulate the manner of construction* does not grant the authority to fix rates. *South McAlester-Eufaula Telephone Co. v. State ex rel.*, 25 Okla. 524, 106 Pac. 962.

Street railways. An ordinance giving a municipality power to regulate by future ordinances the "construction, maintenance and operation" of all railway lines, does not give the municipality power to regulate fares. *Minneapolis v. Minneapolis Street R. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259.

47. *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278.

48. *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; *Bluefield Water Works & Imp. Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759.

General welfare. The general

regulate rates is not a power pertaining to the government of the municipal corporation, it does not follow as an incident to a grant of power to frame a charter for a municipal government.⁴⁹

Continuing power. The power to regulate rates, where conferred on a municipality, is a continuing one, and not lost by its exercise on one occasion.⁵⁰ And where a municipality is empowered to fix rates, it is not precluded from its exercise because it has granted the company the power to make and enforce "all needful rules and regulations not inconsistent with the law."⁵¹ So a *constitutional provision* that the legislature shall enact laws to regulate and limit charges for supplies and services furnished by a public service company does not preclude a municipality from exercising its rights under another constitutional provision to regulate the charges of a public service corporation within its limits, notwithstanding the legislature has en-

rule is that a municipality has no authority to regulate rates under the power conferred upon it to regulate the use of its streets nor under a general welfare clause of the charter, giving it authority to pass all such ordinances, not inconsistent with the provisions of the charter or laws of the state, as may be expedient in maintaining the peace, good government, health and welfare of the city. *Jacksonville v. Southern Bell Telephone & Telegraph Co.*, 57 Fla. 374, 49 So. 509, citing *McQuillin, Mun. Ord.*, § 586.

49. *State ex rel. v. Missouri & K. Tel. Co.*, 189 Mo. 83, 88 S. W. 41, holding that ordinance of Kansas City fixing maximum rate to be charged by telephone companies for service in the city was void, although expressly authorized by the freeholder's charter, where

state had not delegated to the city the power to exercise such authority in framing its charter.

Freeholder's charter. Where the power to fix rates is a right reserved by the people of the state, it cannot be held to be an incident to the right to frame a freeholder's charter. *State ex rel. v. Superior Court of King County* (Wash., 1912), 120 Pac. 861; *Tacoma Gas & Electric Light Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655.

50. *Danville v. Danville Water Co.*, 180 Ill. 235, 54 N. E. 224; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888, *aff'd in Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887.

51. *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 370, 24 Sup. Ct. 82, 48 L. Ed. 217.

acted no law, since the failure of the legislature to enact such a law does not suspend or hold in abeyance the right of the municipality to regulate rates.⁵²

§ 1737. Regulation of rates must not impair obligation of contract.

If a municipality has power to make a contract fixing the rates which may be charged by a public service company, and agreeing not to reduce such rates,⁵³ and such a contract has actually been entered into between the municipality and the public service company,⁵⁴ such contract is protected by the contract clause of the federal constitution and cannot be impaired by subsequent ly reducing the rates,⁵⁵ unless the right to change the

52. *Denninger v. Recorder's Court of Pomona*, 145 Cal. 629, 79 Pac. 360.

53. § 1738 *post*.

54. § 1739 *post*.

55. *Agua Pura Co. of Las Vegas v. Las Vegas*, 10 N. M. 6, 60 Pac. 208, 50 L. R. A. 224; *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, *aff'd* in 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886; *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 711.

§§ 753, 759-761 *ante*, vol. 2.

Gas. A contract to supply gas for a greater period than that authorized by law will not preclude the city from fixing the price after the expiration of the legal time. *State v. Ironton Gas Co.*, 37 Ohio St. 45.

Where the price of gas is fixed by the municipality according to one standard (meter rates), it cannot be altered, without the consent of the company, by fixing another standard (flat rates),

which may affect or limit the price previously fixed. *Logan Natural Gas & Fuel Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 122.

Water. If an ordinance granting a franchise to a water company as the lowest bidder is conditioned on the furnishing of water during the term of the franchise at such prices as the contractor and the consumer should agree upon, not exceeding certain specific rates, the ordinance, where accepted, is a contract, and the municipality cannot reduce the rates below those specified in the ordinance. *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736.

The city of Los Angeles in 1868 leased its waterworks for thirty years and granted the right to lay pipes in the streets and to sell and distribute the water to the inhabitants and to take water from the Los Angeles River, and the city bound itself by the contract not to make any other lease,

rates has been reserved by the municipality, and the fact that a franchise granted a street railway company re-

sale, grant, or franchise to any other person or corporation for the sale or delivery of water to the inhabitants of the city for domestic purposes during the continuance of the contract. They also contracted that the city would not reduce the water rates lower than the rates that were being charged at the time the contract was entered into. It was held that under the Constitution and statute of California, as the same had been construed by the Supreme Court of the state prior to the date the contract was entered into and the franchise was granted, the Legislature had the right to grant a special franchise to persons and corporations, and that the Legislature had by act of 1870 (St. 1869-70, p. 635) ratified and approved the contract which had been previously entered into by the city of Los Angeles, and that this became a valid and binding contract upon the city for the full period of 30 years. *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886, aff'g 88 Fed. 720. See comment of Mr. Justice White on *Los Angeles Case* in dissenting opinion in *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 629, 21 Sup. Ct. 490, 45 L. Ed. 702, 706.

Fares: street railway. Where an ordinance granting a right of way to a street railway company fixes the fare to be charged, the city council cannot thereafter lower the fare to be charged over the objection of the company.

Shreveport Traction Co. v. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345.

In *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 374, 22 Sup. Ct. 410, 46 L. Ed. 592, the legislature of Michigan empowered the city of Detroit to contract for the construction and operation of a street railway and provided that the rates of toll or fare should be established by agreement between the railway company and the city. The municipality passed ordinances which were accepted by the railway company whereby it granted the right to use the streets for street railways for 30 years and provided that the rate of fare should not exceed 5 cents for each passenger. The constitution of Michigan contained a provision that all laws under which municipal corporations were formed might be amended, altered or repealed. The charter of the city gave it general power to control and regulate the use of its streets. The ordinance contract itself reserved to the city the right to make such further rules or regulations as should from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to the railways. After the railways were constructed the city passed ordinances which by their terms reduced the fares below 5 cents for each passenger. The supreme court held (1) that the legislature

serves the right of future control as to "construction, maintenance and operation" of the lines of the company

gave to the city the power to agree upon unalterable rates of fare for 30 years (page 385 of 184 U. S., page 417 of 22 Sup. Ct.); (2) that the city had so agreed; (3) that this agreement could not be lawfully renounced or modified by the city without the consent of the railway company either under the constitutional provision for the alteration or repeal of municipal charters or under the power to regulate the operation of the railways reserved in the ordinance (page 389 of 184 U. S., page 418 of 22 Sup. Ct.); and (4) that the stipulation in an ordinance contract that the rate of fare for one passenger shall not be more than 5 cents is an agreement by the city that it will not reduce the rate below 5 cents for each passenger during the term of the contract: and the court enjoined the city from enforcing the ordinances reducing the fare on the ground that they impaired the obligation of the contract.

In *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 535, 536, 24 Sup. Ct. 756, 48 L. Ed. 1102, the legislature authorized the city to fix the terms and conditions upon which street railways may be "constructed, operated, extended and consolidated." Under this power the city of Cleveland made an ordinance contract whereby it authorized a consolidation and provided that "for a single fare * * * no greater charge than 5 cents shall be col-

lected" during the term of the contract. The supreme court held that this was an unalterable agreement that the city would not reduce the rate of fare during the term below that specified therein, that this contract was authorized by the delegation to the city of the power to fix the terms and conditions of the consolidation, and that a reduction of the rate was an impairment of the obligation of the agreement. In *Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, 26 Sup. Ct. 513, 516, 517, 50 L. Ed. 854, this decision was reviewed and approved.

Six tickets for twenty-five cents. If a city grants a franchise to a street railroad company for a term of years and confers the right to charge a fare not exceeding five cents, an ordinance requiring the company to sell six tickets for twenty five cents is void as impairing the obligation of a contract. *Minneapolis v. Minneapolis St. R. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259.

Additional routes. An ordinance granting a franchise to a street car company required two lines to be maintained so as to cross each other at right angles, and the giving of transfers. It also stipulated that the rates of fare, which were fixed, should not be reduced. It was held that a provision in the ordinance reserving to the municipality the right to make reasonable rules "as may from time to time be deemed nec-

does not authorize the municipality to change the rates of fare fixed in the franchise,⁵⁶ or unless a change of rates is provided for by a *statute* enacted before the contract was made,⁵⁷ or by the constitution.⁵⁸

essary to protect the interests, safety, welfare or accommodation, and running of cars for the public in relation to said railways" did not authorize the municipality to compel an additional route to be established so as to affect the right to collect a second fare in some instances. *People v. Detroit United Ry.*, 156 Mich. 659, 121 N. W. 321.

Abandonment of contract rights. Existing contract rights of a street railway company to charge a certain fare not abandoned by accepting an ordinance permitting a change of motive power from horse power to electricity. *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, aff'g 155 Fed. 989.

Waiver. Right given by charter to street car company to charge a certain fixed rate of fare may be waived by the company by consenting to the operation of leased lines under the provisions of the charter of the lessee rather than that of their own charter. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

In Wisconsin, the purpose of the public utility law of 1907 was ultimately to secure conformity in public utility franchises—past as well as future grants—to the end that patrons might obtain service on a plane of equality and at the lowest price practical; and

the idea therein as to the surrender of existing franchise and the granting of a new *indeterminate permit* was that the surrender should operate as an extinguishment of all incidents in hearing in the old franchise, and that the permit taken in place thereof should be an exact equivalent as to the privilege feature but as to incidents and duration should be governed by the public utility statute, and hence the surrender of a public utility franchise operates as a *waiver by the corporation of all executory features of existing contracts regarding service charges*. *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530.

56. *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, aff'g 155 Fed. 989.

57. *Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304.

Statutes as part of contract. An ordinance regulating rates of a public service company cannot be said to impair the obligation of the contract with the company, where the ordinance granting the franchise to use the streets was passed after the enactment of a statute authorizing municipalities upon complaint filed to examine rates and determine whether they are reasonable and fix such prices to be paid as they may deem to be a reasonable charge,

However, statutory provisions that contracts between a municipality and a public service *company* for a sup-

since such statute will be read into every contract to which it relates, made since its enactment. *Arkadelphia Electric Light Co. v. Arkadelphia*, 99 Ark. 178, 137 S. W. 1093.

In *Stanislaus County v. San Joaquin C. & I. Co.*, 192 U. S. 201, 207-8, 24 Sup. Ct. 241, 48 L. Ed. 406, the legislature granted to counties the power to regulate water rates subject to a limitation in a general law under which a canal and irrigation company was incorporated that these counties might not reduce the rates below such prices as would produce 1 1-2 per cent. per month on the capital actually invested. Under this state of the law the canal company was incorporated and constructed irrigation works. Thereafter the legislature granted to the counties more power, the power to reduce the rates below the limit previously specified, and the courts held that the limited grant of power to the counties constituted no agreement with the canal company that the state would not give to the counties more power and that the latter might lawfully reduce the rates under the later power granted.

58. In Florida, a constitutional provision empowering the legislature to correct abuses and prevent unjust discrimination and excessive charges was held to be self-executing to the extent that contracts made thereafter were subject to the possibility of the ex-

ercise of such power; and it was held that a contract between a water company and the city of Tampa fixing the rates for water for thirty years as a part of the franchise was subject to change, under such constitutional provision, by lowering the rates, as against the objection that thereby the contract was impaired. *Tampa v. Tampa Waterworks Co.*, 45 Fla. 600, 34 So. 631. This decision was affirmed by the Supreme Court of the United States in *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170, which held that it could not be said "that the supreme court of Florida was wrong" in so deciding, but a strong dissenting opinion was filed by Mr. Justice Brown in which Mr. Justice Peckham concurred.

In Idaho, the constitution provides that the legislature "shall provide by law the manner in which reasonable maximum rates may be established for the use of water sold, rented or distributed for any useful or beneficial purpose," and it is held thereunder that a municipality within the state cannot bind itself by contract or otherwise to pay fixed rates for water for any longer period of time than that intervening between the passage of the ordinance or the making of the contract and the subsequent fixing of rates pursuant to the enactment of a statute prescribing the manner and method in which

ply shall not deprive the municipality of the right to regulate rates, do not apply to a contract with *individuals* for the same purpose.⁵⁹ So contracts between a public service corporation and private consumers as to rates for the supply furnished are subject to modification by the municipality without impairing the obligation of contracts.⁶⁰

In so far as impairing the obligation of a contract prohibiting the reduction of rates, is concerned, it is wholly immaterial whether the income of the company has been reduced thereby.⁶¹

The fact that a company has acquiesced in the regulations of its rates for many years does not estop it from claiming equitable relief on the ground that such regulations of rates violates the contract between the company and the municipality, where it has annually protested against the conduct of the municipality.⁶²

The question whether rates fixed by an ordinance granting a franchise may be altered or annulled by the *state*, has been the subject of several decisions,⁶³ and

reasonable maximum rates might be established, although the ordinance or contract would be binding until the legislature enacts a statute prescribing the manner of fixing such rates and the rates are established in conformity therewith. *Pocatello v. Murray* (Idaho, 1912), 120 Pac. 812.

In Texas, the constitutional provision of 1876 subjected to the control of the legislature all privileges and franchises granted by it or created under its authority, and it is held thereunder that a statute requiring half fare tickets to be issued to school children does not impair the obligation of any contract between the company and the municipality fixing the rates which the company may charge. *San Antonio Traction Co.*

v. Altgelt, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491, aff'g 81 S. W. 106.

59. *Santa Ana Water Co. v. San Beunaventura*, 56 Fed. 339.

60. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887, aff'g 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

61. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886.

62. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886.

63. *Manitowoc v. Manitowoc & N. P. Co.*, 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056.

In Washington, the constitution authorizing the incorporation of

a public service commission has been held authorized, under proper circumstances, to raise rates to the point of fairness, notwithstanding rates have been fixed by the municipality.⁶⁴

On the other hand, if the municipality has no power to enter into a contract establishing rates, a subsequent reduction of rates fixed by contract is not invalid as impairing the obligation of a contract.⁶⁵

§ 1738. Same—power of municipality to make contract as to rates.

The power of a municipality to make a contract with a public service company, regulating the rates to be

cities makes freeholder's charters subject to the control of "general laws," and it is held that the public utilities act of 1911 is such a general law so that a city ordinance granting a franchise is not binding on the state as a contract which cannot be impaired, where the power to fix rates for public service corporations is reserved by the people of the state and there has been no express grant or waiver of the constitutional right. *State ex rel. v. Superior Court of King County* (Wash., 1912), 120 Pac. 861.

64. *Dawson v. Dawson Telephone Co.* (Ga., 1911), 72 S. E. 508; *State ex rel. v. Superior Court of King County* (Wash., 1912), 120 Pac. 861.

Change of rates by state. Franchise to telephone company wherein it is provided that the company "agrees and binds itself by this ordinance that the rates charged shall be \$1.50 per month for resident phones and \$2.50 per month for business phones," where accepted, does

not prevent telephone company from increasing such charges by permission of the railroad commission especially where the municipality was not specifically authorized to fix telephone charges. *Dawson v. Dawson Telephone Co.* (Ga., 1911), 72 S. E. 508.

65. *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

Impairment of contract. No one has a vested right to charge an unreasonable or unconscionable rate to consumers while exercising a franchise to serve a public use; and to deprive a person engaged in such a public service of the power to charge and collect an unreasonable, extortionate, or unconscionable rate, deprives him of no right, natural or acquired, and cannot be the impairment of a contract within the purview and meaning of the federal constitution, nor does it amount to depriving him of property without due process of law. *Pocatello v. Murray* (Idaho, 1912), 120 Pac. 812.

charged the inhabitants by the company will be considered here. The power of a municipality to contract for a supply or service for the municipality in its corporate capacity, and the construction of such contracts, is elsewhere considered.⁶⁶

The making of a contract between a municipality and a public service company, fixing the rates which may be charged consumers is, for the most part, the exercise of one of the *business* powers of the municipality.⁶⁷ While the legislature has authority to delegate to municipalities the power to bind themselves by an irrevocable contract not to regulate the rates of a public service company for a term of years,⁶⁸ yet a statute will not be con-

66. § 1718 *ante*.

67. The power to fix and regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation and other public utilities partakes of the nature of a governmental power and also that of a business power. The power to so regulate these rates that they shall not be unreasonable is a legislative or governmental power which the state or city may exercise but cannot renounce. The making of a contract for the construction and operation of waterworks or the like, wherein the parties agree as to what rates may be collected by the owner of the works from private consumers during a reasonable term of years, is the *exercise of one of the business powers of the corporation*, and the purpose of such a contract is not to regulate rates, since there are no rates to regulate. *Omaha Water Co. v. Omaha*, 147 Fed. 1, 5, 6, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736.

68. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679, aff'g 186 Ill. 179, 57 N. E. 862 (followed in *Danville Water Co. v. Danville*, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696, aff'g 186 Ill. 326, 57 N. E. 1129).

The legislature, unless prohibited by the constitution, may empower a city to suspend by contract, and a city may suspend in that way, during a reasonable term of years, its power to change or regulate the rates which an individual or corporation may collect of private consumers. *Omaha Water Co. v. Omaha*, 147 Fed. 1, 6, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736.

Reasonableness. The making of a municipal contract to suspend for twenty-five years the power of the city to regulate the rates which a water company shall collect from private consumers, in consideration of the construction and operation of waterworks, is not an unreasonable exercise of the power to contract therefor

strued as granting such authority in the absence of express words or necessary implication.⁶⁹

Omaha Water Co. v. Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736.

69. See *Milhau v. Sharp*, 17 Barb. (N. Y.) 435, 9 How. Pr. (N. Y.) 102..

Under power "to provide for supplying the city with water," a city may contract with a water company in respect to rates to be charged consumers. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

City held not authorized to enter into any contract which would prevent the legislature from legislating upon the subject of fares of a street railway company. *Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337.

Where no power to grant right of way. Municipal authority to agree with a railroad company upon the "manner, terms and conditions" upon which the streets "may be used or occupied," where the legislature has not delegated to the municipality the power to grant a right of way in the streets, does not authorize the municipality to fix the rates to be charged by a belt line road as a condition to granting a right of way over the street. *T. B. Townsend Brick & Contracting Co. v. Central Trust Co.*, 187 Fed. 63, 66-70.

Contract with telephone company. A municipality, unless expressly authorized, cannot contract with a public utility corporation, such as a telephone company, not

to lower the rates during the existence of the franchise. *Home Telephone & Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

In Illinois, a statute authorized municipalities to grant the right to construct waterworks and maintain them "at such rates as may be fixed by ordinance and for a period not exceeding thirty years," and it was held that under the rule requiring a street construction of such grants, the clause "for a period not exceeding thirty years" was intended to fix the maximum term of the grant but not to qualify the words "at such rates as may be fixed by ordinance" and hence that the rates could not be fixed for the term of thirty years. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679, aff'g 186 Ill. 179, 57 N. E. 862 (followed in *Danville Water Co. v. Danville*, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696, aff'g 186 Ill. 326, 57 N. E. 1129).

In Utah, a municipality, in granting a franchise, cannot fix a rate for the entire term of the franchise, since the power to do so has not been delegated. *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 301, 93 Pac. 828, where it is said on page 302: "Municipalities in this state, therefore, cannot enter into binding contracts with regard to the rates for services rendered to the public."

It is well settled that the state legislature may authorize a municipality to establish by contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates, but inasmuch as such contract extinguishes an undoubted power of government, *both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power.*⁷⁰ For example, in a recent case decided by the federal supreme court it was held that charter authority granted to the common council of the city of Los Angeles "to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections" conferred no authority to enter into a contract to fix the rates for a period of time so that they could not be changed.⁷¹ So it has been held by the same court that statutes authorizing municipalities to "contract for a supply of water for public use for a period not exceeding thirty years", and to authorize private persons to construct waterworks "and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years", did not confer authority upon the municipality to contract that the water company should be exempt from the exercise of the governmental power to regulate rates.⁷²

On the other hand, in a much cited decision of the federal supreme court, it is held, per Mr. Justice Day,

70. Home Telegraph & Tel. Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176, in which it is said that "it is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with

other facts, turn the balance one way or another."

71. Home Telegraph & Tel. Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

72. Freeport Water Co. v. Freeport, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679.

that "under a broad grant of power, conferring, without restriction or limitation", upon a city, "the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years; and, in the absence of a showing of unreasonableness so gross * * * as strongly to suggest fraud or corruption, this action of the council is binding, and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting part."⁷³ So power granted to a city to contract for the construction and operation of waterworks "*on such terms and under such regulations as may be agreed on*" constitutes authority to the municipality to agree with the contractor upon the rates which he may collect of private consumers during a reasonable term of years.⁷⁴ And where a municipality is *expressly authorized to regulate the rates* to be charged by a public service company, it may contract with such a company for rates for a supply to its citizens for a definite period, so as to suspend its power to regulate rates during such time.⁷⁵

*Where the municipality has power to refuse the use of its streets to a public service company, and the agreement as to rates to be charged patrons is a part of the grant of the franchise to use the streets and therefore supported by a valuable consideration, the power to impose conditions on granting the franchise includes the power to stipulate in the franchise as to the rates.*⁷⁶

73. *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155. *Noblesville Gas & Imp. Co.*, 157 Ind. 162, 60 N. E. 1032.

74. *Omaha Water Co. v. Omaha*, 147 Fed. 1, 13, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736. *Louisiana. Shreveport Traction Co. v. Shreveport*, 122 La. 1, 47 So. 40.

75. *Bessemer v. Bessemer Waterworks*, 152 Ala. 391, 44 So. 663. *Maryland. Charles Simon's Sons Co. v. Maryland Tel. & Tel. Co.*, 99 Md. 141, 57 Atl. 193, 63 L. R.

76. *Indiana. Noblesville v. A.* 727.

Accordingly, where a municipality grants the right to use streets for gas pipes, it may provide that the charge for gas furnished the city and its inhabitants shall not exceed certain prices, without regard to whether the municipality has power to *regulate* the rates of the company.⁷⁷ So a telephone company may be granted the use of streets on the condition that the rates shall not exceed a fixed schedule or those fixed by any future ordinance.⁷⁸ And where it was provided by statute that a street railroad should not be constructed until the council "by ordinance shall have granted permission and prescribed the terms and conditions," it was held that the city might enter into a contract prescribing the rates of fare.⁷⁹

Likewise, a statute authorizing a municipality to grant to a corporation the privilege to exercise its public utility franchise therein "upon such terms and subject to such rules and regulation and the payment of such license fees as the common council may prescribe" authorizes such use to be conditioned upon prescribed rates

Massachusetts. *Murphy v. Worcester Consol. Street R. Co.*, 199 Mass. 279, 85 N. E. 507, holding restrictions requiring half fare for pupils attending schools could not be attacked, and that the word "schools" included a state normal school, yet it did not include a college or a business institute.

Michigan. *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197.

New Jersey. *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, *aff'd* without opinion in 71 N. J. Eq. 390, 71 Atl. 1134.

In Louisiana, although there is no express legislation authorizing municipalities to establish rates for street railroads by contract,

"such power necessarily flows from the statutory prohibition that no railroad shall be constructed through the streets of any incorporated city without the consent of the municipal council thereof, and from the general power of regulating the use of the streets." *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 47 So. 40; *Forman v. Railroad Co.*, 40 La. Ann. 446, 4 So. 246.

77. *Noblesville v. Noblesville Gas & Improvement Co.*, 157 Ind. 162, 60 N. E. 1032; *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530.

78. *Moberly v. Richmond Tel. Co.*, 126 Ky. 369, 103 S. W. 714.

79. *Cleveland v. Cleveland Street Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102.

for service.⁸⁰ So a statute conferring exclusive power on a municipality over its streets confers on it authority, in Indiana, to fix the rates, on permitting a public service company to use the streets.⁸¹

A constitutional provision prohibiting the legislature from passing any "law impairing the obligation of contracts or making any *irrevocable grants of special privileges or immunities*" does not preclude the city from making an irrevocable contract regarding rates of a public service corporation.⁸²

A municipality given authority to establish reasonable rules and regulations, *even though it does not possess authority to exclude a company from the use of its streets*, may fix by ordinance a maximum rate of charges, which becomes binding when the ordinance is accepted by the company, where a valuable consideration passes to the grantee of the franchise in the agreement as to rates.⁸³

§ 1739. Same—whether provision in contract actually fixes rates.

An agreement between a municipality and a public service corporation as to rates to be enforced for a specified reasonable time will not be raised by mere *implication*, and where the meaning of a grant or contract in regard thereto is ambiguous or doubtful, it will be construed favorable to the rights of the public.⁸⁴ A pro-

80. *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530.

81. *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822.

82. *Omaha Water Co. v. Omaha*, 147 Fed. 1, 6, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736.

83. *Mahan v. Michigan Telephone Co.*, 132 Mich. 242, 247, 93 N. W. 629

84. *Omaha Water Co. v. Omaha*, 147 Fed. 1, 6, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736.

In *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 436, 23 Sup. Ct. 531, 47 L. Ed. 887, aff'g 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888, a water company was incorporated with power to contract with the city and its inhabitants to supply water and to "charge such prices for the same as may be agreed upon between

vision in a franchise ordinance that the *company shall not charge or receive a higher rate than a specified one* has been construed as not a mere limitation upon the right of the company to charge, but a grant of the right to charge that sum without reduction by the municipality.⁸⁵ But in a case appealed from the Illinois supreme court to the supreme court of the United States, it was held that a municipality is not bound by the contract

said company and said parties." The incorporation was under a general act which provided that "this act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company." The water company made a contract with the city which consisted of three distinct parts, first, the promises of the water company, second, those of the city, and third, their mutual undertakings: In the first part the company undertook to "supply private consumers with water at a rate not to exceed five cents for 100 gallons." The court held that these were in form the words of the water company, that they were subject to the express reservation by its act of incorporation of the power of the city to regulate the price of water furnished by the company and that they did not constitute an agreement with the city that it would not reduce the rate below that specified in the contract.

Cedar Rapids case. So it is held in a very recent decision of the Supreme Court of the United

States that an ordinance granting a renewal of a franchise which provides therein that "in consideration of the privileges herein granted to said company it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed" a certain sum and "twenty cents per thousand cubic feet discount if consumers pay on or before the tenth of each month after consumption," did not constitute a contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment, and hence a reduction of the rate cannot be claimed to violate the contract clause of the federal constitution. *Cedar Rapids Gas-Light Co. v. Cedar Rapids* (U. S.), 32 Sup. Ct. 389 (decided Mar. 11th, 1912), aff'g 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299.

85. *Re Pryor*, 55 Kan. 724, 41 Pac. 958, 29 L. R. A. 398; *State ex rel. v. Laclede Gaslight Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197; *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

rates for the entire period of the franchise because of a provision in the franchise that the grantee "shall charge the following annual rate to consumers of water during the existence of this franchise", since merely a regulation of the right to charge rates, and there is no stipulation that it will be the only instance of regulation.⁸⁶ Likewise, an ordinance authorizing the construction of waterworks for a specified number of years and the charging of certain rates for that time "or other rates that may be established by the grantee and approved by such council" does not preclude the municipality from establishing different rates thereafter if the rates fixed are found to be unreasonable.⁸⁷ But where an agreement in a lease by a municipality of its waterworks provided that the municipality reserves "the right to regulate the water rates charged by said parties of the second part, or their assigns, *provided that they shall not so reduce such water rates, or so fix the price thereof, to be less than those now charged by the parties of the second part for water*", it was held that the contract could not be impaired by reducing the rates thereafter so as to be lower than the rates existing at the time of the contract.⁸⁸

§ 1740. Regulating rates outside municipality.

Of course, a municipality cannot regulate rates as to persons or corporations outside of the municipal limits.⁸⁹ And it has been held in California that a

86. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, in which case Mr. Justice White filed a dissenting opinion based on his dissenting opinion in *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679, which was concurred in by Justices Brewer, Brown and Peckham.

In Illinois, an ordinance granting the right to use streets and fixing

the rates for a period of years is held not a contract that the rates shall not be changed. *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363.

87. *Creston Waterworks Co. v. Creston*, 101 Ia. 687, 70 N. W. 739.

88. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886.

89. *Home Telephone Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547; *Southwestern Tel. & Tel. Co.*

municipality, as a condition of granting a franchise to use the streets to an interurban railway, cannot fix the rates of fare between two cities.⁹⁰

§ 1741. Company as precluded from denying power of municipality to contract as to rates or attacking reasonableness of rates.

If the rates to be charged, or the maximum rates, are fixed by the grant of the franchise to use the streets, as a condition of granting the franchise, and the franchise is accepted by the company, it cannot thereafter deny the power of the municipality to make the agreement, where the company obtained rights and privileges from the municipality which it otherwise would not have had.⁹¹ So if a public service company, by its franchise, agrees to certain rates it cannot thereafter claim that such rates are unreasonable and confiscatory.⁹² On the other hand, an agreement as to rates, contained in a franchise to use the streets, where the right to use the streets is conferred by charter or statute, is void for want of consideration.⁹³

c. Mode of fixing rates.

§ 1742. Manner of fixing rates by municipality.

If the procedure to fix rates is established by stat-

v. Dallas (Tex. Civ. App., 1910), 131 S. W. 80.

A franchise limiting the rates of a telephone company do not apply to rates outside of the municipality. *Moberly v. Richmond Tel. Co.*, 126 Ky. 369, 103 S. W. 714.

See § 657 *ante*, vol. 2; § 897 *ante*, vol. 3.

90. *South Pasadena v. Los Angeles Terminal R. Co.*, 109 Cal. 315, 41 Pac. 1093.

But see *Coy v. Detroit, Y. & A. A. Ry.*, 125 Mich. 616, 85 N. W. 6

91. *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; *Rochester Tel. Co. v. Ross*, 109 N. Y. S. 381, 125 App. Div. 76.

92. *Charles Simon's Sons Co. v. Maryland Tel. & Tel. Co.*, 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727; *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197; *Condon v. New Rochelle Water Co.*, 116 N. Y. S. 142, *aff'd* without opinion in 120 N. Y. S. 1119, 136 App. Div. 897.

93. *Macklin v. Home Telephone Co.*, 24 Ohio Cir. Ct. Rep. 446.

ute, ordinance, or contract, that procedure should be followed.⁹⁴ Rate regulation being purely a legislative function, even where exercised by a subordinate body upon which it is conferred, the *notice and hearing* essential in judicial proceedings are not indispensable, and even if notice and hearing are indispensable it is sufficient that such notice and hearing are afforded by ordinance.⁹⁵

In some municipalities, by virtue of statute or charter provisions, the rates of a public service company may be fixed by an ordinance passed under the *initiative and referendum*.⁹⁶

§ 1743. City officers as impartial tribunal to fix rates.

The fact that the municipality which fixes the rates is not an impartial tribunal because it is interested in the rates, either in its municipal capacity or through its inhabitants, does not preclude the power of the legislature to delegate to a municipality the authority to regulate the rates of public service companies doing business within its limits.⁹⁷ Likewise, it cannot be success-

94. But ordinance fixing rates, passed after February, is valid although constitution required passage of ordinance in February. *Fitch v. San Francisco*, 122 Cal. 285, 54 Pac. 901.

95. *Home Telegraph & Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

Notice of intention to fix the rates need not be given the company. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046, 16 Am. St. Rep. 116, 6 L. R. A. 756.

96. *Southwestern Telegraph & Telephone Co. v. Dallas* (Tex. Civ. App., 1910), 131 S. W. 80.

Constitutionality. The adoption of rates of a public service company by the initiative and

referendum provision in a charter does not violate the federal or state constitution. *Southwestern Tel. & Tel. Co. v. Dallas* (Tex. Civ. App., 1910), 131 S. W. 80.

Notice of hearing to fix rates of telephone company is not necessary where such rates were voted on by the people at large thereafter under the initiative and referendum. *Southwestern Tel. & Tel. Co. v. Dallas* (Tex. Civ. App., 1910), 131 S. W. 80.

97. *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, aff'd in 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

Officers fixing rates as impartial. It cannot be contended that

fully contended that a city council given power to fix rates is not an impartial tribunal because in effect it is a judge in its own case, nor that the action of such body will be influenced by the fact that there is a provision in the charter authorizing a *recall of members of the council* under certain conditions.⁹⁸

d. *Reasonableness of rates.*

§ 1744. Rates must be reasonable.

Rates fixed by a municipality to govern the charges of a public service company, where not a matter of contract, must be reasonable.⁹⁹ Yet *reasonable* is a rela-

the power to fix rates for water is virtually left in the hands of the water consumers because the consumers elect the supervisors, and this is a violation of the principle that no man shall be a judge in his own case. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 676.

The fact that section 2839 of the Rev. Codes, which provides for the appointment of a commission for the purpose of fixing rates to be charged water consumers, requires that such commissioners shall be "taxpayers of the city," does not render the statute obnoxious to either the state or federal Constitution on the ground that it does not provide an impartial and unprejudiced tribunal. *Pocatello v. Murray* (Idaho, 1912), 120 Pac. 812.

But it has been held in New Mexico that the legislature cannot constitutionally delegate the power to fix prices at which water shall be sold in a city, to the authorities of the city, which is itself a consumer, either in its

municipal capacity or through its inhabitants, without some provision for a judicial investigation of the reasonableness of the rates fixed by such authorities. *Aqua Pura Company v. Las Vegas*, 10 N. M. 6, 60 Pac. 208, 50 L. R. A. 224.

98. *Home Telegraph & Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

99. *Florida*. *Tampa v. Tampa Waterworks Co.*, 45 Fla. 600, 34 So. 631, aff'd in *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170.

Illinois. *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, 73 N. E. 375, aff'g 116 Ill. App. 200.

Massachusetts. *Souther v. Gloucester*, 187 Mass. 552, 73 N. E. 558, 69 L. R. A. 309.

New Jersey. *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, aff'd without opinion in 71 N. J. Eq. 790, 71 Atl. 1134.

United States. *Cumberland Telephone & Telegraph Co. v. Memphis*, 183 Fed. 875; *San Diego Land & Town Co. v. Jasper*, 89

tive term, and what is reasonable depends upon many varying circumstances,¹ and each case must depend to a large extent on its own particular facts and circumstances. In regulating rates, the extent of their reduction is wholly immaterial provided the rates as fixed produce a fair return so as not to be confiscatory.²

It is not within the scope of this work to consider the validity of maximum fares for passengers and for freight fixed by *state* commissions in various states, to determine whether such rates are confiscatory.³

§ 1745. Rates fixed by municipality presumed to be reasonable.

The rate established by a municipality is presumed to

Fed. 274; *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. 952.

Rates must be reasonable. Ever since the case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, "the doctrine has been well established that except in abnormal cases legislation reducing rates which does not leave a fair profit upon the capital involved is virtually confiscatory." *Wyman, Public Service Corporations*, § 1123.

Eliminating discounts. Fixing a rate which eliminates a discount for prompt payment cannot be attacked on the ground that it will necessitate an additional expense for collecting bills. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Ia. 426, 120 N. W. 966.

Judge Farrington, in deciding the validity of water rates for the City and county of San Francisco, presents a careful and thorough study of the question in most of its aspects, with great learning and ability, in *Spring Valley Waterworks v. San Fran-*

cisco, 192 Fed. 137, decided in 1911.

1. *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

Free water. Requiring water to be furnished free to all charitable, religious and educational institutions, and for bath tubs, water closets, urinals and wash-bowls, held, under the circumstances, to be confiscatory. *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, 73 N. E. 357.

2. *Stanislaus County v. San Joaquin Canal & Irr. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406, where rates were reduced so as to earn only six per cent instead of eighteen.

3. See *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, involving validity of constitutional provision of Oklahoma reducing maximum fares for passengers from \$.03 to \$.02 per mile and orders of the commission reducing maximum freight rates from forty per cent to fifty per cent.

be reasonable, in the absence of any showing to the contrary;⁴ and the burden of proving water rates unreasonable is on the party asserting it.⁵ Rates fixed by the state or municipality must be regarded as *prima facie* fair and valid notwithstanding the data upon which the commission acted was insufficient, where the rates were not based entirely upon arbitrary conjecture.⁶

§ 1746. How far rates subject to review by courts.

Rates fixed by municipality to govern the charges of a public service company are reviewable by the courts but cannot be held invalid as unreasonable unless so low as to be confiscatory, *i. e.*, to deprive the grantee of the franchise of its property without due process of law.⁷ It follows that the only question to be determined

4. Noblesville v. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032; Cedar Rapids Gas-light Co. v. Cedar Rapids, 144 Ia. 426, 120 N. W. 966; McCook Waterworks Co. v. McCook, 85 Neb. 677, 124 N. W. 100; Railroad Com. of Louisiana v. Cumberland Telephone & Telegraph Co., 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577; Spring Valley Waterworks v. San Francisco, 192 Fed. 137, 142.

Presumption overcome where company denied the privilege of being heard. San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

5. Lake Forest Water Co. v. Lake Forest, 249 Ill. 382, 94 N. E. 517.

6. Railroad Commission v. Cumberland Telephone & Telegraph Co., 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 377.

7. Cedar Rapids Water Co. v. Cedar Rapids, 118 Ia. 234, 91 N.

W. 1081; Brymer v. Butler Water Co., 179 Pa. St. 231, 36 Atl. 249, 36 L. R. A. 260 (holding that stock issued in place of profits earned may be considered in determining investment of stockholders); San Diego Land & Town Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154, aff'g 74 Fed. 79.

See also Rieker v. Lancaster, 7 Pa. Super. Ct. 149, 42 W. N. C. 160.

If rates are confiscatory, courts will interfere. San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; Palatka Waterworks v. Palatka, 127 Fed. 161. See also Chicago v. Rogers Park Water Co., 214 Ill. 212, 73 N. E. 375, aff'g 116 Ill. App. 200.

If the rates are confiscatory, and fixed arbitrarily and without investigation they will be set aside by the court. Spring Valley Waterworks v. San Francisco, 82

by the courts is whether the rates are confiscatory,⁸ and rates will not be declared confiscatory unless clearly shown to be so.⁹ So, if the rates fixed by the muni-

Cal. 286, 22 Pac. 910, 1046, 16 Am. St. Rep. 116, 6 L. R. A. 756.

Courts can review rates only where confiscatory. *Contra Costa Water Co. v. Oakland*, 159 Cal. 323, 113 Pac. 668.

The board of supervisors may not, under the guise of regulation, establish rates which will deprive the water company of the whole or any portion of that which under the circumstances is a just and reasonable return for the use of its property devoted to public service. The use and profits of property are themselves property, and are alike under the protection of the federal constitution. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 142.

Preliminary injunction. On motion for preliminary injunction, it is not necessary to show clearly and beyond doubt that the rates are confiscatory. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 683.

8. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 683.

Estoppel to sue to enjoin rates. The fact that a public service company has paid the rates fixed by the municipality for several years, prior to bringing suit, does not estop it in suing to enjoin the enforcement of the rates on the ground that they are confiscatory. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 706.

9. *McCook Waterworks Co. v. McCook*, 85 Neb. 677, 124 N. W. 100.

Unreasonableness must be clearly shown. "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidences. On the other hand, the

cipality, to govern a company, are not less than those authorized by the contract between the municipality and the company, relief will not be granted because the rates are so inadequate as practically to result in confiscation of property.¹⁰

In the earlier decisions, however, it was frequently held, and the doctrine was for a time unhesitatingly followed and affirmed by state and subordinate federal courts, that a person or corporation injured by legislative determination as to what was a reasonable rate for the use of property affected with a public interest could not successfully claim that it had been deprived of its property without *due process of law*.¹¹

The fixing of rates is purely a legislative function, but whether rates already established are just and reasonable is a question for the court. If the court, in the exercise of its judicial discretion, determines that a rate so fixed is unreasonable, that determination must prevail over any presumption in favor of the ordinance. A court cannot control the discretion of the rate fixing body; it has no power to revise or correct an ordinance fixing rates; it has no authority to substitute its judgment for that of the board. It cannot interfere with the collection of rates established under such an ordinance, "unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the company and to the public."¹²

companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based." *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

10. *Leadville Water Co. v. Leadville*, 22 Colo. 297, 45 Pac. 362.

11. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, and cases cited.

12. Per Mr. Justice Peckham in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382; *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 142; *Capital City Gas-light Co. v. Des Moines*, 72 Fed. 818.

Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature; and, in that event, there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But, where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, *and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt*, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts.¹³

Furthermore, the question whether rates are so unreasonable as to be confiscatory must be answered by the court from its own *independent investigation*, without reference to the methods of investigation pursued by the municipal or state board or officer,¹⁴ The rates fixed by a municipality are presumably correct, and if the alleged constitutional invalidity rests on *disputed questions of fact*, the invalidating facts must be proved to the satisfaction of the court. It has been held by the supreme court of the United States that "in view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they are confirmed by the trial court. * * *. This court will not fetter its discretion or judgment in artificial

13. Per Mr. Justice Peckham in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

14. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 145.

rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation."¹⁵

The fact that certain provisions in a statute or ordinance regulating rates are invalid as confiscatory, does not invalidate the provisions relating to rates where the invalid provisions are clearly separable.¹⁶

A federal circuit court cannot decline to take jurisdiction of a suit to enjoin the enforcement of alleged unreasonable rates fixed by statute or ordinance where asserted to violate the federal constitution.¹⁷

§ 1747. Court cannot itself fix rates.

Unless power so to do is conferred on the courts by statute,¹⁸ they have no power to establish and fix rates,¹⁹ but can only *enjoin the enforcement of a rate* where it is held by the court to be so unreasonable as to be confiscatory.

15. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

16. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

17. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

18. See *Janvrin*, Petitioner, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319.

19. *Brymer v. Butler Water Co.*, 179 Pa. St. 331, 36 Atl. 249, 39 W. N. C. 439, 36 L. R. A. 260; *Ball v. Texarkana Water Cor.* (Tex. Civ. App., 1910), 127 S. W. 1068; *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 264, 108 N. W. 65; *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961; *Pocatello v. Murray*, 173 Fed. 382.

Courts cannot fix rates. "It follows, therefore, as a corollary

of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi-public service, because that is a legislative prerogative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different." *Western Union Tel. Co. v. Myatt*, 98 Fed. 335, 342.

§ 1748. Matters to be considered in determining reasonableness of rates.

In determining whether rates fixed to govern the charges of public service companies are unreasonably low, many matters must be taken into consideration. *First*, the question arises as to what sum shall be fixed as representing the property of the company on which it is entitled to a fair return, *i. e.*, the value of the property. According to nearly all the decisions, the basis on which the reasonableness of rates is to be determined, *i. e.* a fair return, is the *value* of the plant, *at the time* the inquiry is made concerning the rates;²⁰ except possibly where the property has increased so enormously in value as to render a rate permitting a reasonable return upon

20. *California*. Redlands, L. & C. Domestic Water Co. v. Redlands, 121 Cal. 365, 53 Pac. 843.

Maine. See Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

Missouri. Home Telephone Co. v. Carthage, 235 Mo. 644, 139 S. W. 547.

New Jersey. Long Branch Commission v. Tintern Manor Water Co., 70 N. J. Eq. 71, 62 Atl. 474, aff'd without opinion in 71 N. J. Eq. 790, 71 Atl. 1134.

Oklahoma. Pioneer Telephone & Telegraph Co. v. Westenhaver (Okla., 1911), 118 Pac. 354.

United States. Spring Valley Waterworks v. San Francisco, 192 Fed. 137, 145; San Diego L. & T. Co. v. National City, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; San Diego, L. & T. Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; Contra Costa Water Co. v. Oakland, 165 Fed. 518, 532; San Diego Land & Town Co. v. National City, 74 Fed. 79.

Present value of property as test. "There can be no true test, other than the physical valuation, and to such physical valuations there may be added certain other items." Des Moines Water Co. v. Des Moines, 192 Fed. 193, 197, per Judge McPherson.

Depreciation in value of a waterworks plant and of the value of its services from a diminution in the water supply from a long-continued drought, since the regulation of water rates, may be considered in determining their reasonableness. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 23 Sup. Ct. 571.

Time. The value to be ascertained is the value at the time of the inquiry. Spring Valley Waterworks v. San Francisco, 192 Fed. 137, 142.

Admissibility of evidence as to value of land, see Spring Valley Waterworks v. San Francisco, 192 Fed. 137, 163-166.

such increased value unjust to the public.²¹ This question is considered more in detail in a subsequent section.²²

Second, the gross earnings of the company must be determined.²³ And the net income of a company during the years immediately succeeding the passage of an ordinance fixing rates should be considered by the court, where the ordinance has never been enforced.²⁴

21. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

22. § 1750 *post*.

23. *Discounts*. In determining the amount of receipts of a water company a discount, if the monthly charge is promptly paid, should not be figured, but instead the book rate where the company was not compelled by ordinance to discount the rates established. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

24. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

Income after regulation of rates. "The precise subject of inquiry was, what would be the effect of the ordinance in the future. The operations of the preceding fiscal year, or of any other past fiscal year, were valueless if the year was abnormal, and were only of significance so far as they foretold the future. If, as in this case sufficient time has passed, so that certainty instead of prophecy can be obtained, the *certainty would be preferable to the prophecy*. In this case there could be no absolute certainty, because the ordinance had never been put in oper-

ation. But evidence of the operations of the years succeeding to the ordinance is relevant and of great importance, and by a consideration of such evidence a much greater degree of certainty could be obtained. Suppose, by way of illustration, that before bringing suit the company had put the ordinance into effect and had observed it for a number of years, and the result showed that a sufficient net income had been realized—is it possible that a suit then could be brought and the evidence confined to a period prior to the ordinance, and, by a process of speculation, the conclusion reached that the ordinance would be confiscatory?" *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

If an ordinance fixing water rates has been in force for several years so that its practical results are susceptible of proof as to whether the company has received a fair return thereunder, the company, in an action to have the rates declared unreasonable, should show the earnings and expenses during the time since the passage of the ordinance. *Lake Forest Water Co. v. Lake Forest*, 249 Ill. 382, 94 N. E. 517.

Third, the operating expenses of the company must be ascertained and deducted from the gross earnings. Among the operating expenses, which must be deducted from the gross earnings, are wages, incidental supplies, ordinary repairs, taxes, etc.²⁵ Interest upon outstanding bonds must also ordinarily be protected.²⁶ Whether the cost of taking out casualty insurance to cover injuries to employees can be charged as part of the operating expense has not been decided, but no good reason is apparent why such charge should not be deducted from the income. But the expenses of a suit to enjoin enforcement of rates fixed by the municipality cannot be charged as a part of the operating expenses, nor can the expense of a reorganization of the company.²⁷ So if water can profitably be served from a *near source of supply* at a certain rate, the company ought not to be permitted to charge a higher rate based upon the expense of bringing it from a farther and more expensive source, and this is so even if in attempting to serve the municipality and other communities together it might be more profitable to the company to do so.²⁸

Fourth, the question whether the rate of interest on the property of the company, produced by the net income after making all proper deductions, is so low as to make the rate confiscatory, must be determined.²⁹

§ 1749. Same—reasonableness as looked at from different standpoints of patron and company.

In determining whether rates are reasonable, some courts take into consideration the *value of the supply or service to the patron* as well as a fair return to the company for the supply or service furnished or rendered,³⁰

25. Wyman, Public Service Corporations, §§ 1150-1157.

26. Wyman, Public Service Corporations, § 1131.

27. Spring Valley Waterworks v. San Francisco, 192 Fed. 137, 190.

28. Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537.

29. § 1762 *post*.

30. Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; Brunswick &

and hold that a public service property may or may not have a value independent of the amount of rates, which

T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537.

Value of service or supply to patron as test. The public has a right to demand that no more shall be exacted than the services rendered are reasonably worth. The public cannot be subjected to unreasonable rates, in order simply that stockholders may earn dividends. Covington & Lexington T. R. Co. v. Sanford, 164 U. S. 578, 597, 598, 17 Sup. Ct. 198, 41 L. Ed. 560; Spring Valley Water Co. v. San Francisco, 165 Fed. 667; Spring Valley Waterworks v. San Francisco, 192 Fed. 137, 143.

"The company engages in a voluntary enterprise. It is not compelled, at the outset, to enter into the undertakings. It must enter, if at all, subject to the contingencies of the business, and subject to the rules that its rates must not exceed the value of the services rendered to its customers. It has accepted valuable franchises granted by the state, franchises ordinarily exclusive for the time being, franchises which ordinarily debar the public from serving themselves satisfactorily in any other way; and in return it must perform the duties to the public which it has voluntarily assumed at rates not exceeding the value of the services to the public taken as individuals, and this irrespective of the remuneration it may itself receive." Brunswick & T. Water Dist. v.

Maine Water Co., 99 Me. 371, 59 Atl. 537, 541.

"We do not doubt that, when the worth of a public service of this kind to the public or the customers is spoken of, necessarily one of the elements to be considered is the expense at which the public or customers, as a community, might serve themselves were they free to do so, and were it not for the existence of the practically exclusive franchises of the supplying company. When the worth of the water to a consumer is estimated, we are not limited to the value of water itself, for it is an absolute necessity. Its value has no limit. Water, speaking abstractly, is priceless; it is inestimable. To sustain life it must be had at any price. And in this respect a public water service differs from all other kinds of public service. In estimating what it is reasonable to charge for a water service—that is, not exceeding its worth to the consumers—water is to be regarded as a product, and the cost at which it can be produced or distributed is an important element of its worth. It is not the only element, however. The individuals of a community may with reason prefer to pay rates which yield a return to the money of other people higher than the event shows they could serve themselves for, rather than make the venture themselves, and risk their own money to lose in an uncertain enterprise. It was said by us in

for the time being may be reasonably large, and that a public service company may, under some circumstances, be required to perform its service at rates prohibiting a fair return to its stockholders, considering their property merely as an investment.³¹

While a rate which is reasonable from the point of view of the public service company may be unreasonable from the point of view of the patron, and *vice versa*, and some courts hold that the rate must be fair in so far as the patron is concerned, and theoretically this is correct, and in some instances where the question is whether a particular charge by a carrier is a reasonable one, it is proper to consider the fairness of the charge from the standpoint of the patron, *yet in so far as the rates of water, gas, electric light, telegraph and telephone, street car, etc.*, companies are concerned, it may be questioned whether the value of the service to the patron can be made the test, since that value cannot ordinarily be ascertained. *A fortiori*, the cost to the consumer of obtaining the service for himself is not, it is believed, a proper test, although that has been applied in at least one case.³²

the Waterville case that the investor is entitled to something for the risk he takes, and it is not unreasonable for the consumer to be charged with something on that account. That is one of the things which make up the worth of the water to the customer. The same element enters always into the relations between producer and consumer. But such a consideration as this last one must always be treated with caution. The company is only entitled to fair returns, in any event, and 'fair' to the customer as well as to itself." *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537, 543.

31. *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

The basis of calculation to determine the reasonableness of rates charged for water by a public service corporation, is the fair value of the property used by it for the convenience of the public. However, the public have a right to demand that the rate be no higher than the services are worth to them as individuals, not in the aggregate. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

32. *Grand Haven v. Grand Haven Water Works*, 119 Mich. 652, 78 N. W. 890.

§ 1750. Same—present value of property as test.

As already stated, it is well settled, with a very few exceptions, that the only practical test for determining the amount on which the public service company is entitled to a fair return is the present value of the property of the company at the time of the inquiry.³³ In determining the value of the property of a public service company, it has been said that "each case must depend very largely upon its own special facts, and every element and every circumstance which increases or depreciates the value of the property, or of the service rendered, should be given due consideration, and allowed that weight to which it is entitled. It is, after all, very much a question of sound and well-instructed judgment."³⁴ The fair return is to be based on the reasonable value of the property and not upon the *monopoly value*.³⁵ However, no inflexible method for

33. § 1748 *ante*,

"Fair" Value. "It is impossible to consider the constant use of the word 'fair' or the word 'reasonable,' in connection with value, * * * without feeling that regard must be given to the service performed by the property; that reasonable value and fair value are not always and under all conditions the precise equivalent of full actual value, or the value which would be awarded in condemnation proceedings; that the value upon which a fair return is due is the value which under all the circumstances is reasonable and fair as between the public and the person who has voluntarily devoted his property, or some portion or use thereof, to public convenience." *Spring Valley Water Works v. San Francisco*, 192 Fed. 137, 154.

Price paid on foreclosure for a

waterworks plant is evidence of its value for the purpose of fixing water rates. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892.

34. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 680.

35. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, in which Judge Farrington says (p. 153): "Having secured all available reservoir sites, water rights, and watershed lands within fifty miles, the water company says to the city: You must have water. If you do not take ours, you will be compelled to go to the Sierras for an adequate supply. It is the only available source; consequently our property, for the purpose of determining what we are entitled to charge you for water, is worth as much as it will cost you to con-

the ascertainment of the value of the property used in the service has been fixed by legislative bodies dealing with rates, nor by the courts in determining the validity of rates, and from the nature of the subject no inflexible method can be fixed.³⁶ The property should be appraised at its *fair market value*, not what it would bring at a forced sale, but at what it is fairly worth to the seller, under conditions permitting a prudent and beneficial sale.³⁷

The property of a public service corporation must be considered as a single thing to which certain characteristics belong which affect its value and the property cannot be valued separately from its inherent characteristics.³⁸ But what is the value of a plant at the time of the fixing of rates cannot be determined by the mere addition of the separate values of its component parts, nor from the cost alone, nor from what it formerly might have been sold at, nor alone from what it might cost to replace.³⁹

struct a plant which will bring an adequate supply from the Tuolumne. Your right to regulate does not extend to value."

36. *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354.

37. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

38. *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

39. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299.

"The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, the probable earning capac-

ity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration and are to be given such weight as may be just and right in each case," as well as other matters. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

In estimating the value of gas mains and pipes, which were laid at a time when the streets were not paved, the additional cost in placing the pipes beneath the streets, if it should be done at the time of the fixing of the rates and since the pavement of the streets, cannot be considered. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299

Matters other than the mere value of the land and erections thereon, such as the *value of the franchise*,⁴⁰ the value of the plant as a *going concern*,⁴¹ a reasonable amount of working capital,⁴² etc.,⁴³ must also be considered and included. So the valuation of a plant for purposes of *taxation* may be considered in determining its value, especially where the valuation was sworn to by the officers of the company.⁴⁴ Likewise, the actual rates which have been charged by a public service company in the past are evidence of the value of the plant,

40. § 1755 *post*.

41. § 1756 *post*.

42. *Cumberland Telephone & Telegraph Co. v. Louisville*, 187 Fed. 637, 646.

Supplies on hand should be included in estimate of value of property. *Cumberland Telephone & Telegraph Co. v. Louisville*, 187 Fed. 637, 647.

43. "Among the proper matters to be considered are the original cost of construction; the amount expended in permanent improvements; the amount and market value of stock and bonds; the present, as compared with original, cost of construction; the probable earning capacity of the property under the particular rates prescribed by the ordinance for each of the years in question; the sums required to meet operating expenses; what it will cost to obtain water, equal in quantity and quality to the present supply, from the next most available source; the depreciation suffered by that portion of the plant which is worn by use or action of the elements, or shorn of its value by newer, cheaper, and more efficient appliances and machinery; the

fact that the plant has a franchise and is a going concern, with an established business and thousands of customers, whose buildings are connected with the distributing system; and appreciation in value since the various properties constituting the plant were acquired. To each of these factors just and proper weight must be given; and, finally, the result must be the reasonable and fair value of the plant as between the company and the public." *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 143.

Telephone rates may, in a large measure, be local questions to be determined upon factors, among which the most important may be (1) the cost of the plant; (2) the cost of operation and maintenance; (3) the amount of taxes and other dues exacted by the local government; and (4) the rapidity of deterioration due to climatic or other causes. *Cumberland Telephone & Telegraph Co. v. Memphis*, 183 Fed. 875.

44. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892.

provided the rates which have been charged have been reasonable.⁴⁵

On the other hand, nothing can be allowed for the promotion and organization of the company.⁴⁶ And if a water company voluntarily devotes to the mere catchment of water lands which are much more valuable for other purposes, it is unreasonable, in fixing rates, to appraise such lands for more than they are worth as watershed areas.⁴⁷ Furthermore, the *capitalization of income*, even at reasonable rates, cannot be adopted as a sufficient test of present value.⁴⁸

In some cases, it has been held that the receipts and charges of *different parts of a system* should be considered separately, as where a water company was supplying a municipality and also agricultural land outside the corporate limits, and it was held that in fixing reasonable water rates for the municipality the value of that part of the plant referable to the territory embraced in the municipality should be considered without taking into consideration losses to the company arising from the distribution of water to consumers outside of the city, and that the municipality was not required to adjust rates for water furnished to it and its inhabitants so as to compensate the company for any such losses.⁴⁹

§ 1751. Same—rates too low as to certain items or patrons.

It is immaterial that the rate is too low as to some customers,⁵⁰ and hence a rate is not unreasonable merely

45. Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

46. Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299.

47. Spring Valley Water Co. v. San Francisco, 192 Fed. 137, 160, 165 Fed. 667, 698, following same case (C. C.), 165 Fed. 667, 698.

48. Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

49. San Diego, L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804, aff'g on this point 74 Fed. 79.

50. Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 282.

because there would be a loss as to smaller consumers.⁵¹ The better rule seems to be that the company is not entitled to a reasonable profit upon each transaction but that the regulation of rates is valid, although it precludes a reasonable profit or any profit at all as to particular items of the business, where a fair return will result from the rates as a whole.

§ 1752. Cost of construction and betterments as fixing value.

Sometimes the present value is arrived at by ascertaining the original cost of construction and all betterments, and deducting therefrom their depreciation; but this method does not always prove to be fair and just. However, the cost of constructing the works and of betterments and improvements is always a matter to be taken into consideration in determining the value of the works,⁵² although not conclusive as to value,⁵³ inasmuch

51. *Lincoln Gas & Electric Light Co. v. Lincoln*, 182 Fed. 926, 929.

Rates too low in part. "It may be that the rates were so adjusted that certain consumers will receive water at prices for less than it is worth; it may be that in determining the value of complainant's property some elements were placed too high, others too low, and still others totally ignored; but if, on the whole, the result is reasonable, and complainant receives a just income, it certainly has no grievance and no cause of action. This court will only consider whether the rates as a whole, and the value of the property taken as a whole, are fair and reasonable." *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 682.

52. Actual cost as test. In determining what is a fair and rea-

sonable rate the actual cost is a primary consideration, but prior cost is not the only criterion of present value. *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

Fair rate of interest upon the money invested in the plant during construction, and before completion, is as large a part of the cost of construction, as is the money itself which is expended for materials and labor. *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

53. *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

"What a plant costs originally is not the measure of value that courts must look to to determine the validity or invalidity of rates." *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 197.

The question is not what the

as the works may have been built imprudently, or when prevailing prices were high so that actual cost in such respects may exceed present value,⁵⁴ or the works may have increased in value since their construction or acquisition. If the present value of the structure is greater than the cost, the public service company is entitled to the benefit of it, while if the present value is less than the cost, the company must lose it;⁵⁵ provided, however, that the increased valuation does not require a return so large as to be unreasonable and unjust to the public.⁵⁶

§ 1753. Cost of reproduction as test.

Cost of reproduction is admissible to show what is the present value, but is not conclusive.⁵⁷ If the cost of reproduction is estimated, to ascertain the value, a reasonable amount for *interest* on the capital invested in the

plant costs, "although such evidence is admissible as having a bearing. The question is: What is the value of the plant today? There must be a reasonable rate of interest or dividend allowed on the value of the plant." *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 196.

54. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

If there was extravagance and unnecessary waste in the construction, or, as is often the case, fictitious stocks and bonds issued, the proceeds of which did not go into the original construction, such method would prove unfair to the public. On the other hand, where the market price of the physical units or of the labor entering into the construction of the plant has advanced since its construction, the original cost may be much lower than the present value, and for that reason be to the owner

of the plant an unfair determination of its present value. *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354.

55. *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

56. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 143.

57. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

See *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354.

Cost of present reproduction is evidence of the strongest character of the present value of a structure. *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

Going concern value as item which must be added to cost of reproduction. § 1756 *post*.

properties of the plant during the period of construction should be allowed;⁵⁸ and of course a due allowance must be made for depreciation.⁵⁹

58. *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354.

59. Cost of reproduction is not a fair measure of value, unless a proper allowance is made for depreciation, because all constructive portions of the plant are subject to decay, and to be worn out or consumed by use. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Contra Costa Water Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. 668; *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 143.

"The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, stand-pipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages, with different expectations of life." *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

"Depreciation may be delayed, but it cannot be prevented. Ultimately every structure in complainant's plant will be worn out by use, wasted by action of the elements, broken by accident, abandoned in the development of the system, or displaced by newer and more efficient contrivances. In view of this fact, it was held in the 1908 case that complainant was entitled to an annual allowance to cover such loss. The highest courts have repeatedly declared this fact cannot be ignored in determining the value of property in rate cases. In *Knoxville Water Co. v. City of Knoxville*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371, and more recently in *Contra Costa Water Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. 668, the lower court found the present cost of reproducing the plant, but failed to take into account the fact that an old plant is worth less than a new one. In each, the result was a reversal. It is impossible to measure accurately such loss until it has matured. When a machine is worn out, we know its original value is gone; but while the machine is in use the amount of deterioration is largely a matter of opinion. Here the difficulties of the problem are increased by the fact that a very large portion of the most valuable construction, such as pipes, masonry, and concrete work, are concealed in the ground or under water. Counsel

§ 1754. Cost of next available substitutional system.

In fixing the value, the cost of the next available substitutional system is rejected as a criterion.⁶⁰ The ar-

for the city contend that no annual allowance for depreciation should be given, because it has been made good by current repairs and replacements, charged to operating expenses, and paid out of the water rates. On the other hand, counsel for the water company stoutly maintain that the structural portion of the plant can not be reproduced for its original cost, and that its reproductive cost should not be diminished by reason of depreciation. However, complainant insists that it is entitled to an annual allowance for depreciation, and defendants believe true value cannot be ascertained, except by subtracting depreciation from present cost of reproduction." *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 184.

60. "Even if permissible, a valuation of the plant, based on the estimated cost of the next available substitutional system, is at best problematical. There may be other equivalent substitutes which are cheaper. We must reckon, not only with the uncertainties of the estimate itself, with the relative serviceability and permanency of the substitute system, with the relative quantity and quality of water which it is capable of furnishing, but also with undiscovered and overlooked elements which may greatly affect the cost. There is, however, a still more serious objection to this method of valuation. To say the value of

the Spring Valley land and water rights for rate-fixing purposes is to be measured by the cost of the Tuolumne system is to say that the price of Spring Valley water should be fixed by comparison with the cost of bringing water from Hetch Hetchy. The same method was applied to railroad charges when rates were based on the cost of hauling freight by mule teams, that mode of transportation being the next most available substitute. The owner of private property sets the price at which others may buy or use it; he cannot be compelled to accept less; this is his right of contract; but when he devotes his property to public use, he must submit to the right of the public to regulate his compensation for such use down to what is just both to himself and to the public, and that compensation is to be based, not on the cost of the next available substitute, but on a fair, reasonable value of the property at the time it is used for public convenience. While the cost of a substitute system may be considered in finding the reasonable value of the Spring Valley plant, it cannot be a controlling element. Otherwise, by securing control of all available sources from which water can be brought to San Francisco, the company might force a greatly exaggerated value upon its plant for rate-fixing purposes, and thus absolutely defeat the very object of government regulation." *Spring*

gument to the contrary is well set forth in a very recent case where the contention of counsel appears verbatim, and it is so clearly stated it is inserted in full in the note below.⁶¹

Valley Water Co. v. San Francisco, 165 Fed. 667.

61. "We submit that this announces the principle that appreciation in total value, due to the monopolistic feature growing out of the ownership of all available sources, shall not be allowed, because the service is impressed with a public use, and that this item of valuation, inseparable from the whole, will be disregarded. We have previously demonstrated the error of this view. The property may be subject to rights in the public, but it continues to be a subject of private ownership. There has been an exercise of supervisory police power only—no element of value has been taken by the public, and subtracted from corporate assets, and, when valuation is at issue, the element of monopoly, if it exists, has as much value in the case of a public as in the case of a private corporation. The very fact that 'water is a necessity of life' proves the value of its control. It must be given to the public, but that in no way lessens its value. The fact that all surrounding sources are in the hands of one corporation is an element of value accruing to the corporation, and not to the public. In other words, regulation extends only to use and income. It neither attempts to, nor does it in fact, lessen value. We believe that the court has failed to make this distinction.* * * There are no

lands and no water rights within fifty miles of the city which might serve to form even the nucleus of a waterworks to supply San Francisco with water. Nearly all such properties are owned by complainant, and what are not owned by it are in the ownership of other companies, actually serving communities with water. * * * These circumstances, which are accurately stated from the city's own showing here, make it impossible to apply to the ascertainment of value of our real estate, outside of San Francisco, the method of valuation which would obtain if other properties existed in the same localities, and were available for the purposes for which ours are used. * * * The best guide for determining value is the necessary cost of acquiring similar property, capable of the same service, or, what we conceive to be the same thing, the investment that will be required to enable one to render an equivalent service to that rendered by this company. * * * What we do maintain is that value is measured by the cost of the most available adequate substitute. * * * If water could be obtained of equal quality and quantity from other sources, the cheapest possibility would be the limit of value. * * * The showing made is that San Francisco must have water. There is no intimation that she can get it cheaper than from the Tou-lumne. The unqualified showing

§ 1755. Franchise as item of value.

The general rule is that in determining the value of the property of a public service company, the value of its franchises—and by this is meant both the franchise to act as a corporation and the franchise to use the streets—must be considered as an item of value.⁶² But

is that the Tuolumne is the most available system. * * * We do not say that the value of our plant is the cost of the Tuolumne system simply because it is the Tuolumne system, but that it is the value of the Tuolumne system because the Tuolumne system has been shown to be the cheapest and the most available. * * * I have never contended, and I do not now contend, that your honor is compelled to take as the measure of value of this property what it would cost to bring a supply of water from the Tuolumne. I do claim, however, that one of the circumstances which you may and should take into consideration is what it would cost to render the same service to San Francisco that was being rendered in the year 1903 by complainant." Argument of counsel as set forth in *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 152.

62. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, aff'g 157 Fed. 849; *Consolidated Gas Co. v. Mayer*, 146 Fed. 150; *Spring Valley Waterworks Co. v. San Francisco*, 124 Fed. 574.

Franchise as item of value.

"But, again, it is not only a structure, and a structure being used,

but it is a structure built, maintained, and used by authority expressly granted to the company by the state; that is, it was built and is maintained and used by virtue of a franchise or franchises. The structure is lawfully in existence, and may rightfully continue to be used as a going concern structure, until the state determines otherwise. This also makes the structure in use more valuable. It is the difference between a structure existing by sufferance and one maintained by right. The franchise, however, is a limited one. It is not perpetual. It may be recalled by the state. It is not exclusive. Other and competing franchises may be granted. It is not absolute. The right may be limited or qualified by express enactment. One franchise is limited in the nature of things, and that is the franchise to charge tolls or rates for water furnished. It cannot charge arbitrary rates beyond the power of revision. It may not, as we have seen, under some circumstances charge rates even fairly remunerative upon the investment. It can only charge reasonable rates in any event. A franchise may exist entirely independent of the structure. There may be franchises when there is no structure. This water company may have franchises within this

if the public service company wishes its franchise and going business to be treated as things of definite value, it must establish that value.⁶³

The value of a franchise means the value of the property as affected by the franchise.⁶⁴ It depends upon the net income of the plant at reasonable rates, and in determining the value it is proper to take into consideration whether they are exclusive, their duration, and whether the charter under which the company operates is subject to repeal by the legislature. But past faithfulness or unfaithfulness in the exercise of a franchise does not bear any such relation to the present value of the franchise as to make it a proper matter for consideration.⁶⁵ In some decisions, however, it is held that

district which are not connected with the use of the structure which the district has taken. Of that we have no knowledge. But so far as the structure is maintained and used by virtue of a franchise, that fact may add to the value of the structure. One would be likely to pay more for it as a structure if it could be rightfully used than he would if it could not." *Brunswick & T. Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

63. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 693.

64. *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

65. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

How value of franchise determined. As to ascertaining the value of the franchise and going business, "very little has been settled by the courts except that each case must depend on its own

special circumstances." *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 693.

"When the prevailing rate of interest is seven per cent, a franchise which will enable its owner to collect twenty per cent net on his investment is valuable. But, on the other hand, when the prevailing rate of interest is twenty per cent, a franchise under which the owner can realize but seven per cent, has very little value. 'It is obvious * * * that either for the purpose of condemnation or regulation the value of a franchise depends wholly upon what is earned under it. * * * The best way of finding out how much a franchise separately considered is worth is to ascertain what those persons desirous of continuing operations under it consider it to be worth.'" *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 694.

"If, when the franchise was acquired, or at any subsequent time, the city entered into a contract

the value of a franchise, where it is granted by the city without compensation, cannot be allowed.⁶⁶ So it has been held that a franchise, in order to be valued as a separate part of a property for the purpose of fixing rates, must be shown to have a *distinct productive efficiency*, by earning profits over and above a fair return for the use of the physical properties composing the company's plant, and that franchises purchased from the predecessors of a company for which the purchaser issues capital stock cannot be independently valued where

with the company providing for definite rates of income, and this agreement is now binding, and gives a present value to the franchise; or if, for a number of years, the aggregate market value of the stock and bonds of the company has exceeded the actual value of the physical plant; or if, as in *Consolidated Gas Co. v. New York (C. C.)*, 157 Fed. 849, 878, the franchise was capitalized for some fixed sum, say \$100,000, the actual cash invested was \$100,000, and \$200,000 worth of stock was issued, which has maintained itself at par and paid satisfactory dividends on the whole amount of stock for a number of years—it would be very easy to determine whether the franchise has value, and what that value is." *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 695.

66. *Lincoln Gas & Electric Light Co. v. Lincoln*, 182 Fed. 926, 928, explaining *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, as not in conflict.

Where no direct proof is given as to value of franchise and nothing was paid for it, it is properly disregarded as an item of value.

Cumberland Telephone & Telegraph Co. v. Louisville, 187 Fed. 637, 647.

Contra. "The fact that a franchise has been acquired from the municipality by gift or without adequate compensation may evidence lack of foresight, or something worse, on the part of the municipal government, but it can have no effect on the present problem. The franchise, however, acquired, must be considered in determining reasonable rates for the use of property devoted to public service, otherwise it would be possible to practically destroy or confiscate its value. When property used under a franchise is condemned, the whole property is taken. The franchise is paid for as well as the physical property. The idea that a valuable franchise could be taken in condemnation proceedings, without compensation, would not be tolerated for an instant; and to permit such a franchise to be taken without consideration, indirectly, by means of rate regulation, is equally obnoxious to the federal constitution." *Spring Valley W. Co. v. San Francisco*, 165 Fed. 667, 693.

the term for which the franchises were granted have long since expired.⁶⁷ However, in the recent case involving the regulation of the rates of the *Consolidation Gas Company of New York City*, it was held that inasmuch as the total sum for which that gas company issued its stock on consolidating other gas companies, was pursuant to a statute recognizing the valuation of the franchise of the constituent gas companies as a certain sum, such valuation should be accepted as conclusive as to the value of the franchise at the time of consolidation, but that the increase in the assets and in the supply of gas since the consolidation did not authorize a proportional increase of the value of the franchise.⁶⁸

67. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 170.

"The right to collect rates for the use of water supplied to any city and county, or the inhabitants thereof, is declared by the Constitution of California to be a franchise, and by the same instrument a franchise is declared to be property. In the 1908 case it was held that complainant's franchise should be included among the properties on which complainant is entitled to a return, at whatever reasonable value it is shown to have. Obviously complainant's plant is much more valuable with than without a right to collect water rates, yet, if it is to be regarded as more than a characteristic of the property, it should somewhere and somehow manifest a distinct productive efficiency, by earning profits above and in addition to what is but a fair return for the use of the physical properties composing the plant. This, however, has not been shown." *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 168.

68. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

In the *Willcox Case*, *supra*, seven gas companies operating in the city of New York, owning exclusive franchises, were permitted to consolidate by an act of the legislature, which contained a proviso to the effect that the capital of the new consolidated company should not exceed the fair aggregate value of the property, franchise, and rights of the several companies. The total value of the seven franchises was fixed at \$7,781,000. Stock of the new company was issued to cover that value. From the time of their creation to the date of consolidation "these companies had been free from legislation upon the amount of the rates to be charged for gas;" they had paid enormous dividends; several of the companies had averaged from date of organization dividends of over sixteen per cent per annum; and a statute prohibiting the laying of any more gas pipe in the streets of the city for twenty years further

The assessed value for taxation of the franchises of a gas company does not fix their value, where such taxes have been treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount could be arrived at, applicable to dividends.⁶⁹

§ 1756. Value as "going concern."

In determining the value of the plant of a public service company, whether as a basis for regulating rates,⁷⁰

enhanced the value of their property. The lower court fixed the value of the franchise at the time the suit was brought at \$20,000,000, on the theory that the value of the franchise and the value of the tangible property had advanced with equal pace. The supreme court, in declining to allow a valuation exceeded that fixed at the date of consolidation, said: "Because the amount of gas supplied has increased to the extent stated, and the other and tangible property of the corporation has increased so largely in value, is not, as it seems to us, any reason for attributing a like proportional increase in the value of the franchises. Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchises. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas; but that immunity for the future was, of course, uncertain, and the moment it ceased, and the legislature reduced the earnings to a

reasonable sum, the great value of the franchises would be at once and unfavorably affected, but how much so it is not possible for us now to see. The value would most certainly not increase." The court concludes its discussion of this subject with the following words: "What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated."

69. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

The value of a franchise fixed by the taxing officers is of little worth in determining the value of the franchise. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 696.

70. *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354; *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 197; *Spring Valley Water-*

as the basis of a sale of the plant to the municipality,⁷¹ or in condemnation proceedings by a municipality to ac-

works v. San Francisco, 124 Fed. 574.

But see Cedar Rapids Water Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081.

Value as going concern included. One of the leading cases so holding is the National Water Works Co. v. Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827, 27 U. S. App. 165. In that case it was said in the opinion by Mr. Justice Brewer: "Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city, not only with a capacity to earn, but

actually earning, makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction. * * * The city, by this purchase, steps into possession of a waterworks plant, not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets, and a multitude of private buildings. It steps into a possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor, not merely the value of a system which might be made to earn, but that of a system which does earn."

In Iowa, however, it is held that the fact that a plant is in successful operation constitutes an element of value but in so far as affected by income the computation necessarily must be based on reasonable charges, and outside thereof the element of value designated a "going concern" is but another name for "good will," which is not to be taken into account in a case where the company is granted a monopoly. Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299.

71. Norwich Gas & E. Co. v. Norwich, 76 Conn. 565, 57 Atl. 746; Omaha v. Omaha Water Co., 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991.

quire the plant of a public service company,⁷² the general rule is that the value of the plant as a *going concern* is to be taken into consideration so as to enhance the mere value of the land and structures. The value of a business as a "going concern" means the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return.⁷³ But in many instances it is apparently impossible to establish a *separate and distinct valuation for going business*.⁷⁴ It has been contended that the value of a going concern as a separate element is the difference between the income which the company should have received, and the amount which it did actually collect from rates prior to the time when the plant became a paying concern, and that the amount which should have been

72. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

73. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

74. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 167, holding that the burden is on the company, if it wishes an independent valuation, to produce the evidence on which it can be based.

Value as going concern as separate item. "We speak sometimes of a going concern value as if it is or could be separate and distinct from structure value—so much for structure and so much for going concern. But this is not an accurate statement. The going concern part of it has no existence, except as a characteristic of the structure. If no structures,

no going concern. If a structure in use, it is a structure whose value is affected by the fact that it is in use. There is only one value. It is the value of the structure as being used. That is all there is to it." Per Judge Savage in *Brunswick Water District v. Maine Water Co.*, 99 Me. 371, 376, 59 Atl. 537.

But in *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354, going concern value was estimated at twenty per cent of the reproductive value.

In *Knoxville v. Knoxville Water Co.*, 219 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371, the lower court added to the appraisement of the physical properties the sum of six million dollars for going concern value and the federal supreme court assumed, without deciding, that this item was properly added.

received is equal to the amount of interest which would have been earned prior to the time when the plant became a paying concern, by the same money at contemporary current rates, but such contention has been said to be "open to the objection that the deficiency of revenue may have been due to extravagant or wasteful management. The company may have purchased a plant larger and more expensive than necessary; current rates of interest may have been abnormally high; many causes, which have absolutely no relation to the value of the company's business now as a going concern, may have increased or diminished the deficiency in revenue. Furthermore, if it be conceded that early deficiency of revenue is the proper measure of value for the present going business, then it follows that, the greater the deficiency and the more unprofitable the business, the greater the present value of the going concern; and, if the business had yielded large profits from its very inception, the going business to-day would be worthless."⁷⁵

§ 1757. Good will as item of value.

Generally, *good will*, independent of the item of value as a *going concern*, should not be considered as a distinct element of value,⁷⁶ and especially is this true where the company has in fact a monopoly.⁷⁷

75. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 166, 165 Fed. 657, 696.

In *Contra Costa Water Co. v. Oakland*, 159 Cal. 323, 113 Pac. 668, 676, it was contended that the valuation of "going business" is measured by deficiencies of income prior to the time the business was brought to a paying basis. The supreme court was of the opinion that early losses "had no relation to the question of present value, and offered no basis for any valuation." And finally they dismissed the subject with

these words: "In what we have said we do not desire to be considered as deciding that in the matter of fixing rates anything at all should be added to the value on account of the element of going concern."

76. *Contra Costa Water Co. v. Oakland*, 159 Cal. 323, 113 Pac. 668; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Ia. 426, 120 N. W. 996, 138 Am. St. Rep. 299.

77. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; *Willcox v. Consol-*

§ 1758. Deducting for depreciation.

As a general rule, an annual charge for depreciation in value of the plant by use is proper.⁷⁸ So if the value of the property is estimated in part by figuring the cost of construction or the cost of reproduction,⁷⁹ there must ordinarily be subtracted from such figures a substantial allowance for depreciation.⁸⁰ So an amount should be allowed for depreciation notwithstanding the plant has been kept in a good state of preservation, and needed

idated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

"Good will rests on the probability that customers as a matter of personal choice will continue to trade where they have been doing business. Here there is no such choice. They must take water from the Spring Valley Water Company or go without." *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 168.

78. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299; *Danvers v. Commonwealth*, 184 Mass. 502, 69 N. E. 320; *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, *aff'd* without opinion in 71 N. J. Eq. 390, 71 Atl. 1134; *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354.

But see *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Ia. 234, 91 N. W. 1081.

Wyman, *Public Service Corporations*, § 1166 *et seq.*

Depreciation fund as part of capital, § 1750 *ante*.

Depreciation. There should be deducted from the earnings sufficient to make good the deprecia-

tion of the plant and replace the deteriorated portions thereof when they become incapable of repair. *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354.

Telephone plant. It must be conceded that a wise and proper management of such a public utility as a telephone system requires and demands that a liberal sum should always be reserved from the earnings, whatever such funds may be designated, in order to keep the plant in a high degree of efficiency at all times and to provide for emergencies, but the company cannot deduct from its yearly earning five per cent of the total value of its property as a depreciation fund independent of operating expenses for repairs, etc., where the fund has been maintained for two years without any item of expense being incurred against it. *Home Telephone Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547.

79. §§ 1752, 1753 *ante*.

80. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 703.

repairs, etc., have been fully made and chiefly charged to expense account.⁸¹ However, no fixed rule can be laid down to govern the decision of what amount shall be allowed annually for depreciation of any property,⁸² and so far as deduction of depreciation from income is concerned it must be provided for from year to year out of annual earnings and cannot be ignored for a long period and then capitalized.⁸³ In Califor-

81. *Lincoln Gas & Electric Light Co. v. Lincoln*, 182 Fed. 926.

82. "Just what amount should be allowed annually for depreciation of any property is difficult to determine accurately. It can only be approximated; and in so doing many things must enter into consideration, such as the class and character of the property, its condition when placed in the plant, the location, the usage to which it is subjected, and, where electrical properties are involved, another element must be considered. The last decade has witnessed great progress in electrical sciences and appliances, and constant improvement is being made in electrical machinery and equipment of all kinds. Telephone instruments and equipments are no exception to this rule. Equipments that at any given time are regarded as adequate and the most modern are in a short time, because of new inventions and improvements, inadequate and obsolete, and must be discarded before they are worn out. This loss is in the nature of depreciation, and is usually classed as such. *Dodgeville v. Dodgeville Electric Light & Power Co.*, 2 Wis. Ry. Com. Rep. 392. In the foregoing case, the amount of an-

nual depreciation in an electric light plant was involved, and held to be five per cent of the value of the property. In the opinion, it is said that the depreciation will vary from five to ten per cent, depending upon the circumstances of each case. We think, under the evidence in this case, that seven per cent of the reproductive value of the physical property is fair and sufficient to allow for annual depreciation, which amounts to the sum of \$6,626.45. In so finding, we fix no arbitrary rate as amount to be allowed for depreciation in all cases wherein are involved telephone properties. The amount allowed in each case must, in a large measure, be determined by the facts therein." *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354.

83. "A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its

nia, however, depreciation is not allowed as a separate item.⁸⁴

§ 1759. Value of property not used.

The value of property of the public service company which is wholly unnecessary or not used, or has been abandoned, cannot be considered.⁸⁵ Thus, in determin-

property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation, at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regula-

tion of its prices come under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past." *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

Wyman, Public Service Corporations, § 1170.

84. *Redlands, L. & C. Domestic Water Co. v. Redlands*, 121 Cal. 312, 53 Pac. 791, following *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

85. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299.

Property not useful. The only property which can be valued is that used at the time of the inquiry and useful for supply purposes. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 142.

In *Consolidated Gas Co. v. New York*, 157 Fed. 849, 857, Judge Hough excluded from the valuation the present worth of leased, vacant, and unimproved lands to the amount or more than \$2,000,000, because they were not then in use.

"The value of property is the

ing the amount of capital invested by the company, amounts expended or investments made by the company in *experiments*, which have resulted in nothing of value, cannot be considered any more than other unprofitable investments.⁸⁶ However, if an expenditure of money for a part of the system seems wise at the time it is made but after a change in the system the part does not become as important as under the old system, it has been held that the cost of such part of the plant is nevertheless capital entitled to a full return, where it was a proper purchase under the circumstances.⁸⁷

A public service *may*, and it is its duty to do so, look ahead and provide for future needs, to a reasonable extent, and hence the value of property reasonably acquired for necessary use in the near future should be considered.⁸⁸ But "while the company should be in ad-

value of its uses. If but half complainant's land is used, a return on that half only should be exacted. The value of that half would be the reasonable value of the property in use. If complainant's land is susceptible of two equally advantageous uses, each of which may be exercised without detriment to the other, and only one of them is taken for the public, half the value of the property again would be the reasonable value of the property in use. When watershed lands are used for grain raising, under proper restrictions, neither use materially interferes with the other. So, also, lands may be employed at the same time both for water production and water storage. Neither use excludes the other." *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 158.

86. *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829.

87. *Wilkes Barre v. Spring Brook Water Co.*, 4 Lack. (Pa.) Legal News, 367, where cost of filtration plant was held to be capital, although upon reorganization of the system one source which formerly required an expensive filtration plant was assigned exclusively to manufacturing purposes in which filtering was unnecessary.

88. **Property needed for future use.** "These considerations lead to the conclusion that the water company when it starts with new works, or a large addition to the original supply, is entitled to an income therefrom somewhat greater than what is due to the cost of work sufficient merely to meet the present demands. I say 'somewhat greater' for I do not mean to be understood as holding that capitalists ought to expect an immediate compensatory income from an enterprise of this character. But on

vance of the present demand, and provide for emergencies, for growing population, for unusual droughts, and for extraordinary conflagrations, it should not be too far in advance. If property is to be included in a valuation for rate-fixing purposes, it must be shown to be either presently useful, or to be necessary for wants which are near at hand. If the rule were otherwise, the public might be called on to bear the burden of the company's investments, in addition to paying a reasonable price for the company's service. The courts are always open. Such lands can always be condemned, and reservoirs constructed and connected with the system, within a reasonably limited time before they are needed."⁸⁹

the other hand it would be manifestly unjust to expect them to invest their money in a plant necessarily larger than present demands require and take as an income therefor such a sum as would satisfy an investment sufficient to meet present demands." Per Vice-Chancellor Pitney in *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, 479, aff'd without opinion in 71 N. J. Eq. 390, 71 Atl. 1134.

In *San Diego L. & T. Co. v. National City*, 174 U. S. 739, 757, 19 Sup. Ct. 804, 811, 43 L. Ed. 1154, it is said that a fair return to which the owner of such property is entitled cannot always be based — "upon the total amount invested, because some portion of that which is acquired by the investment may be neither *necessary nor presently useful* for the public service." But the fair return is to be based upon the fair present value of that which is used for the public benefit, *having due regard always to the reasonable value.*"

89. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 159.

Mr. Justice Holmes says, in *San Diego L. & T. Co. v. Jasper*, 189 U. S. 439, 446, 23 Sup. Ct. 571, 574, 47 L. Ed. 892: "If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not yet have the customers contemplated, neither justice nor the Constitution requires that say two-thirds of the contemplated number should pay a full return."

Waterworks. "The average daily consumption is about 33,500,000 gallons; the daily capacity of complainant's plant is 35,000,000 gallons; but it is alleged that with additional dams and aqueducts complainant's plant will be capable of supplying San Francisco with more than 110,000,000 gallons per day. In other words, the plant is sufficient, with reasonable development, to supply the needs of San Francisco when it has a population of 2,000,000. The company has looked ahead for 50 years; it has invested wisely

§ 1760. Effect of reduction of rates on amount of future business as element.

In the business of most public service corporations an increase in business results in a decrease in the average

and judiciously; it has a great property; but it does not necessarily follow that the water rates in question are confiscatory because they fail to yield an income of 7, or 6, or even 5 per cent on the full value of this property." *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 155.

In *Long Branch Com. v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, 480, a much larger reservoir site was provided by the company than was or would be necessary for many years to come. The original plans provided for a very large reservoir, including a high dam; but in carrying out the plans a lower dam was adopted, and but one-third to one-half the land was covered with water. The court deducted from the total value of the land about one-third. A dam was constructed at a cost of \$89,500, of sufficient width to sustain one of two or three times its height. The court deducted \$30,000 for excessive cost of the dam. It appeared also that a 36-inch main was used, when a 30-inch main would have been sufficient to perform the service required. This main, 8 miles in length, cost \$300,000. The court deducted \$75,000.

In *Brunswick & T. Water District v. Maine Water Co.*, 99 Me. 371, 376, 59 Atl. 537, 539, Mr. Justice Savage uses the following illustration;

"Suppose that a 500 horse power engine was used for pumping when a 100 horse power engine would do as well. As property to be fairly valued, the larger engine might be more valuable than the smaller one, yet it could not be said that it would be reasonable to compel the public to pay rates based upon the value of the unnecessarily expensive engine."

Gas. "Lots * * * may be required some time, but no man can determine the contingencies of the future, and it will not do to burden the patrons of today in order to provide for possible needs of those of five or ten years hence, at least when this is said not to be necessary in order to provide for equal facilities when demanded." *Judge Ladd in Cedar Rapids Gas-light Co. v. Cedar Rapids*, 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299.

Railroads. In *Southern Pacific Co. v. Bartine*, 170 Fed. 725, 767, the court declared:

"If a railroad is built into a new and sparsely settled territory, with a view of serving a large future population and developing business, the Constitution does not require the few people and the small business of the present time to pay rates which will yield an income equal to the full return to be gathered when the country is populated and business developed to the full capacity of the road."

cost, and it has been held that where a municipality reduces the rates of a public service company, the fact that such reduction usually results in an increase in business should be taken into consideration,⁹⁰ but in some lines of business the increase in business means an increase in the average cost, as for example in the telephone business.⁹¹

§ 1761. Capitalization and bonded indebtedness.

The capitalization or bonded indebtedness of a public service company ordinarily is no test of the value of the

90. Increase in business from reduction in rates. Of course, there is always a point below which a rate could not be reduced, and, at the same time, permit the proper return on the value of the property, but it is equally true that *a reduction in rates will not always reduce the net earnings*, but on the contrary, may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are, from the evidence, so uncertain, and where the margin between possible confiscation and valid regulation is so narrow, we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient." *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 199, 53 L. Ed. 382.

"The inquiry in cases of this character is not alone what has complainant heretofore earned,

but it is what will be the effect of the ordinance reducing the rate upon the future net earnings of the company, and it devolves upon complainant to show not that the past rates have not produced a reasonable return, but that the rate prescribed by the ordinance will not in the future produce a reasonable return." *Lincoln Gas & Electric Light Co. v. Lincoln*, 182 Fed. 926, 929.

"The point is urged from time to time that the reduction ordered in existing rates should not be questioned at the outset, but the company should be compelled to give the new rates a fair trial. It may turn out that there will be no reduction in earnings after all, since the increased business consequent upon the lower rate might more than make good that loss. Although this has much force from a theoretical point of view, it must obviously be acted upon in an actual case with the greatest caution." *Wyman, Public Service Corporations*, § 1129.

91. *Louisiana R. R. Comm. v. Cumberland Tel. Co.*, 212 U. S. 414, 53 L. Ed. 577, 29 Sup. Ct. 357.

property.⁹² "So notorious is it that outstanding securities may have no relation to actual values, that their par value is hardly regarded by any one today."⁹³ *A fortiori*, the capitalization of the company should not have an influence in determining the valuation of property where it is considerably in excess of any valuation testified to by any witness, or which can be arrived at by any process of reason as where all, or substantially all, the preferred and common stock was issued to contractors for the construction of the plant, and the nominal amount of the stock issued was greatly in excess of the true value of the property furnished by the contract since "bonds and preferred and common stock issued under such conditions afford neither measure of, nor guide to, the value of the property."⁹⁴ So the amount of *mortgage bonds* issued on the property is no reliable guide as to the true value of the investment.⁹⁵

The market *price* of the capital stock of the company is entitled to little, if any, consideration.⁹⁶ The aggre-

92. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

93. *Wyman*, Public Service Corporations, § 1092.

"The value of stocks and bonds is no test, for obvious reasons, and mere theorists only, at the present day, insist upon such as the valuation." Per Judge McPherson, in *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 197.

94. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

The amount of outstanding stock and bonds of the company should not be considered where they are several times the cost or present value of the property. *Lincoln Gas & Electric Light Co. v. Lincoln*, 182 Fed. 926.

95. *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

96. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

Market value of stocks. But it is said: "True, the market quotation of stocks and bonds is not always a correct index of value; such prices often go up and down without much regard to the intrinsic worth of the property represented, yet it seems to be clear, under the authorities, that, in order to ascertain the fair value of the property being used by the company for the public 'the amount and market value of its bonds and stock' are 'matters for consideration, and are to be given such weight as may be just and right.'" *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 699.

gate value of bonds and issued capital stock of the company at present market prices is not a reliable index of the value of the plant, because such prices often rise and fall from the operation of causes which have little or nothing to do with the real intrinsic value of the property, and the bonded or other indebtedness of the company may exceed the actual value of its property.⁹⁷

If a public service corporation accumulates a *depreciation fund* from its receipts, no part thereof can be added to the capital on which the company is entitled to a fair return from rates established by the state or municipality.⁹⁸

§ 1762. What profit deemed reasonable.

What rate of return upon the investment will be considered reasonable or unreasonable by the courts is necessarily involved, at least to some extent, in nearly every case wherein rates are attacked as confiscatory.⁹⁹ But no court of last resort has undertaken to say what per cent on the value an investment in a public service company should yield its owners in all cases. This is *a question of fact to be determined in the light of the evidence in each particular case.*¹ The prevailing rate

97. *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137, 143.

98. *Railroad Commission v. Cumberland Telephone & Telegraph Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 377.

99. *Home Telephone Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547.

1. **Rate of Income.** "It will not do for the courts to say that the income, above all expenses, including taxes, on property devoted to the public service, must necessarily much exceed the rate of five percent to avoid the charge of being confiscatory." *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144

Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299.

No fixed and unvarying rule has been or can be announced upon the subject, but each case must of necessity depend upon the surrounding facts and circumstances. *Home Telephone Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547.

Temporary rise in interest rates. Where conditions, which have caused interest rates to rise, are probably temporary, such rise does not justify a higher rate of income. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 684.

of interest on money loaned, the hazard of the business, the life of the property used, the reliance upon the constancy of a return, which depends largely upon the existence or probability of competition, are all proper matters for consideration, as well as many others.²

So the reasonableness of the rate may be affected by the *degree of risk* to which the original enterprise was naturally subjected, *i. e.*, such a risk as may have been justly contemplated by those who made the original investment;³ but if allowance be sought on account of this

Matters to be considered in determining rate of interest. "The waterworks company claims that certain other specific things, by name, should be allowed, either by way of enhancing the value of the property, or that which would be the same thing, by calling them hazards, and allowing such rates as would produce a reasonable revenue thereon. One of these is the fact that rates are subject, at any time, to change by the city council, subject to local prejudice, and without experience or training with reference thereto; the hazard that the city, at any time, can force an involuntary sale by proceedings of condemnation; the fact that the franchise cannot extend beyond 25 years, with no assurance that it will be renewed; another competing plant may be allowed; the city may establish a competing plant; and other minor hazards. There can be no question but that some of these matters should be given consideration. The greater the hazard, the higher the rate of interest. A farmer who observes his contracts and pays his debts can get a loan at a low rate of interest by a mortgage on his farm. A man whose

credit is not good, and who can only tender security of a doubtful character, must pay a high rate of interest. This has always been so, and always will remain so. The fact that the company's charter may be revoked by a forced sale, or that it may expire at the end of 25 years, and that it will be continuously kept in litigation, are all hazards, which in other business enterprises would increase the rate of interest that the borrower must pay, and justly entitles it to a higher rate of earnings than if its earnings were certain and fixed, and were in perpetuity or of long duration. But it is well-nigh impossible to point out just what particular hazard, and to what extent such a particular hazard, will increase the rate of interest, or will entitle it to a higher rate of earnings." Per Judge McPherson in *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 198.

2. *Home Telephone Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547.

3. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; *Brunswick & T. W. Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

element of original risk, it seems permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this risk.⁴

An equivalent to the *prevailing rate of interest* may be a reasonable return and again it may not, depending largely on the hazards or difficulties in the particular place.⁵ "There is no particular rate of compensation which must, in all cases and in all parts of the country, be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted, and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which, in some cases, might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less

4. Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl.-6, 60 L. R. A. 856.

5. Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537.

But in *Brymer v. Butler Water Company*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, it is said: "By what rule is the court to determine what is reasonable and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the cost of maintenance and operation must first be provided for; then the interests of the owners of the property are to

be considered. They are entitled to a rate of return if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges, and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property cannot be said to be unreasonable."

The current rate of return to capital, it is submitted, is the true basis of fixing percentage. *Wyman, Public Service Corporations*, § 1133.

risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return, without legislative interference, than can be obtained from an investment in government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated."⁶

It has been said that dividends upon stock, where there are outstanding bonds, ought to be allowed at a somewhat larger amount than the interest upon the bonds.⁷

In particular cases,⁸ rates yielding six,⁹ five and one-

6. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 198, 53 L. Ed. 382.

7. *New Memphis Gaslight Co. v. New Memphis*, 72 Fed. 952.

8. In Arkansas, where the legal rate of interest is six percent and the contractual rate is limited to ten percent, a rate is not confiscatory where it enables the company to pay dividends of from six to ten percent according to the valuation of the electric light plant. *Arkadelphia Electric Light Co. v. Arkadelphia*, 99 Ark. 178, 137 S. W. 1093.

Iowa. Rate between four and two-fifths and five and one-half percent on estimated capital of water company held not confiscatory. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Ia. 234, 91 N. W. 1081.

New Jersey. Water company "ought to get at the start a moderate rate of interest, say five per-

cent, on their investment after paying all expenses of operation and maintenance and a moderate allowance for depreciation in value." Per Vice-Chancellor Pitney in *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, *aff'd* without opinion in 71 N. J. Eq. 390, 71 Atl. 1134.

Telephone company held entitled to set aside from gross earnings every year a sum equal to seven per cent of the value of its property exclusive of real estate and cash capital and supplies on hand, to cover depreciation and keep the property in working order, and then to earn a net revenue equal to seven percent on all its property. *Cumberland Telephone & Telegraph Co. v. Louisville*, 187 Fed. 637, 658.

9. In the consolidated gas company case the court held that a rate which would permit a re-

half,¹⁰ five,¹¹ and even less than five per cent,¹² have been held reasonable.

On the other hand, it has been held that, considering the fair value of money in a state like Iowa, and considering the hazards and liabilities, some of them certain and others contingent, and some of them destructive, an eight per cent return on the plant of a waterworks company is moderate.¹³ And rates yielding less than four,¹⁴

turn of six percent would be sufficient to avoid charge of confiscation, regard being had to the nature of the business, the fact of monopoly, the population of New York City, and the fact that six per cent was the return ordinarily sought and obtained on investments of that degree of safety in New York City. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

10. In Oklahoma, the legal rate of interest is six percent but by contract a rate may be agreed upon not to exceed ten per cent, and it is held in that state that rates of a telephone company yielding five and one half percent per annum are valid. *Pioneer Telephone & Telegraph Co. v. Westenhaver* (Okla., 1911), 118 Pac. 354.

11. *Lincoln Gas & Electric Light Co. v. Lincoln*, 182 Fed. 926; *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 685.

12. In California, net return of four and one half percent upon property devoted to a public use not regarded as confiscatory in a particular case, but such a return may be confiscatory in some cases. *Contra Costa Water Co. v. Oakland*, 159 Cal. 323, 113 Pac. 668.

Idaho. "Now 5 percent income on the entire investment was probably reasonable and fair when Pocatello was a mere village and the defendant had a comparatively small amount of money invested. But as the village has grown into a city of some 10,000 or more inhabitants, and the defendant has invested several times the original amount of money in extending and enlarging his water system, 5 per cent on so large an investment might be excessive. The amount of the investment, the conditions of the times, the extent of the use or the number of consumers, the permanence and security of the investment, are all elements that would enter into the question of what would constitute a reasonable income. It is notorious that men who have money to loan or invest expect and demand a higher rate of interest on a small investment than they do on a large investment; the security being sufficient and adequate in each instance." *Pocatello v. Murray* (Idaho, 1912), 120 Pac. 812.

13. *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 199, per Judge McPherson.

14. Water rates yielding less than four per cent on the present

five,¹⁵ or six ¹⁶ per cent have been held unreasonable.

13. REMEDIES.

§ 1763. General rules.

In determining the right to sue in relation to the granting or exercise of a franchise, it is necessary to keep in mind the difference between the right of a mere individual to sue, and the right of an abutting owner to sue. Individuals, merely as such, are not ordinarily entitled to sue to enjoin the use of streets by a company having no franchise or license to use the streets.¹⁷ Thus, it has been held that a private individual cannot maintain a bill in equity to enjoin a public service company from proceeding to lay tracks on a street in a city, where the basis of the relief sought is the invalidity of the franchise purported to be granted, since in effect a *quo warranto* to challenge the validity of the charter itself.¹⁸ And a private citizen cannot sue in equity to compel the *specific performance* of a contract between the municipality and a street car company as to rates of fare.¹⁹

value of the property held unreasonably low, unjust, and confiscatory. Spring Valley Waterworks v. San Francisco, 192 Fed. 137, 192.

15. 4.03 per cent upon the present value of the property of a water company in use is not reasonable compensation. Spring Valley Water Co. v. San Francisco, 165 Fed. 667, 705.

So an ordinance requiring a street railway company, which is charging five cent fare, to sell six tickets for twenty five cents, is unreasonable, where the current rate of interest is six per cent, and the road is earning less than four and one half percent on its investment and is paying five percent interest on its bonds. Milwaukee Electric Ry. & Light Co. v. Milwaukee, 87 Fed. 577.

16. Home Telephone Co. v. Carthage, 235 Mo. 644, 139 S. W. 547.

17. Thirteenth & Fifteenth Sts. Pass. R. Co. v. Broad St. R. T. S. R. Co., 219 Pa. St. 10, 67 Atl. 901; Andel v. Duquesne St. R. Co., 219 Pa. St. 635, 69 Atl. 278.

But in Wisconsin it seems that an individual may adjudicate the power of the municipality to grant the use of its streets. Allen v. Clausen, 114 Wis. 244, 90 N. W. 181.

18. Thirteenth and Fifteenth Sts. Pass. R. Co. v. Broad Street Rapid Transit St. R. Co., 219 St. 10, 67 Atl. 901.

19. Blankenburg v. Philadelphia Rapid Transit Co., 228 Pa. St. 338, 77 Atl. 506.

So, for the reason that the act of a municipality in granting a franchise to use the streets is a legislative one, it is usually held that injunction does not lie to prevent a municipality from granting a franchise.²⁰ But it has been held that citizens may institute *mandamus* proceedings to compel the executive board of a municipality to advertise and sell a telephone franchise, as directed by an ordinance, where the proper representative of the municipality fails to act.²¹

If a railway company uses the streets without authority, such use is a public nuisance which makes the company liable to *indictment*.²²

Certiorari is a proper remedy in a few jurisdictions to review the granting of a franchise,²³ but in West Virginia the action of municipal authorities in revoking the franchise of a street railway company to occupy the streets is not judicial and is not subject to review by *certiorari*.²⁴

In those states where the same court is vested with both legal and equitable jurisdiction, there is very little difference in its practical results between proceedings in *mandamus* and by *mandatory injunction*, the former being permissible when the action is to enforce the per-

20. *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259.

§ 1632 *ante*.

See §§ 703 to 705 *ante*, vol. 2.

21. *Louisville Home Tel. Co. v. Louisville*, 130 Ky. 611, 113 S. W. 855.

Mandamus lies, in New York City, to compel borough president to have railroad track removed from street, where an unlawful incumbrance. *People ex rel. v. Gresser* (N. Y. Court of Appeals, 1912), 98 N. E. 205.

22. *Pittsburg, C. & St. L. R. Co. v. Hood*, 94 Fed. 618.

23. Abutting property owners on a street in which a city's legis-

lative body has granted the right to a railroad company to construct and operate a railroad are entitled to *certiorari* to set aside such grant on account of illegality not appearing on its face; as where it was shown that they would be inconvenienced in the use of the street to a greater degree than the general public and that the interests of the public will be promoted by having such illegal grant set aside. *Specht v. Central Passenger Ry. Co.*, 76 N. J. L. 631, 68 Atl. 785.

24. *Wheeling, etc. R. Co. v. Triadelphia* (W. Va., 1905), 52 S. E. 499.

formance of duties, existent for the benefit of the public and the latter being confined usually to causes of an equitable nature and in the enforcement of rights which solely concerns individuals.²⁵

§ 1764. Same—quo warranto.

The right of a public service company to hold or exercise the license or privilege to use the streets, granted by the municipality, may be questioned, in some jurisdictions, by an information in the nature of a *quo warranto* on the ground that it has been granted improperly or without warrant of law, or that it is so held or exercised.²⁶ *Quo warranto* by a municipality, it has been held in Illinois, is a proper proceeding to present the question of law whether the breach of conditions contained in a franchise ordinance is of a matter vital to the contract (there being no provision in the ordinance as to the effect of a breach of the condition), and also the question of fact whether there has been any breach of any condition.²⁷ And in Wisconsin the right to sue is conferred by statute.²⁸ But a private individual cannot maintain a bill in the nature of *quo warranto* to inquire

25. Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co. (N. C., 1912), 74 S. E. 636, citing High, Injunctions (4th Ed.), § 2.

26. People ex rel. v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245 (Where information charged telephone company with having misused and abused its franchise by demanding and receiving unlawful rates for telephone service and otherwise); Kavanaugh v. St. Louis, 220 Mo. 496, 518, 119 S. W. 552.

Against foreign corporations. A proceeding to forfeit the franchise to use streets may be brought against a foreign corporation as

well as a domestic corporation. State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

27. People ex rel. v. Central Union Tel. Co., 232 Ill. 260, 278, 83 N. E. 829.

28. *Quo warranto* lies to oust a corporation exercising a franchise attempted to be conferred on it by an invalid ordinance, the statute authorizing *quo warranto* against any "person" being applicable to a corporation. State ex rel. v. Milwaukee Independent Tel. Co., 133 Wis. 588, 114 N. W. 108 (and see concurring opinion of Judge Winslow in 114 N. W. 315).

into the right of a street railway company to occupy the streets of a city.²⁹

The state may bring *quo warranto* where the conditions of the franchise are not complied with,³⁰ and in some jurisdictions this remedy by the state is held to be exclusive,³¹ while in others the municipality may bring suit.³² In New York, a municipality, although it cannot sue to declare a franchise forfeited for nonuser, may

29. Thirteenth & Fifteenth Sts. Pass. Ry. Co. v. Broad Street Rapid Tr. St. R. Co., 219 Pa. St. 10, 67 Atl. 901.

30. Statute authorizing attorney general to maintain suit against a person, unlawfully exercising a franchise, includes corporations. People v. Bleecker St. & F. F. R. Co., 125 N. Y. St. 1045, 140 App. Div. 611.

31. In Wisconsin, a suit to forfeit the franchise for nonuser can be brought only in the name of the state. Milwaukee Electric R. & L. Co. v. Milwaukee, 95 Wis. 39, 69 N. W. 794, 36 L. R. A. 45, 60 Am. St. Rep. 81.

In New York, an action to declare a franchise forfeited for nonuser can be brought only by the people acting through the attorney general. New York v. Montague, 129 N. Y. St. 1084, 145 App. Div. 172.

32. Gainesville Water Co. v. Gainesville, 57 Tex. Civ. App. 257, 122 S. W. 959, rev'd on other grounds in 128 S. W. 370.

Failure to comply with the condition to furnish water of a certain quantity and quality is ground of forfeiture and an action to annul the grant will lie on behalf of the municipal corporation. The right of forfeiture is not

limited to *quo warranto* on the part of the state. St. Cloud v. Water, Light & P. Co., 88 Minn. 329, 92 N. W. 1112.

Where a municipality brings a suit to forfeit the franchise of a public service company, either on the ground of its insolvency or violation of its franchise obligations, the same test must be applied as though the suit was being prosecuted by the state. Gainesville Water Co. v. Gainesville, 103 Tex. 394, 128 S. W. 370, rev'g 57 Tex. Civ. App. 257, 122 S. W. 959.

Granting the same rights to another company does not constitute a forfeiture. Santa Rosa City R. Co. v. Central St. R. Co. (Cal., 1895), 38 Pac. 986.

In Kansas, a municipality may bring a *quo warranto* proceeding in its own name to obtain a forfeiture of the franchises of a street railway because of the abuse or nonuser of the rights granted by ordinance to use the streets. Olathe v. Missouri & K. Interurban R. Co., 78 Kan. 193, 96 Pac. 42.

Quo warranto lies to annul charter for breach of a charter duty. See Capital City Water Co. v. State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743.

sue to abate a nuisance consisting of worn and defective rails in the streets.³³ If the municipality had power to grant the franchise, an information by the state in the nature of a *quo warranto* does not lie.³⁴

Whether a forfeiture of a franchise may be declared in a suit in equity has already been noticed.³⁵

§ 1765. Remedies of municipality.

The remedies of a municipality in case of unauthorized obstructions in its streets in general,³⁶ including ejectment,³⁷ summary removal,³⁸ actions to abate or enjoin the nuisance,³⁹ and indictment,⁴⁰ have already been mentioned. In so far as these rules relate to remedies for obstructions in streets, they apply equally well where the obstruction consists of pipes, poles, wires or tracks of a public service company.

In so far as rates are concerned, a municipality has no such legal interest in the relations of a public service company and the individual consumer as warrants the bringing of a suit to determine the reasonableness of rates to private consumers, but the remedy is by suit on behalf of the individual consumer;⁴¹ and a municipality, which has granted a franchise, cannot sue the grantee of the franchise for the benefit of the inhabitants who have been overcharged.⁴²

33. *New York v. Montague*, 129 N. Y. S. 1084, 145 App. Div. 172.

34. *People ex rel. v. Ft. Wayne, etc. R. Co.*, 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752.

35. § 1668 *ante*.

36. § 1368 *ante*, vol. 3.

37. § 1369 *ante*, vol. 3.

38. § 1370 *ante*, vol. 3.

39. § 1371 *ante*, vol. 3.

Worn rails as nuisance. Under its right to sue to abate a public nuisance, a municipality may sue a receiver of a street railway to abate the nuisance created by

worn and defective rails in the street which constitute dangerous obstructions and prevent the municipality from repaving or repairing the streets without tearing up the rails. *New York v. Montague*, 129 N. Y. S. 1084, rev'g 124 N. Y. S. 959, 68 Misc. Rep. 176.

40. § 1373 *ante*, vol. 3.

41. *Mt. Vernon v. New York Interurban Water Co.*, 101 N. Y. S. 232, 115 App. Div. 653.

42. *Newport v. Municipal Light Co. (Ky., 1912)*, 145 S. W. 1107.

§ 1766. Same—mandamus in behalf of municipality.

Where a provision of an ordinance is a legislative act touching a public duty, to which acceptance by the public service company lends the added force of a contract, it may be enforced by *mandamus*.⁴³ *Mandamus* lies on behalf of a municipality to compel the performance of public duties owing by a public service corporation,⁴⁴ growing out of the acceptance of a franchise.⁴⁵

So a city may, by *mandamus*, compel a water company to perform its duty to extend its mains in a city,⁴⁶ or to make the connections to supply consumers,⁴⁷ or to connect the water with its sewerage system,⁴⁸ or to furnish water for certain purposes free of charge, as required by ordinance;⁴⁹ or the furnishing to it of a supply at a reasonable price,⁵⁰ or the operation of a street railway,⁵¹

43. *Camden v. Public Service Ry. Co.* (N. J. L., 1912), 82 Atl. 607, holding that ordinance granting street railway company right to use the streets but providing that all cars shall stop at street crossings clear of said crossing on signal to let off and take on passengers was a legislative act touching the public duty to which acceptance by the street railway company lent the added force of a contract, rather than an ordinance creating rights essentially private so that its efficacy was derived wholly from the assent of the railway company thereto.

44. *People v. Suburban R. Co.*, 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; *Seymour Water Co. v. Seymour*, 163 Ind. 120, 70 N. E. 514; *State ex rel. v. New Orleans Gaslight Co.*, 108 La. 67, 32 So. 179; *Portsmouth, Berkley & Suffolk Water Co. v. Portsmouth* (Va., 1911), 70 S. E. 529.

45. *State v. Marion Light &*

Heating Co., 174 Ind. 622, 92 N. E. 731.

Mandamus lies to compel compliance with conditions. *Grosse Pointe v. Detroit & L. Street R. Co.*, 130 Mich. 363, 90 N. W. 42.

46. *Topeka v. Topeka Water Co.*, 58 Kan. 349, 49 Pac. 79.

47. *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

48. *Portsmouth, B. & S. Water Co. v. Portsmouth* (Va., 1911), 70 S. E. 529.

49. *Independent School Dist. of Le Mars v. Le Mars City Water & Light Co.*, 131 Iowa, 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859.

50. *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122, 57 Atl. 482; *People v. New York Suburban Water Co.*, 56 N. Y. S. 364, 38 App. Div. 413.

51. *Bridgeton v. Bridgeton & M. Traction Co.*, 62 N. J. L. 592, 42 Atl. 715, 45 L. R. A. 837; *State v. Spokane St. Ry. Co.*, 19 Wash.

or to compel a street railway to fulfill its legal obligation to change the location of its track pursuant to a demand,⁵² or to compel the performance by the public service company of contractual conditions in the franchise to use the streets.⁵³

However, it has been held in Illinois that *mandamus* does not lie to compel a company to perform a mere contractual obligation, such as the performance of conditions imposed upon it in a franchise which it has accepted. Thus, where a telephone company was granted the use of the streets on condition that it would report semi-annually its gross receipts for the preceding six months, and pay into the city a certain per centage of such receipts, *mandamus* will not lie to compel the performance of such conditions.⁵⁴

Mandamus lies to compel a street railway to perform its duty imposed by an ordinance to sprinkle the parts of streets occupied by its tracks.⁵⁵ And *mandamus* lies to compel a street railway to obey an ordinance requiring it to construct new lines where a clear legal obligation so to do is imposed by a contract between the company and municipality, and there is no force in the objection that the only remedy for the refusal of the company to construct any line required is by a forfeiture *pro tanto* of its franchise.⁵⁶

518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739, holding that company cannot urge want of franchise.

Contra, *San Antonio St. Ry. Co. v. State*, 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834, rev'g 38 S. W. 54, were ordinance merely granted privilege of constructing street railway on streets.

§ 1660 *ante*.

Compelling giving of transfers, see *Newark v. North Jersey St. Ry. Co.*, 73 N. J. L. 265, 62 Atl. 1003.

52. *People v. Geneva, W. S. F. & C. L. Traction Co.*, 186 N. Y. 516, 78 N. E. 1109, aff'g 98 N. Y. S. 719, 112 App. Div. 581.

53. *Ross Tp. v. Michigan United Rys. Co.*, 165 Mich. 28, 130 N. W. 358.

54. *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1084.

55. *State ex rel. v. Milwaukee Electric R. & L. Co.*, 144 Wis. 386, 129 N. W. 623.

56. *State ex rel. v. St. Paul City R. Co.* (Minn., 1912), 135 N. W. 976.

Where the power to grant the right to use a street for a railroad is exclusively in the legislature, and the legislature has granted a right to use certain streets which has been availed of for many years, the right to compel the company to remove its tracks from such streets rests in the state rather than the municipality without regard to whether they are a nuisance or for the reason that the franchise has expired.⁵⁷

§ 1767. Same—injunction in suit by municipality.

Where a public service company illegally attempts to use the streets, two remedies are open to the municipality—one, to resist by force the use of the streets, and the other to apply to a court for equitable relief against the use.⁵⁸ *A fortiori*, where a statute not only requires the consent of the municipality to the use of its streets by public service companies, but also authorizes it to charge a fair price for all franchises granted for the use of its streets, the municipality has such a direct and special pecuniary interest as to entitle it to sue to enjoin a public service company from conducting its business on the streets within the limits of the municipality.⁵⁹ Even though a penalty is imposed for using streets without consent of the municipality, it may sue to enjoin such use of the streets as against the objection that the remedy is at law to collect the penalty.⁶⁰

But if a franchise is granted subject to the right to grant to any other company the exclusive right to use the streets on the first company failing to comply with the extensions demanded, the only remedy of the municipality on the failure of the company to comply with the extension orders is to grant the franchise to some other company. *Minneapolis St. R. Co. v. Minneapolis*, 189 Fed. 445, 449.

57. *New York Central & H. R. R. Co. v. New York*, 127 N. Y. S. 513, 142 App. Div. 578.

58. *Somerville Water Co. v. Somerville Borough*, 78 N. J. Eq. 199, 78 Atl. 793.

Injunction. If a public service company attempts to use the streets of a municipality without authority, the municipality may enjoin such use. *Landis Tp. v. Millville Gaslight Co.*, 72 N. J. Eq. 347, 65 Atl. 716; *Franklin v. Nutley Water Co.*, 53 N. J. Eq. 601, 32 Atl. 381.

59. *Patapsco Electric Co. v. Baltimore*, 110 Md. 306, 72 Atl. 1039.

60. *Utica v. Utica Tel. Co.*, 48 N. Y. S. 916, 24 App. Div. 361.

So far as rates are concerned, a municipality may obtain relief by *injunction* where a public service company is charging excessive rates, although the rates are not fixed by statute or ordinance or otherwise.⁶¹ If the charge for past service is unreasonable, the municipality may restrain the cutting off of the supply because of the failure to pay such charges.⁶² And a municipality may sue to enjoin a public service company from violating a special negative covenant in a contract between the two regarding the maximum rates.⁶³ Furthermore, a city may enjoin the shutting off of water from hydrants at the suit of a city, for protection against fire, although the shutting off was justified under the contract between the company and the city.⁶⁴

§ 1768. Same—resisting use of streets by force.

If the street is used unlawfully without the consent of the municipality, it may remove the structures placed in the street by the company,⁶⁵ or resist by force the unauthorized construction of tracks on its streets.⁶⁶ And a municipality having the power to regulate the use of streets will not be restrained from forcibly preventing the use of its streets by a public service company not entitled to use them.⁶⁷

61. *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 264, 108 N. W. 65.

Mayor and common council of a city, representing the consumers of water in a city, may sue in behalf of the consumers to restrain the water company from violating its contract with a municipality by installing meters and charging certain rates. *Washington County Water Co. v. Hagerstown*, 116 Md. 497, 82 Atl. 826.

62. *Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390.

63. *Muncie Natural Gas Co. v.*

Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822.

64. *Bienville Water Supply Co. v. Mobile*, 112 Ala. 260, 20 So. 742, 57 Am. St. Rep. 28, 33 L. R. A. 59.

65. *Butler v. Cincinnati*, 25 Ohio Cir. Ct. Rep. 772.
§ 1370 *ante*, vol. 3.

66. *Los Angeles R. Co. v. Los Angeles*, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269.

67. *Bayonne v. North Arlington Borough* (N. J., 1911), 79 Atl. 357.

See also *Atlantic & B. R. Co. v. Montezuma*, 122 Ga. 1, 49 S. E. 738; *Delaware L. & W. R. Co. v.*

§ 1769. Same—right of city to restrain public service company from discontinuing the business.

The right of a public service company to surrender its franchise wholly or in part has already been noted,⁶⁸ and it has been held that a municipality cannot enjoin the public service company from ceasing to do business where the franchise to use the streets is silent as to its duration.⁶⁹

§ 1770. Remedies of public service company.

A public service company which is authorized to use the streets of a municipality may enforce its rights in the streets, and other incidental rights, by appropriate judicial proceedings. If the municipality is improperly interfering with the use of the streets by the company, *injunction* is ordinarily the proper remedy.⁷⁰ If a *permit* to excavate the streets is required, as an exercise of the police power of the municipality, and the municipality refuses to grant one in a case where the duty to grant is mandatory, *mandamus* to compel the granting of the permit is usually the remedy,⁷¹ although in some

Buffalo, 158 N. Y. 478, 53 N. E. 533.

But see Spokane St. R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. 1072.

68. § 1660 *qntc*.

69. East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92.

70. Rock Island v. Central Union T. Co., 132 Ill. App. 248; La Harpe v. Elm Tp. Gaslight, F. & P. Co., 69 Kan. 97, 76 Pac. 448; Missouri River Tel. Co. v. Mitchell, 22 S. D. 191, 116 N. W. 67; Belington & N. R. Co. v. Alston, 54 W. Va. 597, 46 S. E. 612.

Preliminary injunction to restrain city from preventing water company from laying its pipes

through a municipality, where act unlawful, held properly denied. Somerville Water Co. v. Somerville Borough, 78 N. J. Eq. 199, 78 Atl. 793.

71. Cheney v. Barker, 198 Mass. 256, 84 N. E. 492, 16 L. R. A. (N. S.) 436; State ex rel. v. Latrobe, 81 Md. 222, 31 Atl. 788; State ex rel. v. Flad, 23 Mo. App. 185; Nassau Electric R. Co. v. White, 34 N. Y. S. 960, 12 Misc. Rep. 631, 69 N. Y. St. Rep. 128.

Mandamus. After securing the franchise to use the streets, *mandamus* will lie to compel the issuance of a permit to excavate in the streets in pursuance of the rights granted by the franchise, where such issuance is a mere minis-

-cases injunction against interference with the work is held the proper remedy rather than *mandamus*.⁷² Where a franchise to use the streets has been granted, and it is the duty of a municipality to designate the streets, or the particular part thereof to be used, a *mandatory injunction* is the proper remedy, in Alabama, to compel the performance of such duty.⁷³

Generally, *mandamus* lies to compel the municipality to designate the location of poles, where the duty is mandatory.⁷⁴ The granting of a franchise to use the streets, where a discretionary matter, cannot be compelled by *mandamus*; ⁷⁵ but if the franchise is a matter of right *mandamus* will lie.⁷⁶ Thus, it seems that if the only power of regulation conferred on a municipality is to decide where railroad crossings shall be, *mandamus* lies to compel it to eliminate wholly unauthorized restrictions from its consent to use the streets.⁷⁷

If the rates of a public service company, as regulated by a municipality, are deemed confiscatory by the company, the remedy is to sue to enjoin the municipality from enforcing the reduction in rates, and such suits are generally brought in the federal courts which have jurisdiction because of the contention that the reduction in rates constitutes the taking of property without due process of law.⁷⁸ In some jurisdictions, however, the only

terial duty and the company has complied with all lawful requirements. *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436; *Boston Consol. Gas Co. v. Cheney*, 198 Mass. 356, 84 N. E. 492.

See § 1005 *ante*, vol. 3.

72. *Chesapeake & P. Tel. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; *Baltimore v. Baltimore County Water & E. Co.*, 95 Md. 232, 52 Atl. 670.

73. *Gadsden v. Mitchell*, 145 Ala. 137, 40 So. 557, 6 L. R. A. (N. S.) 781, 117 Am. St. Rep. 20.

Mandatory injunction as distinguished from *mandamus*, see § 1763 *ante*.

74. *State ex rel. v. Red Lodge*, 30 Mont. 338, 76 Pac. 758.

75. *McGinnis v. San Jose*, 153 Cal. 711, 96 Pac. 367.

76. *Sufficiency of complaint*, see *Percia v. Wallace*, 129 Cal. 397, 62 Pac. 61.

77. *People ex rel. v. North Tonawanda*, 126 N. Y. S. 186, 70 Misc. Rep. 91, *aff'd* in 128 N. Y. S. 1140, 143 App. Div. 955.

78. *Multiplicity of suits*. If an ordinance regulating rates is

remedy in the state courts to review the reasonableness of rates is by a writ of *certiorari*.⁷⁹

§ 1771. Same—suits against competitors, attacking their franchises.

If an exclusive franchise is granted, and thereafter a second like franchise is granted, injunction lies to preserve the franchise granted the first company.⁸⁰ And the grantee of a valid franchise, according to what seems to be the better rule, may enjoin interference with its property rights by a competitor which has not obtained a valid grant of the right to use the streets.⁸¹ However, if the first company has not obtained the right to use the streets, it has no standing in equity to enjoin a later company which has obtained the right to use the

invalid because of want of power of the municipality to enact it, and it imposes a penalty for each violation, the company may sue to enjoin the enforcement of the ordinance, in order to prevent a multiplicity of suits. *Mills v. Chicago*, 127 Fed. 731.

79. *Woodruff v. East Orange*, 71 N. J. Eq. 419, 64 Atl. 466.

80. *Newport v. Newport Light Co.*, 84 Ky. 166, 8 Ky. L. Rep. 22.

81. *Millville Gaslight Co. v. Vineland Light & P. Co.*, 72 N. J. Eq. 305, 65 Atl. 504; *Raritan & D. B. R. Co. v. Delaware & R. Canal*, 13 N. J. Eq. 546, 569; *Tulsa Street R. Co. v. Oklahoma Union Traction Co.*, 27 Okla. 339, 113 Pac. 180 (holding that validity of franchise, under which defendant was acting, could be questioned); *Bartlesville Electric Light & Power Co. v. Bartlesville Interurban Ry Co.*, 26 Okla. 453, 109 Pac. 228, 29 L. R. A. (N. S.) 77 (note), and cases cited, refusing to follow *Coffeyville Mining &*

Gas Co. v. Citizens' Natural Gas & Mining Co., 55 Kan. 173, 40 Pac. 326.

See also *Atlanta R. & P. Co. v. Atlanta Rapid T. Co.*, 113 Ga. 481, 39 S. E. 12.

Contra, *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329; *Coffeyville Mining & Gas Co. v. Citizens' Natural Gas & Mining Co.*, 55 Kan. 173, 40 Pac. 326; *Geneva-Seneca Electric Co. v. Economic Power & Const. Co.*, 120 N. Y. S. 926, 136 App. Div. 219; *Franklin Trust Co. v. Peninsular Pure Water Co.*, 161 Fed. 855.

In *Kentucky*, the question is not decided. But the company already in the field, as a taxpayer, was held to be entitled to sue to restrain the operations of a company to whom a franchise has not been sold as required by the constitution. *Merchants' Police & D. T. Co. v. Citizens' Tel. Co.*, 123 Ky. 90, 93 S. W. 642.

streets.⁸² And it has been held that a gas company which has a franchise in a particular city in a state, whose public policy is to permit competition in the use of streets for gas pipes, cannot recover damages against another company exercising a similar franchise with municipal consent, although the latter company has failed to comply with some statutory requirement, especially where the state has not interfered, although several years have elapsed.⁸³

§ 1772. Remedies of patrons.

A patron or consumer is entitled to a supply or services without discrimination,⁸⁴ and he may sue to enforce this right. Accordingly where a contract is made by a municipality with a water company for the benefit of the inhabitants, and thereunder it is the *duty* of the company to supply all of the inhabitants willing and able to pay its water charges, a consumer may sue for a breach of such duty in his own name.⁸⁵ And patrons may enforce provisions in a contract for their benefit, as to a free supply, although not a party to the contract between the municipality and public service company;⁸⁶ and a private consumer may maintain an action in his own name against a public service company to enforce the rights accruing to him under a contract between the company and the municipality fixing the maximum rates to be charged patrons.⁸⁷ If a water or light com-

82. *Larimer & L. St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533, 20 Atl. 570.

83. *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 182 Fed. 667.

Contra, *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

84. § 1689 *ante*.

85. *Birmingham Waterworks Co. v. Keiley* (Ala., 1911), 56 So. 838.

86. *Independent School Dist. of*

Le Mars v. Le Mars City Water & Light Co., 131 Iowa, 14, 19, 107 N. W. 944, 10 L. R. A. (N. S.) 859.

87. *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 107 App. Div. 624, 5 Am. & Eng. Ann. Cas. 504 (note), where suit was to enjoin collection of rate in excess of contract rate.

Contra, *Cleburne Water Co. v. Cleburne*, 13 Tex. Civ. App. 141, 35 S. W. 733.

pany fails to perform its duty to furnish a supply, the remedy of a consumer is not a bill for the appointment of a receiver.⁸⁸ Generally, a consumer who has paid rates to prevent the cutting of the supply, where improperly demanded, may recover back the sum illegally demanded.⁸⁹

§ 1773. Same—mandamus.

Mandamus lies in behalf of a patron to compel the furnishing of a supply or services which it is the duty of the public service company to provide,⁹⁰ without dis-

88. *Weatherly v. Capital City Water Co.*, 115 Ala. 156, 174, 22 So. 140.

89. *Chicago v. Northwestern Mut. Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770, aff'g 120 Ill. App. 497; *Panton v. Duluth Gas & Water Co.*, 50 Minn. 175, 52 N. W. 527, 36 Am. St. Rep. 635; *American Brewing Co. v. St. Louis*, 187 Mo. 367, 86 S. W. 129; *St. Louis Brewing Ass'n v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; *Westlake & Button v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4.

See *Capital City Water Co. v. Carey*, 99 Ala. 539, 13 So. 276.

But see *Bray v. Philadelphia*, 11 Wkly. Notes Cas. (Pa.) 202.

Right of tenant to sue. *Randolph v. Bar Harbor Water Co.*, 87 Me. 126, 32 Atl. 790.

90. *Indiana*. *Portland Natural Gas & Oil Co. v. State*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

Maine. *Robbins v. Bangor Ry. & El. Co.*, 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963.

Massachusetts. *Cox v. Malden & Melrose Gaslight Co.*, 199 Mass. 324, 85 N. E. 180, 17 L. R. A. (N. S.) 1235.

Michigan. *Mahan v. Michigan Tel. Co.*, 132 Mich. 242, 93 N. W. 629.

Missouri. *State ex rel. v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684.

New Jersey. *Johnson v. Atlantic City Gas & Water Co.*, 65 N. J. Eq. 129, 56 Atl. 550 (not injunction).

New York. *People v. New York Suburban Water Co.*, 56 N. Y. S. 364, 38 App. Div. 413.

North Carolina. *Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co.* (N. C., 1912), 74 S. E. 636.

South Carolina. *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923; *State ex rel. v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, holding that *mandamus* lies though petitioner has not complied with previous contract with the company to use its telephone exclusively.

"*Mandamus* is a common-law remedy to compel action, injunction an equitable remedy to prevent action, and maintain the parties in *statu quo*; so that a person desiring a commodity manufactured and sold by a quasi public corporation may resort to

crimination;⁹¹ and at the rate prescribed by the state or municipality;⁹² and also may compel the restoration of service after it has been unlawfully cut off.⁹³ And if *mandamus* is not an adequate remedy to compel a company to furnish water to a consumer, equity may grant

mandamus to compel a supply when the supply has not yet been commenced; and in equity, when the supply is being furnished, to enjoin its stoppage. 13 Ency. Pl. & Pr. 500; 20 Cyc. 1164; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142; Sickles v. Manhattan Gas Light Co., 66 How. Pr. (N. Y.) 314." Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Inv. Co., 49 Colo. 122, 111 Pac. 834, 837.

Water supply — mandamus. *Mandamus* will lie in favor of an individual to whom a water company owes the duty of supplying water, to compel the company to furnish the water. Merrill v. South Side Irrigation Company, 112 Cal. 426, 44 Pac. 720.

Mandamus will lie to compel a water company to supply water to one on its mains upon his compliance with its reasonable rules and regulations. On the same principle, injunction will lie by an individual to prevent a water company from removing its mains without authority from the city, if such removal will deprive it of the means of fulfilling its contract to the individual. Asher v. Hutchinson Water, L. & P. Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52.

But a consumer cannot compel the company by *mandamus* to furnish a water meter for the joint use of a tenant and a sub-tenant occupying a building divided by

a partition and each using water separately from the other, although it might be compelled to furnish a meter to measure the water used by the tenant alone. Nogales Water Co. v. Neumann, 12 Ariz. 306, 100 Pac. 794.

In Kentucky, injunction, rather than *mandamus* is the proper remedy to compel a telephone company to install an instrument. Williams v. Maysville Tel. Co., 119 Ky. 33, 82 S. W. 995.

91. Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Tel. Co. v. Hopper, 124 Ind. 600, 24 N. E. 1091.

92. Richman v. Consolidated Gas Co., 100 N. Y. S. 81, 114 App. Div. 216, aff'd in 186 N. Y. 209, 78 N. E. 871; Grossman v. Consolidated Gas Co., 100 N. Y. S. 100, 114 App. Div. 242, aff'd in 186 N. Y. 541, 78 N. E. 1104.

An individual has the right to maintain an action against a water company to compel it to supply him with water at the rate specified in a contract between the company and the city. Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958. See also, Wainwright v. Queens County Water Co., 78 Hun (N. Y.) 146, 28 N. Y. S. 987.

93. Huffman v. Marcy Mut. Tel. Co., 143 Ia. 590, 121 N. W. 1033.

relief by a *mandatory injunction*.⁹⁴ But a municipality which owns its water works cannot be compelled by mandatory injunction to extend a water main, since the municipality is invested with discretion in regard to such governmental functions and such discretion, where exercised in good faith, cannot be controlled by mandatory injunction.⁹⁵

§ 1774. Same—injunction.

Injunction lies to prevent the cutting off of a supply,⁹⁶ especially where the amount due is disputed,⁹⁷ or where the rate charged is more than the law authorizes.⁹⁸ If the rates of a public service company are limited by ordinance, an individual may sue to enjoin the company from charging him higher rates than those fixed by the

94. *Bourke v. Olcott Water Co.* (Vt., 1911), 78 Atl. 715, holding *mandamus* not adequate remedy where suit for injunction brought in the latter part of November, and petition for *mandamus* could not have been heard until the January term of the supreme court.

Mandatory injunction. A consumer is entitled to a mandatory injunction to compel the furnishing of a supply. *Wright v. Glen Tel. Co.*, 99 N. Y. S. 85, 112 App. Div. 745, aff'g 95 N. Y. S. 101, 48 Misc. Rep. 192.

95. *Browne v. Bentonville*, 94 Ark. 80, 126 S. W. 93.

96. *Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785; *Delaware, L. & W. R. Co. v. Buffalo*, 115 N. Y. S. 657.

See *Wood v. Auburn*, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376; *Bennett v. Tacoma Light & Water Co.*, 3 Wash. St. 337, 28 Pac. 520.

Injunction lies by consumer to restrain cutting off of supply where rates are unreasonable. *Ball v. Texarkana Water Corp.* (Tex. Civ. App., 1910), 127 S. W. 1068.

97. *Sickles v. Manhattan Gas-light Co.*, 64 How. Pr. (N. Y.) 33, 66 How. Pr. (N. Y.) 314; *Mansfield v. Humphreys Mfg. Co.*, 82 Ohio St. 216, 92 N. E. 233; *Union v. Sartor* (S. C., 1912), 74 S. E. 496, where municipality owned the plant.

98. *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, 3 Abb. Pr. (N. S.) 26; *Jenkins v. Columbia Land & Improvement Co.*, 13 Wash. 502, 43 Pac. 328.

Arbitrary rates — Injunction. Injunction lies to restrain the shutting off of a supply because of nonpayment of arbitrary rates. *Smith v. Birmingham Water-works Co.*, 104 Ala. 315, 16 So. 123.

ordinance.⁹⁹ It has been held, however, that where the water company charges more than the price fixed in the contract with the city, and attempts to cut off the supply of individual consumers for failure to pay such price, the city and not the individual consumer is the proper party to sue to enjoin the cutting off of the supply.¹ And it has been held that a consumer is not entitled to equitable relief to enjoin the cutting off of water or light where he has a remedy by *mandamus* to compel the supply or by defense to the action for the water rent.² A consumer may enjoin a water company from disposing of the supply to others beyond the capacity of the system.³

§ 1775. Same—actions for damages.

On a wrongful refusal to furnish service or a wrongful cutting off of the supply or service, the patron may sue for damages.⁴ And a penalty imposed by a municipi-

99. Charles, Simon's Sons Co. v. Maryland Tel. & Tel. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

1. Cleburne Water, Ice & Light-
ing Co. v. Cleburne, 13 Tex. Civ.
App. 141, 35 S. W. 733.

2. Johnson-Kahn Co. v. Thomp-
son, 130 N. Y. S. 216, 73 Misc. 103.

3. Lanning v. Osborne, 76 Fed.
319, *aff'd* in Osborne v. San
Diego Land & Town Co., 178 U.
S. 22, 20 Sup. Ct. 860, 44 L. Ed.
961.

4. Connecticut. McCune v. Nor-
wich City Gas Co., 30 Conn. 521,
79 Am. Dec. 278.

Georgia. Freeman v. Macon
Gaslight & Water Co., 126 Ga. 843;
56 S. E. 61, 7 L. R. A. (N. S.) 917;
Southern Bell Telephone & Tele-
graph Co. v. Beach, 8 Ga. App.
720, 70 S. E. 136.

Kentucky. Cumberland Tel. Co.

v. Hendon, 114 Ky. 501, 71 S. W.
435, 60 L. R. A. 849, 102 Am. St.
Rep. 290.

Mississippi. Cumberland Tel.
Co. v. Baker, 85 Miss. 486, 37 So.
1012.

Montana. Ashley v. Rocky
Mountain Bell Tel. Co., 25 Mont.
286, 64 Pac. 765.

South Carolina. Gwynn v. Cit-
izens' Tel. Co., 69 S. C. 434, 48 S.
E. 460, 67 L. R. A. 111, 104 Am. St.
Rep. 819.

Temporary shutting off of sup-
ply to make repairs, liability for
injuries resulting, see note in 21
L. R. A. (N. S.) 468.

Right to recover attorney's fee
in action against public service
corporation, under Georgia statute
relating to the railroad commis-
sion, depends upon violation of
orders, as distinguished from rules,
of the railroad commission which

pality does not preclude a consumer from suing for damages caused by the wrongful act of the company.⁵ So if a company turns off the supply on a mistaken belief that a customer has not paid the rates, damages are recoverable,⁶ but *exemplary damages* are not recoverable except in a case where there is wanton or wilful wrong.⁷ However, if a water company turns off a supply to coerce the payment of an unauthorized demand, the consumer may recover punitive damages where the circumstances justify such damages.⁸

§ 1776. Same—action to recover penalties.

In many jurisdictions, statutes require public service corporations, such as waterworks companies and lighting companies, to supply water, gas, electricity, etc., on application, within certain territorial limits, and authorize an action to recover damages in case the company refuses to supply, or impose a fixed penalty.⁹ How-

governs all public utilities in that state. *Southern Bell Telephone & Telegraph Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 136.

Sufficiency of complaint in action for damages for refusal to supply gas to a consumer, see *Fair v. Home Gas & Electric Co.*, 13 Cal. App. 589, 110 Pac. 347.

Measure of damages in case of refusal to reinstate telephone, see *Cumberland Tel. & Tel. Co. v. Hobart*, 89 Miss. 252, 42 So. 349.

Loss of profits as element of damages, see note in 22 L. R. A. (N. S.) 588, citing *Miller v. Wilkesbarre Gas Co.*, 206 Pa. St. 254, 55 Atl. 974; *Morey v. Metropolitan Gaslight Co.*, 6 Jones & S. (N. Y. Sup. Ct.) 185; *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598; *Shephard v. Milwaukee Gaslight Co.*, 15 Wis. 319, 82 Am. Dec. 679.

Loss by fire, action for, see § 1699 *ante*.

5. *Indiana Natural & Illuminating Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868.

6. *Birmingham Waterworks Co. v. Wilson* (Ala., 1911), 56 So. 760.

7. *Birmingham Waterworks Co. v. Wilson* (Ala., 1911), 56 So. 760.

Exemplary damages are recoverable, in a proper case. *Southern Bell Tel. Co. v. Earle*, 118 Ga. 506, 45 S. E. 319; *Barton v. Cumberland Tel. Co.*, 116 La. 125, 40 So. 590.

8. *Birmingham Waterworks Co. v. Kelley* (Ala., 1911), 56 So. 838.

9. *Fair v. Home Gas & Electric Co.* (Cal. App., 1911), 115 Pac. 754, holding complaint to sufficiently aver refusal to supply gas for lighting.

Penalties. Statute providing for penalty for refusal or neglect

ever, a municipality may fix by ordinance a penalty for the violation of any of the provisions of an ordinance as to cutting off water and the time of paying water rents, only where the power has been delegated to the municipality by the legislature.¹⁰ Before a patron can sue for a penalty, under a discrimination statute, he must comply or offer to comply with reasonable regulations which may include payment for services in advance.¹¹

§ 1777. Remedies of abutters.

In a preceding chapter, the rights of an abutting owner to bring ejectment,¹² to enjoin or abate nuisances in the street,¹³ to recover damages in case of an unlawful use of the street,¹⁴ etc., have been considered at length, as well as what constitutes a *special injury* entitling an

to supply gas held applicable where supply has been cut off after once commenced, as well as refusal to supply gas in first instance. *Hoch v. Brooklyn Borough Gas Co.*, 103 N. Y. S. 370, 117 App. Div. 882.

Application for gas held a written and not a verbal one so as to entitle applicant to recover penalty for failure to furnish it. *Shelley v. Westchester Lighting Co.*, 124 N. Y. S. 484, 139 App. Div. 690.

Only one penalty can be recovered for failure to supply gas. *Jones v. Rochester Gas & Electric Co.*, 168 N. Y. 65, 60 N. E. 1044.

Payment into court. Necessity for paying money into court, to keep tender good, in order to recover statutory penalty for cutting off gas supply because of refusal to pay bill, see *Levine v. Brooklyn Union Gas Co.*, 131 N. Y. S. 255, 146 App. Div. 464.

Defenses. In action to recover penalty for refusal to supply gas, it is no defense that plaintiff obtained all gas needed by an arrangement with his tenant who was a customer of defendant. *Jones v. Rochester Gas & Electric Co.*, 168 N. Y. 65, 60 N. E. 1044.

Sufficiency of complaint in action against gas company for refusal to supply gas to building not more than one hundred feet from a main, see *Fair v. Home Gas & Electric Co.* (Cal. App., 1910), 110 Pac. 347.

10. *Bluefield Water Works & Imp. Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759.

11. *Southwestern Telegraph & Telephone Co. v. Murphy* (Ark., 1911), 140 S. W. 720.

12. § 1375 *ante*, vol. 3.

13. § 1376 *ante*, vol. 3.

14. § 1377 *ante*, vol. 3,

abutter to sue.¹⁵ These rules apply equally well to suits by abutters against public service companies and will not be repeated in detail. If the use of the street is an additional servitude,¹⁶ and compensation is not made, the abutter is entitled in some jurisdictions, to restrain the construction until compensated.¹⁷ If the use of the streets has been properly granted to a public service company and the use does not constitute an additional servitude, an abutting owner, in most jurisdictions, cannot *enjoin* the construction and operation although he suffers special injury therefrom, the remedy at law being adequate.¹⁸

On the other hand, if the use of the streets is without authority,¹⁹ as where the consents of abutters are necessary but have not been obtained,²⁰ an abutter ordinarily may enjoin such use, the remedy at law being considered inadequate;²¹ but in some jurisdictions he cannot sue in equity for the reason that the remedy at law is considered adequate,²² as where there is a remedy by ejectment,²³ at least unless irreparable injury is shown.²⁴

If the use of a street by a public service company is unlawful, and practically destroys its usefulness to abut-

15. §§ 1382-1387 *ante*, vol. 3.

16. § 1700 *et seq.*, *ante*.

17. Lewis, Eminent Domain (3d Ed.), §§ 883, 901 *et seq.*

§ 1377, note 61, *ante*, vol. 3.

See notes in 23 L. R. A. (N. S.) 1082, and 13 Am. & Eng. Ann. Cas. 23.

18. Baker v. Selma St. & S. R. Co., 135 Ala. 552, 33 So. 685, 93 Am. St. Rep. 42; Haskell v. Denver Tramway Co., 23 Colo. 60, 46 Pac. 121.

§ 1376 *ante*, vol. 3.

19. Irvine v. Atlantic Ave. R. Co., 42 N. Y. S. 1103, 10 App. Div. 560; Allen v. Clausen, 114 Wis. 244, 90 N. W. 181.

§ 1376 *ante*, vol. 3.

20. Beeson v. Chicago, 75 Fed. 880.

21. Holst v. Savannah Electric Co., 131 Fed. 931.

22. Doane v. Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; Stewart v. Chicago General St. R. Co., 166 Ill. 61, 46 N. E. 765.

§ 1376, note 56, *ante*, vol. 3.

23. St. Columba's Church v. North Jersey St. R. Co. (N. J. Eq., 1908), 70 Atl. 692.

24. General Electric R. Co. v. Chicago, I. & L. R. Co., 98 Fed. 907, 39 C. C. A. 345, 58 L. R. A. 231, construing Illinois law.

ters, they may ordinarily obtain relief by *injunction*.²⁵ That the abutter may recover damages where a public service company uses the streets without authority of law is well settled, and if the abutter owns the fee of the street, *ejectment* lies where a railway is constructed in a street without authority.²⁶

The fact that the public service company is exceeding its corporate powers has been held not a ground for enjoining the use of a street at the suit of an abutter.²⁷ And an abutter cannot enjoin the *acceptance of a franchise* to use the streets, although he might enjoin the use of the street in front of his property;²⁸ and one not an abutting owner cannot ordinarily obtain an injunction.²⁹

In some jurisdictions, the remedy of an abutting owner, who has given his consent to a street railway in front of his property on the express condition that no switch shall be constructed in front of his property, where the municipality has nevertheless approved a plan for a switch on the theory that the condition attached to the consent was void, is by *certiorari* to review the ordinance.³⁰

25. *Swinhart v. St. Louis & S. R. Co.*, 207 Mo. 423, 105 S. W. 1043, holding that silence for two years, while street railway is being constructed, was 'no estoppel.

26. *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202, 205, 10 Pac. 510; *Bork v. United New Jersey R. & C. Co.*, 70 N. J. L. 268, 54 Atl. 412, 64 L. R. A. 836.

§ 1375 *ante*, vol. 3.

27. *Watson v. Fairmount & S. R. Co.*, 49 W. Va. 528, 39 S. E. 193.

28. *Linden Land Co. v. Milwaukee Electric R. & L. Co.*, 107 Wis. 493, 509, 83 N. W. 851.

To same effect, *Seccomb v. Wurster*, 83 Fed. 856.

29. *Linden Land Co. v. Milwaukee Electric R. & L. Co.*, 107 Wis. 493, 510, 83 N. W. 851.

30. *St. Columba's Church v. North Jersey Street R. Co.* (N. J. Eq., 1908), 70 Atl. 692.

§ 1379 *ante*, vol. 3.

CHAPTER 35.

MUNICIPAL OWNERSHIP OF PUBLIC UTILITIES.

- | Sec. | Sec. |
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| 1779. Power of legislature to delegate authority to municipalities to own public utilities. | 1794. Municipal ownership or mode of operation as discretionary. |
| 1780. Power as derived from freeholder's charter. | 1795. Procedure to determine whether municipality shall own its own plant. |
| 1781. Power of municipality to own and operate public utility. | 1796. Special assessments to pay for water works. |
| 1782. Same—waterworks. | 1797. Same—assessments to pay for electric light system. |
| 1783. Same—light plants. | 1798. Contracts in connection with municipal ownership, and scope of business. |
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| 1785. Power to furnish water and light to individuals. | 1800. Power of municipality to furnish supply outside territorial limits. |
| 1786. Power to construct and operate competing plant. | 1801. Rights, duties and liabilities of municipality as owner of plant. |
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| 1788. Power to acquire property outside territorial limits. | 1803. Rates. |
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| 1791. "Duty" to purchase existing plant. | |
| 1792. Value of plant bought by municipality and price to be paid. | |

§ 1778. Introductory.

Municipal ownership of waterworks, electric light and gas plants, telephone plants, street railways, ferries, and other public utilities,¹ while it prevails to a great extent

1. What are public utilities, see
§ 1618 *ante*.

in England, Scotland, Germany, Russia, Australia, New Zealand and some other foreign countries,² is common in this country only in respect to waterworks,³ although a number of municipalities own their light plants, and a few have constructed their own street railways, or at least underground railways, the most of which have been leased to private companies.

The economic side of municipal ownership is not within the scope of this work.⁴ Those in favor of municipal

2. Glasgow, Scotland, § 83, pp. 188, 189 *ante*, vol. 1.

Edinburgh, Scotland, § 83, p. 188, 189 *ante*, vol. 1.

3. **Extent of municipal ownership of public utilities.** "In regard to this growth, Professor Frank Parsons, in his 'City for the People,' states that in 1800 there were sixteen waterworks in the United States, all built and owned by private parties except one in Winchester, Virginia; fourteen of the fifteen private plants have since become public, and from 1800 to 1896 the proportion of public works went up from 6.3 per cent to 53.2 per cent of the total. Since the latter date the proportion has been steadily increasing in the United States, and in Great Britain is even larger. Several municipalities in this country own their gas works, and in Great Britain more than one-third of the gas works are public. The number of public electric plants also has shown a rapid increase; and in Great Britain a large proportion of the street railway system belong to municipalities. Likewise, in most European cities where there is not general government ownership of telephones and telegraphs,

the municipalities now own the local systems." Article in 18 Case and Comment, page 373, on "Municipal Ownership of Public Utilities" by Abel C. Willcox.

Water commissioners as separate corporation. Commissioners of public works vested with authority over waterworks and electric light plant as a separate corporation created by the state, independent of the municipality, see *Union v. Sartor* (S. C., 1912), 74 S. E. 496, where municipality owned the plant.

Water supply in ancient cities. Jerusalem, § 12, p. 25 *ante*, vol. 1; Athens, Greece, § 26, p. 52 *ante*, vol. 1; Rome, § 30, p. 61 *ante*, vol. 1.

4. Books to be consulted on advisability of Municipal Ownership: Darwin, *Municipal Trading*; Parsons, *City for the People*; Porter, *Dangers of Municipal Ownership*; Willcox, *Municipal Franchises*, §§ 564-568.

"Public ownership of public utilities has been a political as well as a legal question for quite a while. It seems to have been a political question long before its legality was doubted. We read that Hezekiah, king of Judea, established and maintained by

ownership contend that where it has been adopted, the rates are lower and the service is better, and that it tends to relieve the municipality of corrupting relations with men of wealth and public service companies.⁵ Further argument in favor of municipal ownership results from the continual conflict often existing between the public service company and the municipality as to what constitutes reasonable rates, and the fact that litigation in regard thereto often drags its weary way through the courts for a number of years.⁶ Another argument

public authority a city waterworks plant in the city of David. 2 Kings, c. 20, verse 20. And who has not heard of the famous public baths of ancient Rome? The public lighting of the streets of cities is of modern origin. Yet the necessity for lights in a city is scarcely less now than its necessity for water. Indeed, private wells and cisterns, and resort to natural streams by individuals for their necessary water, could as easily dispense with public waterworks, and more justly perhaps, than could private property owners light the adjacent streets and public places. It is found that light is not only essential to the safety of travelers to prevent their coming in contact with obstructions, but they perform a most valuable office in preventing crime. It is known that crime thrives best in darkness. A good light is the equivalent of a good policeman in preventing certain forms of crime." *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278.

Result of absence of lighting in Ancient Rome, § 30, p. 62 and note 92 *ante*, vol. 1,

5. *Parsons, City for the People*, p. 154, in which he states that experience has shown that public ownership tends to diminish political corruption.

6. "When the city becomes the owner of the plant, all these litigations will be at an end. It may be that the people will not be better served, but the wranglings and disputes will be between the city officers and the people. If proper service is not given, the people can only complain of their own officers. It may be that property owners will pay more for their water, including their share of interest, than they would pay to a private corporation. But this will be largely compensated, when counting the expenses of litigation, and the unending quarrels that follow the present method of having private corporations to operate waterworks plants. It may be that the waterworks company will not be able to receive all of their investments back. But, considering the limitation on their franchises, and the difficulties now encountered to get money with which to build waterworks plants, it is better that they

in favor of municipal ownership, or at least in favor of a public service commission composed of state officers rather than municipal officers, paid a salary commensurate with the exacting duties and the knowledge and ability required of members of such commission, is the fact that rates are often fixed by a municipality without due consideration or investigation as to what in truth are reasonable rates, from the standpoint of both the municipality and the public.⁷

On the other hand, the argument against municipal ownership of public utilities, or at least most public utilities, is that the public utility is not in fact owned and controlled by the people but by a few politicians; that competent and efficient managers cannot be obtained because the compensation is not as high as in private industries; that municipal ownership means a vast number of municipal employees who will vote to hold their position and whose employment will be made the basis of a political machine; and that the municipal debt reaches appalling figures.⁸

charge off their losses and bring present methods to a conclusion." *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 195, per Judge McPherson.

7. "The present expensive chaos should be brought to an end. It is known by all informed men that city councils necessarily adopt rates with but little or no investigation as to what rates ought to be fixed. The result is that we have ordinances fixing rates based upon but little intelligent effort for the ascertainment of the facts. Some of the states, like New York, Massachusetts, and Wisconsin, have state commissions of competent men, who give public hearings, and who do nothing behind doors, nor in

secrecy—a commission with no member interested as a taxpayer of the city, and with no member subject to influences other than the ascertainment of the truth and the facts. Rates are thus fixed with which most fair-minded people are ready to acquiesce. It is strange that we have no such legislation and no such commissions in Iowa." *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 195, per Judge McPherson.

8. In some cities in Europe, franchises of street railway companies have been recently extended on the condition that at the end of the term all property of the company shall pass to the municipality without payment.

In some jurisdictions, a statute forbids the erection of works for private competition after a municipality has constructed its own water plant.⁹

Scope of chapter. This chapter does not include all matters concerning municipal ownership of public utilities. Many questions relating to the operation of a public utility are to be solved without regard to whether the utility is owned by a private company or by a municipality, and in such cases all the decisions have been collected in the preceding chapter on Franchises. Whether the debt incurred in obtaining a plant for the municipality is to be counted in determining the amount of indebtedness to which a municipality is limited by the constitution, and whether, if such debt is counted, it exceeds the debt limit fixed by the constitution, will be noticed at length in the next volume, as will questions relating to municipal bonds to pay for public ownership. Likewise, the liability of the municipality, in case of negligence in the operation of its plant, is not treated in this chapter but will be considered in full in the next volume.

§ 1779. Power of legislature to delegate authority to municipalities to own public utilities.

It is well settled that the legislature, where not forbidden by the constitution, has power to authorize a municipal corporation to own and operate any public utility such as is generally owned and operated in a city by public service corporations.¹⁰ However, it is doubt-

9. *Carlisle Gas & Water Co. v. Carlisle Water Co.*, 182 Pa. St. 17, 37 Atl. 821.

10. *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 304; *Opinion of Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; *Mitchell v. Negaunee*, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468, 4 Det. Leg. N. 318; *Attorney General v. Eau Claire*, 37 Wis. 400.

Constitutionality of statutes. Statute authorizing San Francisco to acquire public utilities is not unconstitutional because it authorizes the sale or lease of them, and that the sale or lease may be made upon such terms and under such circumstances as to constitute a lending of public credit, or a conferring of special privileges and immunities upon a private individual or corporation,

ful whether the legislature has power to authorize a municipality to incur an indebtedness or to levy taxes

in a manner violating the constitution. *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 304.

Delegation of power to own waterworks. A grant by the legislature to villages of the power to construct and operate waterworks, held not in excess of its power merely because of the existence in a village of a private corporation engaged in the same business which had obtained its franchises under a legislative act providing for the creation of waterworks companies in towns and villages. *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 4 L. R. A. 687, rehearing denied in 161 N. Y. 658, 57 N. E. 1124, *aff'd* in 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585.

The legislature has power to grant to any municipality authority to construct waterworks not only to supply the municipality with water for public purposes but also to furnish water for the use of its inhabitants. *Mayo v. Dover & Foxcroft Village Fire Co.*, 96 Me. 539, 548, 53 Atl. 62.

Lighting its streets is a public service on the part of a municipal corporation, and it is competent for the legislature to grant municipal corporations the power to erect plants for lighting their streets and other public places and to furnish light to their inhabitants. *Mitchell v. Negaunee*, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 463, 4 Det. Leg. N. 318.

"The fundamental question is whether the manufacture and distribution of gas or electricity to be used by cities and towns for illuminating purposes is a public service. The maintenance of public streets and buildings is a public service, and it may be reasonably necessary to light them in order that the greatest public benefit may be obtained from using them. To say nothing of the usefulness of lighting streets as a means of promoting order, and of affording protection to persons and property, the common convenience of the inhabitants may require that they be lighted. Cities and thickly-settled towns have for a long time been accustomed to light their public buildings and some of their streets at the public expense. If the streets and public buildings are to be lighted, the means are a matter of expediency. If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appropriate means which it may think expedient. As a question of constitutional power, we cannot distinguish the right to authorize cities and towns to buy gas or electricity for their use from the right to authorize them to manufacture it for their use." Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487.

"Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person.

to enable it to engage generally in the business of supplying water to consumers outside the municipal lim-

Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly-settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies, or by the municipality, and it cannot be distributed without the use of the public streets, or the exercise of the right of eminent domain. It is not necessarily an objection to a public work maintained by a city or town that it incidentally benefits some individuals more than others, or that from the place of residence, or for other reasons, every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it as the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But in general it may be said that in matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs

them and may participate in them, and it is for the interest of each inhabitant that others, as well as himself, should possess and enjoy them. If the legislature is of opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity, for the purpose of furnishing light to their inhabitants, we think that the legislature can confer the power." *Opinion of the Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487.

Furnishing light to private residences. Legislature may delegate the right to furnish light from a municipal plant to private residences. *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, 18 So. 677, 51 Am. St. Rep. 24, 30 L. R. A. 540.

Taxes imposed to pay for and operate natural gas works are for a public use and are proper. "Taxation implies an imposition for a public use. * * * But what are public purposes is a question that must be left to the legislature, to be decided upon its own judgment and discretion. Water, light, and heat are objects of prime necessity. Their use is general and universal. It is now well settled that the legislature in the exercise of its constitutional power may authorize cities to appropriate real estate for waterworks. * * * What we have said in reference to water-

its; and it has been held that it cannot construct and maintain a dam, for the purpose of leasing the water power to private persons for private use.¹¹

works is for the most part applicable to the erecting and maintaining of natural or artificial gas works. Heat being an agent or principle indispensable to the health, comfort, and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water. It is sufficient if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy; but in deciding whether in a given case, the object for which taxes are assessed is a public or a private purpose, we cannot leave out of view the progress of society, the change of manners and customs and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And in deciding whether such taxes shall be levied for the new purposes that have arisen we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and, by long course of legislation levied." *State ex rel. v. Toledo*, 43 Ohio

St. 112, 26 N. E. 1061, 11 L. R. A. 729.

Objection that municipality, as purchaser of waterworks, may be compelled to furnish water outside limits. The sovereign power of the state may authorize a municipal corporation, as one of the agencies of government, to purchase and pay for, by money raised by taxation or otherwise, an existing waterworks system for the purpose of supplying water for its own municipal wants and for the domestic uses of its inhabitants; and if such purchase is made in good faith, the constitutionality of the legislation authorizing such purchase and the action thereunder, including the raising of money by taxation therefor, is not affected by the fact that, incidental and entirely subsidiary to these main and primary purposes in the purchasing of the property, the municipal corporation may be compelled to carry out the obligation of the original water company in furnishing water for some takers outside of the limits of the purchasing municipality. *Mayo v. Dover & Foxcroft Village Fire Co.*, 96 Me. 539, 53 Atl. 62.

Street railway. Municipality may be authorized to own and operate. *Love v. Yazoo City*, 91 Miss. 535, 44 So. 835.

11. *Attorney General v. Eau Claire*, 37 Wis. 400, 436.

Furthermore, the power of the legislature to authorize a municipality to own and operate public utilities is sometimes limited by constitutional provisions. Thus, in Michigan, four of the eight justices held that the constitutional prohibition against municipalities becoming a party to or interested in any work of *internal improvement* prohibited the conferring authority on a municipality to construct a street railway.¹² But, in New York, the constitutional provision that no "county, city, town, or village shall be allowed to incur any indebtedness except for county, city, town or village purposes" has been held not to preclude the legislature granting to a municipality the right to construct or operate a street railway, such a railway being a *city purpose*.¹³

12. The provision of the constitution prohibiting the state from becoming a party to or interested in any work of *internal improvement* applies to municipalities and prohibits a municipality from constructing and owning a street railway to be leased for revenue to a street railway company, since the construction of a railroad is an internal improvement within the meaning of the constitution. *Bird v. Detroit*, 148 Mich. 71, 111 N. W. 860 (Justice Carpenter who wrote the main opinion, concurred in by Chief Justice McAlvay and Justice Hooker so held, as did Justice Grant in a separate opinion. The contrary was held by Justice Ostrander in a separate concurring opinion and in the dissenting opinion of Justice Blair, concurred in by Justices Montgomery and Moore).

Contra, see *Pine Grove Tp. v. Talcott*, 19 Wallace (U. S.) 666, 22 L. Ed. 227; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008.

Earlier decision in Michigan

held a one hundred mile railway, partly outside the city of Detroit, was an internal improvement, but declined to express any opinion as what the rule would be if all the railway was within the city limits. *Attorney General v. Pingree*, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407.

13. A statute authorizing municipal corporations, of over a million inhabitants, to construct and operate a street railway, is not unconstitutional as constituting an expenditure of money for other than a *city purpose*. *Sun Printing & Pub. Assn. v. New York*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, aff'g 40 N. Y. S. 607, 8 App. Div. 230. Pursuant to such legislation the subway in New York City was constructed.

Street railways a "city purpose." Municipalities are not limited to providing for the strict necessities of their citizens but, under legislative authority, they may minister to their comfort, health, pleasure, or education.

However, a municipality cannot be authorized to construct a railway where the real purpose of the statute

"They are not limited to policing the city, to paving its streets, to providing it with light, water, sewers, docks, and markets. They may also be required by the sovereign power to furnish their citizens with schools, hospitals, dispensaries, parks, libraries and museums, with zoological, botanical, and other gardens. They may even gratify our ears with music of a summer afternoon, or minister to our comfort by providing us with public baths. Expenditures in all these directions have never been questioned. Where, then, shall we draw the line? It would be very simple to draw it at this proposition for which precedent in the past can be found and to exclude all others. This test should be easy of application, but would be essentially vicious and erroneous. *Growth and extension are as necessary in the domain of municipal action as in the domain of law.* New conditions constantly arise, which confront the legislature with new problems. As the structure of society grows more complex, needs spring up which have never existed before. These needs may be so general in their nature as to affect the whole country or the whole state, or they may be local and confined to a single county or municipality. * * * To hold that the legislature of this state, acting as the *parens patriae*, may employ for the relief or welfare of the inhabitants of the cities of the state only those methods

and agencies which have proved adequate in the past, would be a narrow and dangerous interpretation to put upon the fundamental law." Per Judge Barrett in *Sun Printing & Pub. Ass'n v. New York*, 40 N. Y. S. 607, 8 App. Div. 230, aff'd in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788.

Statute authorizing construction of New York subway held constitutional. "Unless, therefore, we are to lay down a hard and fast rule limiting municipal action to what has already been done, and to nothing else, the mere fact that a rapid transit railroad in a city was never before planned or executed by a municipal corporation ought not to foreclose the question. The true test is that which requires that the work should be essentially public, and for the general good of all the inhabitants of the city. *It must not be undertaken merely for gain or for private objects.* Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience of the people of the city at large. Within that sphere of action, *novelty should impose no veto.* Should some inventive genius by and by create a system for supplying us with pure air, will the representatives of the people be powerless to utilize it in the great cities of the state, however extreme the want and dangerous the delay? Will it then be said that pure air is not as important as pure water

is to aid a private enterprise in violation of a constitutional provision forbidding such aid.¹⁴ And a distinc-

and clear light? We apprehend not. The illustration may seem fanciful today, but who shall say that peculiarly local conditions may not arise which will make it a vital question hereafter. * * *

The health of the people is dependent in a measure upon decent and convenient transit between their homes and their places of business; not in as great a degree as upon light, air, and water, but in no considerable degree. The scheme under consideration is intended to supply not only rapid, but such decent and convenient, transit, to ameliorate the present congestion which at certain hours of each day is fraught with danger to thousands; and to furnish business men and women with the means of reaching their homes at such hours without being crushed in body or worn in nerve. The question cannot be justly solved without considering the problem which was before the legislature when it was asked to pass these acts. The court must take judicial notice of the city's history in this regard. We know that relief had been sought through the instrumentality of private adventure, and that capital was not forthcoming. The legislature had before it this latter crucial circumstance. The need of the people was growing day by day. The hope of relief in the ordinary manner was steadily receding. Shall it be said that, in such emergency, the people were helpless except through an

amendment to the constitution; that in such a crisis, and under such exceptional circumstances, the legislature could not adjudge, upon all the facts before it, a new and imminent, though hitherto unknown, *city purpose*? It is not the province of the court to deny the legislative power to thus adjudge. The present enterprise was demanded of the city by the surrounding conditions. It was a public enterprise. It was not for travelers nor for public travel, in the ordinary sense. It was for daily and hourly use in the business and home life of our people. It was entirely within the boundaries of the city. It was primarily for the benefit alone of its long-suffering inhabitants. It was not tainted with even the suggestion of a private character, nor with the purpose of gain. The sole object was public and general locomotion in the locality; locomotion for which there was a crying need; safe, rapid, healthful locomotion; locomotion worthy, in fine, of a civilized metropolis and of a well-governed municipality." *Sun Printing & Publishing Assn. v. New York*, 40 N. Y. S. 607, 611, 8 App. Div. 230, *aff'd* in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788.

14. *Wyscaver v. Atkinson*, 37 Ohio St. 80; *Taylor v. Ross County*, 23 Ohio St. 22; *Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N. E. 520; *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864.

In Idaho, a statute providing

tion is to be observed between authorizing a municipality, such as a township or the like, which is sparsely settled, to build a railroad as a matter of mere convenience, and authorizing a large city to build where the construction is necessary to the business interests of the municipality. The latter may be authorized by the legislature but the former cannot.¹⁵

Undoubtedly the legislature cannot empower a municipality to build a railroad or other public utility merely as a speculation for the purpose of sale. But it may sanction the construction of a railway, at the expense of the municipality, to be leased to a private company, as against the objection that the credit of the municipality is thereby loaned to a private company in violation of a constitutional provision.¹⁶

for the formation of railroad districts, and the voting of bonds, and the purchase or construction of railroads by such districts, and for the operation or leasing thereof, has been held to violate the constitutional provision forbidding municipalities or other subdivisions of the state to lend or pledge their credit directly or indirectly in aid of any individual association or incorporation. *Atkinson v. Ada County*, 18 Idaho 282, 108 Pac. 1046, 28 L. R. A. (N. S.) 412.

15. *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864.

16. See *Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N. E. 520.

Contracts by the city of New York to lease new subways to be constructed by the city are not unconstitutional as a gift or loan by the city in aid of a corporation, notwithstanding the lessee is to furnish the equipment and part of the money for construction, and the receipts are to be divided after

paying operating expenses, a fixed sum to the lessee, and interest on the investments of both parties, notwithstanding the credit of the lessee is thereby increased so as to permit it to borrow money on the leasehold. "It is argued that the lease, with its financial provisions, will so increase the lessee's credit as to permit it to borrow money on the leasehold, and that, therefore, the city is lending its credit to or in aid of the lessee. This argument is disposed of in the *Sun Case*. The lease of the present subway is a valuable asset of the Interborough, earning as it does upwards of six million dollars a year; but the court of appeals decided in the *Sun Case* that the law authorizing exactly that lease was not unconstitutional. If the argument is valid, any lease profitable to the lessee would be unconstitutional, for it would furnish the basis of borrowing. This would mean that every contract with the city is invalid, if profit-

The fact that part of the property in a city is wild land receiving no benefit from electric light furnished to inhabitants does not affect the power of the legislature to authorize municipal ownership, nor the power of the municipality to become indebted for such a plant and to levy taxes to pay for furnishing such light.¹⁷

§ 1780. Power as derived from freeholder's charter.

A freeholder's charter may authorize the municipality to acquire public utilities, so that it is unnecessary for the legislature to act in connection therewith further than to approve the charter when so required.¹⁸

§ 1781. Power of municipality to own and operate public utility.

In some jurisdictions, statutes or charter provisions expressly authorize public ownership of water works,

able, which is a *reductio ad absurdum*. The argument that the preferential assignment to the Interborough Company of a portion of the receipts of the combined system constitutes a lending of credit seems to me artificial. It depends entirely upon the use of the word "guaranty" in stating the argument. A guaranty does import the lending of credit. But obviously this provision does not constitute a guaranty. It is not a guaranty because it lacks the very element necessary to support the argument. The Interborough is entitled to a preferential payment out of the earnings only. A deficiency in any year is cumulative but only out of earnings. In no contingency is the city's credit pledged for this sum or any part of it. It is begging the question to call the provision a guaranty, and then declare it void because

it is called a guaranty, and not because it is one." *Hopper v. Willcox*, 135 N. Y. S. 384.

17. *Mitchell v. Negaunee*, 113 Mich. 359, 361, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468, 4 Det. Leg. N. 318.

18. *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 304, holding that the constitutional provision that a city may frame a charter "for its own government" does not use the word "government" with reference to the recognized distinction between governmental and proprietary powers of a municipality so as to preclude the granting of such power.

City given power to amend its own charter may adopt an amendment giving it power to own and operate an electric street railroad and to issue bonds therefor. *Love v. Yazoo City*, 91 Miss. 535, 540, 44 So. 835.

light plants or the like;¹⁹ and statutory authority con-

19. *Georgia*. *Murphy v. Waycross*, 90 Ga. 36, 15 S. E. 817.

Idaho. *Jack v. Grangeville*, 9 Idaho 291, 74 Pac. 969.

Illinois. *Dutton v. Aurora*, 114 Ill. 138, 28 N. E. 461, holding that statute applied to cities incorporated under special charters as well as those incorporated under the general law.

Indiana. *Nelson v. La Porte*, 33 Ind. 258.

New Jersey. *Hackensack Water Co. v. Hoboken*, 51 N. J. L. 220, 17 Atl. 307.

Pennsylvania. *Dorrance v. Bristol Borough*, 224 Pa. St. 464, 73 Atl. 1015.

Rhode Island. *Farnsworth v. Pawtucket*, 13 R. I. 82.

Tennessee. *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

United States. *Riverside & A. R. Co. v. Riverside*, 118 Fed. 736.

Power of municipality to own plant. Authority contained in the general law "to make and sink wells, erect pumps, dig drains," etc., is distinct from, and does not limit or qualify, the express particular authority "to pass all laws necessary to guard against fire," or the charter power "to provide for the establishment of waterworks." Nor does it limit the powers given under the general welfare clause. *State ex rel. v. Tampa Waterworks Co.*, 56 Fla. 858, 47 So. 358, 361, 19 L. R. A. (N. S.) 183.

Power to provide includes power to pay for. Under power to contract for waterworks, a city may make the necessary and

proper arrangements to provide for paying for same. *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. 586.

Electric power or light as incident to water supply. An act authorized cities "having a plant, appliances or machinery designed or used for furnishing a public water supply, to utilize, use and develop any power which may be derived therefrom and to develop additional power to furnish electrical energy for lighting or other public use." In order to take advantage of the provisions of such act, a city must be possessed of some plant, appliance or machinery already established in connection with its public water supply, from which it may derive power, which, either alone or together with additional power to be developed for the purpose, may be used in furnishing electrical energy. *Lightpipe v. Orange*, 75 N. J. L. 365, 68 Atl. 120.

Revocation of power. Charter power of a municipality to supply water, where unexecuted, may be revoked by a statute conferring exclusive authority to furnish water, on a private company. *Downingtown Gas & Water Co. v. Downingtown*, 175 Pa. St. 341, 34 Atl. 799, 38 Wkly. Notes Cas. 376.

In Nebraska, cities of the second class of less than 5,000 inhabitants are authorized by statute to operate electric light plant for municipal and commercial purposes. *Todd v. Crete*, 79 Neb. 671, 113 N. W. 172, aff'd in 115 N. W. 307.

ferred on a municipality to incur an indebtedness in excess of the charter debt limit to light the municipality and furnish it with a water system confers power to incur such indebtedness for one of the two purposes separately.²⁰

Where there is no express delegation of authority, the rules which have been laid down in the various states are more or less conflicting. The power of a municipality to own a public utility is not inherent,²¹ but the general rule is that a municipality need not be expressly authorized to construct and operate a water or light plant of its own, but such power may be implied from other powers expressly conferred. In some jurisdictions, a general grant of power to a municipality is sufficient, while in others the power will not be implied unless from language clearly authorizing such an implication.²²

It should be remembered, however, that the power of a municipality to construct and maintain water and light plants is not governed by the same rules as those which govern the power of a municipality to construct a street railway, since water works contribute to the public health and a public lighting system tends to the suppression of crime and the safety of travelers upon municipal highways, and hence such undertakings are in the performance of what has always been regarded as a duty owed by the government to its citizens, while the furnishing of transportation facilities can hardly be regarded as the duty of a government.²³

As stated in another chapter,²⁴ a municipality has no power to take charge of or control the operation of a plant of a public utility company on the termination of

20. *Klamath Falls v. Sachs*, 35 Ore. 325, 57 Pac. 329, 76 Am. St. Rep. 501.

Statutory authority "to contract for supplying the city with water and lights," conferred upon a municipality, authorizes it to own and maintain a waterworks system or electric light plant. *Swann*

v. Murray, 146 Ky. 148, 142 S. W. 244.

21. *Savings Fund Assn. v. Philadelphia*, 13 Pa. St. 175.

22. §§ 1782, 1783 *post*.

23. See *Bird v. Detroit*, 148 Mich. 71, 111 N. W. 860.

24. § 1658 *ante*, vol. 4.

its franchise or upon the doing of acts which constitute a forfeiture of its franchise, unless the right to take possession and own is given by the grant of the franchise.²⁵

§ 1782. Same—waterworks.

Statutes or charter provisions often expressly authorize municipal ownership of waterworks,²⁶ and, if duly empowered, the municipality may acquire an existing

25. See *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 57 Pac. 210, 571.

26. *California*. *Orcutt v. Pasadena Land & Water Co.*, 152 Cal. 599, 93 Pac. 497.

Idaho. *Jack v. Grangeville*, 9 Idaho 291, 74 Pac. 969.

Illinois. *Gault v. Glen Ellyn*, 226 Ill. 520, 80 N. E. 1046, holding lease with option to purchase not invalid.

Indiana. *Eddy Valve Co. v. Crown Point*, 166 Ind. 613, 76 N. E. 536, 3 L. R. A. (N. S.) 684.

Massachusetts. *Seward v. Revere Water Co.*, 201 Mass. 453, 87 N. E. 749.

New York. See *Re Simmons*, 116 N. Y. S. 439.

Oklahoma. *Mitchell v. Tulsa Water, Light, Heat & Power Co.*, 21 Okla. 243, 95 Pac. 961.

Rhode Island. *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 974; *Peabody v. Westerly Waterworks*, 20 R. I. 176, 37 Atl. 807.

Texas. *Austin v. McCall*, 95 Tex. 565, 68 S. W. 791.

Washington. *Tacoma Light & Water Co. v. Tacoma*, 13 Wash. 115, 42 Pac. 533.

Wisconsin. *Connor v. Marshfield*, 128 Wis. 280, 107 N. W. 639.

Water districts. *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774.

Provision for payment. Contract for purchase of waterworks plant not invalid, in city of second class in Nebraska, because no provision for payment therefor has been previously made by an appropriation bill. *Slocum v. North Platte*, 192 Fed. 252, 256-258, and see chapter on Municipal Indebtedness in vol. 5.

City purpose. Establishment by a municipality of a water department for the supply of water to the municipality and its inhabitants is for a city purpose, within the constitutional prohibition limiting indebtedness to such purposes. *Comstock v. Syracuse*, 5 N. Y. S. 874.

In Arkansas, statutes authorizing cities to lay off the whole city or any portion thereof into improvement districts for local improvements including water, gas, etc., confer power to lay off the whole city into an improvement district for waterworks. *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955.

plant instead of constructing one of its own.²⁷ Even where there is no express authority, it is held, in some jurisdictions, that a municipality has *incidental power* to contract for the construction and operation of a system of waterworks,²⁸ but the general rule is to the contrary.²⁹ However, in most jurisdictions, the authority of a municipality to construct its own waterworks will be implied from very general grants of powers. Thus, it is held that power to provide for a public water supply includes municipal authority to erect its own plant.³⁰

27. Covington Gaslight Co. v. Covington, 22 Ky. L. Rep. 796, 58 S. W. 805.

§ 1789 *post*.

28. Gadsden v. Mitchell, 145 Ala. 137, 40 So. 557, 117 Am. St. Rep. 20, 6 L. R. A. (N. S.) 781; Memphis v. Memphis Water Co., 5 Heisk. (Tenn.) 495.

Georgia and Kentucky: general welfare. Under power to make all contracts deemed necessary for the welfare of the city, a city may contract for the construction of waterworks. Rome v. Cabot, 28 Ga. 50; Dyer v. Newport, 123 Ky. 203, 29 Ky. L. Rep. 656, 94 S. W. 25.

In Wisconsin, a municipal corporation may construct waterworks under its usual police powers, and duty to preserve the public health, and general welfare. Ellingwood v. Reedsburg, 91 Wis. 131, 64 N. W. 885.

29. The power to construct a waterworks system for a municipality is not a necessary incident of its corporation but must be derived directly from the legislature of the state. Huron Waterworks Co. v. Huron, 7 S. D. 9, 62

N. W. 975, 30 L. R. A. 848, 58 Am. St. Rep. 817.

A municipality cannot construct waterworks unless the power so to do has been delegated. Re Board of Water Com'rs of White Plains, 176 N. Y. 239, 68 N. E. 348, rev'g 76 N. Y. S. 11, 71 App. Div. 544.

A municipal corporation has no implied power to engage in the business of supplying its citizens with water for pay. It can do so only under express authority from the legislature. White v. Meadville, 177 Pa. St. 643, 35 Atl. 695, 34 L. R. A. 567.

30. Commonwealth v. Covington, 128 Ky. 36, 32 Ky. L. Rep. 837, 107 S. W. 231, 14 L. R. A. (N. S.) 1214; Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825, *overruling* Mayo v. Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.

Under power to provide a water supply, a municipal corporation may construct a water works; and the mere fact that a private water company has been permitted to lay pipes in certain streets to supply the residents on such streets with water will not

So, where a municipality was authorized by statute, to construct its own system of waterworks or to grant a franchise therefor to a private company, it was held that it might own its waterworks for the purpose of supplying a part only of its inhabitants, or only a portion of its territory, and grant to a corporation the franchise to supply water to others of its inhabitants or to other parts of its territory.³¹

§ 1783. Same—light plants.

The rules relating to the power of a municipality to own its own waterworks apply, at least in the main, to its power to own a light plant.³² In some cases, how-

preclude the municipal corporation from constructing its own plant. *Hughes v. Parnassus*, 23 Pa. Co. Ct. 196; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353; *Colby University v. Canandaigua*, 69 Fed. 671.

31. *Donahue v. Morgan*, 24 Colo. 389, 400, 50 Pac. 1038.

32. § 1782 *ante*.

Power to own light plant.

Where authorized by charter or statute, a municipality may own its own electric light plant. *Clark v. Los Angeles*, 160 Cal. 30, 317, 116 Pac. 722.

Express authority not necessary. "It is, therefore, universally held now that it is clearly within the police power of cities, even without express authority, to provide public lighting of their streets at the public expense." *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

Natural gas. Authority conferred upon a municipality "to construct and establish gas works" includes authority to con-

tract for the purchase of a *natural gas* distributing plant, notwithstanding that natural gas was not known to be available for use in the locality at the time such authority was granted. *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640, 75 C. C. A. 442. *Contra*, *Quinby v. Consumers Gas Trust Co.*, 140 Fed. 362.

Power to light with gas not power to light with electricity. Power was given a city council "to provide the city with water and light," and to provide for lighting the streets and erecting lamps thereon, and to erect, maintain and operate waterworks or *gas* works and to regulate the same; to acquire ground on which to erect such works; provided, the mayor and council may in their discretion grant the right to any person or persons to erect waterworks or *gasworks*, and lay down pipes, mains, etc., for the use of the city and its inhabitants. It was held under such grant of power that the city had no power to construct an *electric* plant for the purpose of lighting

ever, a distinction is drawn between the power of a municipality to light its streets and the power to supply water.³³

In some jurisdictions, it is held that the municipality has implied or inherent power to furnish light for streets and public places,³⁴ or that the power is included in the general welfare clause,³⁵ or in power to light the

the city, or to transmit electric power by means of poles and wires placed in the streets and alleys. *Carthage v. Carthage Light Co.*, 97 Mo. App. 20, 70 S. W. 936.

City purpose. It has been held that under the constitutional provision in New York, the construction and operation by a city of an electric light plant to supply lights to the municipality and its inhabitants is a *city purpose* for which indebtedness is proper. *Hequembourg v. Dunkirk*, 49 Hun (N. Y.) 550, 2 N. Y. S. 447.

Municipal improvements. Statutory authority conferred on a municipality to incur indebtedness to pay the costs of any municipal improvements confers power to incur an indebtedness for improvements for lighting the city. *Hammond v. San Leandro*, 135 Cal. 450, 67 Pac. 692.

33. "It may be conceded that the lighting of the streets of the town is a very great convenience, and, furthermore, may have a tendency to the repression of a certain class of crimes; but it is not indispensable to this end. It is unlike the supply of pure and wholesome water, which is essential to the life of the citizen; and hence in this respect the case is differentiated from those wherein

it is decided that the supply of water to the inhabitants, being indispensable, is considered as an implied power essential to the declared objects and purposes of the corporation." *Posey v. North Birmingham*, 154 Ala. 511, 45 So. 663, 15 L. R. A. (N. S.) 711.

34. *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268; *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825; *Wade v. Oakmont*, 165 Pa. St. 479, 30 Atl. 959; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885.

In Indiana, where it is held that the power to light the streets and public places of a city is one of the implied and inherent powers of the city, to properly protect the lives of its inhabitants and as a check on immorality, it is held that the city has inherent power to provide and maintain the necessary plant to generate and supply the electricity required therefor and to furnish whatever is necessary for the production and dissemination of the light. *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214.

35. **General welfare clause** includes authority to purchase an electric light plant. *Mauldin v.*

streets,³⁶ or in power to *provide* for public lighting;³⁷ but in other jurisdictions the power cannot be exercised unless the authority to do so has been delegated by something more than mere general provisions.³⁸ For instance, in Massachusetts, it was held that power to erect and maintain works for the manufacture and distribution of electric lights for lighting the public streets and places and to furnish light to the inhabitants could not be implied as an incident to the power expressly granted to erect and maintain street lamps—at least where it had become the custom of the legislature to specifically de-

Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

36. Municipal power to light the streets of a municipality includes power to buy or build a plant for such purpose. *Blanchard v. Benton*, 109 Ill. App. 569; *Hay v. Springfield*, 64 Ill. App. 671.

Statutory or charter authority "to contract for supplying the city with water and lights" empowers the municipality to purchase and construct waterworks and light plants to supply such needs. *Swann v. Murray*, 146 Ky. 148, 142 S. W. 244.

Where a municipality is given the power, either expressly or by necessary implication, as an incident to its police power, to light its streets, and where the precise method is not expressly provided, it may either hire another to furnish the lights or may furnish its own lights. *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

But in New Jersey, municipal power to pass ordinances for lighting the streets does not confer power by implication to erect an

electric light plant. *Howell v. Millville*, 60 N. J. L. 95, 36 Atl. 691.

37. *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825.

The power to maintain a plant to light the streets has been held to be implied from statutory authority to *provide for and regulate the lighting of the streets*. *State v. Hiawatha*, 53 Kan. 477, 36 Pac. 1119; *Christensen v. Fremont*, 45 Neb. 160, 63 N. W. 364 (electric light system). But power to regulate the erection of gas and electric lights in the streets does not confer authority to establish an electric light plant to supply light to the inhabitants. *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41.

38. *Posey v. North Birmingham*, 154 Ala. 511, 45 So. 663, 15 L. R. A. (N. S.) 711.

A municipality cannot establish an electric lighting plant for its use and to provide lights for its inhabitants unless the authority so to do is conferred by the statute or charter. *Lighthipe v. Orange*, 76 N. J. L. 817, 823, 68 Atl. 120.

fine from time to time the purpose for which municipal corporations could raise money.³⁹

So it is held in Alabama that the general welfare clause conferring power upon a municipality does not impliedly authorize it to own and operate an electric lighting plant, nor does authority to purchase, hold and dispose of real property and such personal property as may be necessary for the use of the corporation, nor does authority "to exercise such other powers as are conferred on them by law."⁴⁰ And the fact that the constitution of the state limits the indebtedness of municipalities to a certain percent of the assessed valuation of the property therein "*except for the construction of or purchase of*

39. *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421.

Power to erect street lamps. "The argument is that, if such a town as Peabody can erect and maintain street lamps, it can maintain them by any appropriate means, and that one appropriate means is the construction and maintenance of works for the manufacture and distribution of the gas or electricity which it uses for the purpose of lighting its streets. The extent to which powers will be implied from general words depends a good deal upon the nature of the written instrument, the meaning of which is to be determined. In interpreting a constitution of government, the necessities of the government established by the constitution must be considered; and when it appears that there is no attempt specifically to define in the constitution all the powers granted, but that the great objects of the government are described only in general terms, a somewhat liberal construction may be necessary in

order that the government may not fail of accomplishing the ends for which it was created. Towns are subordinate divisions of a state, and they vary greatly in the number of their inhabitants, and in the amount of their taxable property. It is wholly for the legislature to determine, within the limitations of the constitution, the powers which towns shall possess; and when it appears that the custom of the legislature has been specifically to define from time to time the purposes for which towns may raise money by the taxation of their inhabitants, and when the legislature can at any time grant additional powers if they are deemed necessary, a somewhat strict construction of existing statutes is reasonable, and in accordance with the presumed intention of the legislature." *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421.

40. *Posey v. North Birmingham*, 154 Ala. 511, 45 So. 663, 15 L. R. A. (N. S.) 711.

water works, gas or electric lighting plants," etc., does not show a grant of power to municipalities to purchase or construct a lighting plant.⁴¹

§ 1784. Same—power to own and operate street railways.

Municipal ownership of street railways, while common in many other countries, is almost unknown in this country, although, in a few instances, statutes have authorized municipalities to construct at their own expense a street railway, and such statutes have been acted upon.⁴² For example, in New York, in 1891, such a statute was enacted to govern cities of a population of a million or more, and thereunder New York City constructed its subway system of rapid transit for conveying passengers. And it has been held in Illinois that the statute authorizing cities to own, operate or lease "street railways" includes *underground* street railways and, therefore, the city of Chicago was authorized to construct a subway for rapid transit.⁴³

41. Posey v. North Birmingham, 154 Ala. 511, 45 So. 663, 15 L. R. A. (N. S.) 711.

42. Street railway a "city purpose." In New York a constitutional provision prohibits the incurring of indebtedness by a city except "for a city purpose," and it is held thereunder that a street railway constructed by the city of New York, after failure to induce construction by private capital, is "for a city purpose" within such provision. Sun Printing & Publishing Assn. v. New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 783, aff'g 40 N. Y. S. 607, 8 App. Div. 230.

Impairing obligation of contract. Where a company was incorporated for the purpose of constructing and operating a railroad

in the streets of New York City, but had never obtained the consent of the city, it could not enjoin the city from constructing a railroad in some of the streets selected for its lines on the ground that such action impaired the obligation of a contract. Underground Railroad v. New York, 116 Fed. 952.

43. Barsaloux v. Chicago, 245 Ill. 598, 92 N. E. 525.

Chicago subway. An ordinance of the city of Chicago providing that the traction companies of the city shall contribute to the cost of subways to a specified amount and that the traction companies shall have the privilege of using the subways during the remainder of their terms in accordance with the ordinances under which they

On the other hand, the power of a municipality to construct and own street railways can exist only when conferred by the state.⁴⁴ And authority conferred upon a municipality to "grade, pave, repave, or otherwise improve" the streets does not authorize it to construct a street railway thereon for the purpose of thereafter leasing it to private individuals or companies, since the term "otherwise improve" merely confers powers *ejusdem generis* with the enumerated powers.⁴⁵

§ 1785. Power to furnish water and light to individuals.

Whether a municipality, conceding it to have power to own and operate waterworks, has power to supply *water* not only for public uses but also to the inhabitants, is a question which does not seem to have been decided contrary to the right to furnish a supply to the inhabitants;⁴⁶ but in so far as *lights* are concerned, there has

are now operating, unless the city shall sooner elect to exercise its right to purchase the street railway systems of the city, are not invalid as granting an exclusive right to the traction companies to use the subways to the exclusion of all other means of travel, since the clear meaning of the ordinances is that the city will not permit any other street car company to use the tracks in the subway that are leased to the present traction companies. *Barsaloux v. Chicago*, 245 Ill. 598, 92 N. E. 525.

44. See *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 304, holding that grant of power to acquire "any public utility" clearly includes street railways.

May construct and operate railroad, where material to development of city, etc., by legislative authority, and may by same au-

thority raise means therefor by taxation of its citizens. *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

Authority to construct, maintain and manage a bridge across navigable waters does not confer power on a municipality to construct and operate a railroad thereon. *Dilluvio v. New York*, 132 N. Y. S. 531, 73 Misc. Rep. 122.

45. Separate opinion of Justice Ostrander in *Attorney General v. Detroit*, 148 Mich. 71, 103, 111 N. W. 860, but as to which Mr. Justice Blair dissents (148 Mich. 71, 113), in a separate opinion, in which Justices Montgomery and Moore concur.

46. Authority to provide "the city" with water includes power to furnish the "inhabitants" with water. *Scott v. La Porte*, 162 Ind. 34, 68 N. E. 278, rehearing denied

been some conflict of opinion as to whether power conferred upon a municipality to own and operate a light

in 69 N. E. 675; *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

Furnishing water to inhabitants. "Here the first clause, 'to provide the city with water by waterworks,' is very broad and comprehensive, and was obviously intended to authorize the corporation to furnish the inhabitants of the city with water. Having accepted the charter, and undertaken to exercise this authority in the manner detailed by the witness, it cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end. It is the use of corporate property for corporate purposes, in the sense of the revenue law of 1877. It can make no difference whether the water be furnished the inhabitants as a gratuity or for a recompense; the sum raised in the latter case being reasonable, and applied for legitimate purposes. So raising a fund to help defray the expense of operating the waterworks, and to keep down the interest on the city's indebtedness, incurred in the construction thereof, is no more engaging in business for gain and profit than would be the assessment and collection of taxes for that or any other legitimate object. To the extent that money is realized by sale of water, if it be so termed, the necessity of laying taxes in the usual way is diminished. If the water were furnished free of charge, then the

expenses of operating the works and meeting the interest on the debt would have to be met by an increased tax assessment." *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

Furnishing water compared to furnishing sewers. "The city is authorized to acquire and own waterworks plants, because water is needed for the purpose of flushing sewers of the city and carrying off the material which would accumulate in the city that would cause sickness and produce death. If a city can build sewers at public expense, because they are a public necessity, it would seem that the same necessity exists for acquiring waterworks for the purpose of making the sewer useful and accomplishing the purpose for which they are built. Likewise water is needed by the inhabitants of the town to carry away the effete matter from the various residences to the sewers in the street. The public is just as much interested in carrying such matter from the homes of the citizens as it is in carrying it through the sewers of the city after it reaches them. The same necessity rests upon the city to see the inhabitants are supplied with water for that purpose as it is to see that a sewer is constructed for the purpose of carrying the matter away after it has flowed into them. In the first instance it is the duty of the commonwealth to look after the public health of the citizens. It has

plant to furnish light for the streets, public buildings, and public places was broad enough to authorize the municipality to furnish light for the private use of its inhabitants. In one of the earliest cases, which arose in South Carolina in 1890, it was held that implied power of a municipality to light its streets included power to purchase and become the owner of an electric light plant to produce electricity to light the streets and public buildings of the municipality, *but that this power did not include authority to furnish light for private residences and places of business for compensation.*⁴⁷

This rule that power conferred by statute or charter to maintain a municipal light plant for lighting streets and public places of the municipality does not necessarily include power to furnish the inhabitants lights for private use⁴⁸ has been followed in a few light cases,

made the municipality its agent for that purpose." *Frankfort v. Commonwealth*, 29 Ky. L. Rep. 704, 94 S. W. 648.

47. *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291, in which case Justice McGowan, in delivering the opinion of the court, said: "As we understand it, all the powers given to the city council were for the sole and exclusive purpose of government, and not to enter into private business of any kind, outside of the scope of the city government. In that very direction, especially in these latter times, is the dangerous and growing tendency of municipal corporations. It is very important, for the interest of all, to keep them strictly within the legitimate limits of their powers. The power given to the city council to issue bonds, so as to bind not only all the taxpayers of the city, but their children as well, is a very high

confidence and trust, and can be properly exercised for no other purpose than 'for the public use of the corporation,' no matter how great the temptation may be. Without regard to good 'business arrangements,' which may present themselves, such a power must be strictly pursued. We cannot suppose that it was intended to give the city council, as such, the right to go into commerce, to buy for the purpose of selling goods, or to enter into any private business or speculation whatever. As, for instance, if the city council owning horses, in the discharge of their police duties should find it necessary to establish a blacksmith shop, we do not think they would be within their corporate duties to open it for the accommodation of the public, with or without compensation."

48. *Ladd v. Jones*, 61 Ill. App. 584 (referred to without dissent in *Palestine v. Siler*, 225 Ill. 630,

and it has also been held that charter power of a municipality to establish an electric light plant for its own use

637, 80 N. W. 345, 8 L. R. A. (N. S.) 205); *Christensen v. Fremont*, 45 Neb. 160, 63 N. W. 364; *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; *Swanton v. Highgate*, 81 Vt. 151, 69 Atl. 667.

In California, charter authority to provide for and regulate lighting of the streets and public places and to provide for such lights as necessary for the convenient transaction of public business does not authorize the municipality to operate a plant to supply the inhabitants of the municipality with light. "The providing of light for the public purpose of lighting the public streets and public places, and such lights as are convenient for the transaction of public business, is a very small and insignificant enterprise as compared with that of supplying light to the inhabitants generally for their private use. The two objects are manifestly distinct, because of the different nature of the use to which the lights are to be devoted in the different cases. The terms of the express grant of the power to provide light for the public purposes named do not indicate any intention to give the distinct and larger power to establish a plant for furnishing light for private use to all the inhabitants of the city who may desire it, and no such intention can be imputed to the framers of the charter from the language there employed. * * *

The question whether or not, if

the city had erected or should erect a plant to supply electric light for the public streets, public places, and public buildings, it would have power to distribute any surplus thereof to the inhabitants for private use does not arise in the case. Decisions on this question, some of which are cited by appellant, have no bearing on the proposition presented in the case at bar. It is clear that the power to construct works, in whole or in part, for the express purpose of supplying light to the inhabitants is not incidental to or included in the power to construct such works to supply light for public streets and public buildings." *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41.

Nebraska—distinction between express power and implied power to erect plant. "It has been said that, under an express power to erect gas works or waterworks, the uniform rule is that a city is not limited to furnishing gas or water for use in public places, but may furnish the same for private use. *Thompson Houston Electric Co. v. Newton*, 42 Fed. 723. But a power in express terms to erect a lighting plant for the city and a power merely to provide for lighting the streets are very different in their effect. The former power might imply a right to maintain the plant for all purposes for which such plants are generally used, while the latter grant might reasonably be restricted to its terms." *Christen-*

for the purpose of lighting its streets, and to furnish lights and heat to persons outside the corporate limits, does not confer power to furnish its own inhabitants with electric lights for private use.⁴⁹ However, the better rule, and the one supported by the weight of authority is to the contrary, i. e., that statutory authority to acquire, construct and maintain waterworks and works for light includes authority to construct and maintain a plant to supply the inhabitants with water or light for their private use as well as to supply the municipality for public purposes.⁵⁰ So the general rule is that the

sen v. Fremont, 45 Neb. 160, 63 N. W. 364.

In New York, by statute, if light plant is to be constructed for other than "municipal purposes," certificate of authority must be obtained from state gas commission. Potsdam Electric Light & Power Co. v. Potsdam, 97 N. Y. S. 190, 49 Misc. Rep. 18, aff'd without opinion in 98 N. Y. S. 1113, and on rehearing in 99 N. Y. S. 551, 112 App. Div. 810.

49. Swanton v. Highgate, 81 Vt. 152, 69 Atl. 667.

50. *California*. Cary v. Blodgett, 10 Cal. App. 463, 102 Pac. 668 (explaining and distinguishing Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41).

Florida. Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 229, 18 So. 677, 30 L. R. A. 540, 51 Am. St. Rep. 24.

Indiana. Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268.

Kentucky. Overall v. Madisonville, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

Missouri. State ex rel. v. Allen, 178 Mo. 555, 577, 77 S. W. 868.

United States. Thompson Houston Electric Co. v. Newton, 42 Fed. 723.

"It has been the uniform rule that a city, in erecting gas works or water works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use." Per Mr. Justice Shiras in Thompson-Houston Electric Light Co. v. Newton, 42 Fed. 723.

Power granted a municipal corporation to provide for lighting its streets, and vesting in the council control of such works as the city may own for supplying light for its own use or the use of the inhabitants, authorizes the municipal corporation to install light plants to furnish light for public use and for the use of the inhabitants. Overall v. Madisonville, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

Reason for rule. "It is true the courts generally rest their decisions as to the power of the

sale of electricity to private citizens for light, by a municipality which owns its own electric light plant for the purpose of lighting its streets, will not be interfered with by the courts unless the sale results in a material impairment of the lighting of the streets.⁵¹

§ 1786. Power to construct and operate competing plant.

Unless a municipality has granted an exclusive franchise to produce and sell lights to its citizens as well as to furnish its own, upon the theory of the dual nature of a municipal government, in which it is part public and part private. This distinction, though, is rapidly disappearing, and exists now perhaps more as a fiction of the law than as a fact. Towns are now organized for governmental purposes only, no longer for the enjoyment of exceptional privileges granted as a favor by the sovereign. They levy taxes for governmental purposes, and can levy them for none other. Hence any expenditure of the public money must be in furtherance of a public benefit in its nature governmental. In this state a great many towns and cities own and operate their own light and water plants. In nearly every instance they furnish light and water to the inhabitants as well as to the public places. In no instance of which we are aware has it been held by any court, or allowed by an act of Legislature, that a municipality could go into a *commercial business purely as an enterprise of gain*. It is always allowed or supported by the reason that it has the right to make or store the product for its public use. Common sense and good business allow that it should sell its surplus to its inhabitants, rather than to waste it. In this way it is enabled, too, to accomplish the main purpose, the public purpose, by enabling it to own and to economically operate a plant for that purpose. A city, doubtless, would not be allowed to act as a bond broker. Nevertheless, it may invest its sinking fund, which it is allowed and required to have in certain contingencies, in commercial bonds, and necessarily to sell them. Its prisoners may be required to work in its workhouse. May not the product of their labor be sold? The situations all seem to us to be analogous. The main feature in each is a clearly governmental power and duty. The other or added feature is incidental, and allowed as a sensible and necessary concomitant of the main purpose. We think the city had the power to install a light plant to furnish public lighting, and incidentally, as is proposed, light to its inhabitants." *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

51. *Crouch v. McKinney*, 47 Tex. Civ. App. 54, 104 S. W. 518.

chise,⁵² or has otherwise entered into a valid contract not to compete with a public service company,⁵³ where it has authority so to do it may construct a competing water or light plant or street railway,⁵⁴ provided there is no statute requiring it to purchase the plant of the existing company engaged in furnishing a supply of service;⁵⁵ and a contract between a municipality and a public service corporation for a supply of water or light for a term of years does not preclude the city from erecting a competing plant during the term of such contract,⁵⁶

52. Power to grant exclusive franchises, § 1633 *ante*, vol. 4.

53. Power to make such a contract, § 1787 *post*.

54. *Arizona*. Phoenix Water Co. v. Phoenix, 9 Ariz. 430, 84 Pac. 1095.

Colorado. Thomas v. Grand Junction, 13 Colo. App. 80, 56 Pac. 665.

Illinois. Hughes v. Momence, 163 Ill. 535, 45 N. E. 300.

New York. Stolz v. Syracuse, 111 N. Y. S. 467, 59 Misc. Rep. 600, *aff'd* without opinion in 119 N. Y. S. 1146, 134 App. Div. 993; Warsaw Waterworks Co. v. Warsaw, 44 N. Y. S. 876, 16 App. Div. 502, *mod'fd* in 161 N. Y. 176, 55 N. E. 486.

Pennsylvania. Hastings Water Co. v. Hastings Borough, 216 Pa. St. 178, 65 Atl. 403; Re Millvale, 162 Pa. 374, 29 Atl. 641.

Texas. Joy v. Terrell (Tex. Civ. App., 1911), 138 S. W. 213.

United States. Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585, *aff'g* 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353;

Tillamook Water Co. v. Tillamook City, 139 Fed. 405, *aff'd* in 150 Fed. 117, 80 C. C. A. 71; Farmers' Loan & Trust Co. v. Sioux Falls, 131 Fed. 890, *rev'd* in Sioux Falls v. Farmers' Loan & Trust Co., 136 Fed. 721, 69 C. C. A. 373; Colby University v. Canandaigua, 96 Fed. 449; Westerly Waterworks Co. v. Westerly, 80 Fed. 611.

On annexation, municipality may supply water to annexed territory, although village had granted franchise to a private company prior to its annexation. Rogers Park Water Co. v. Chicago, 131 Ill. App. 35.

Temporary injunction against city to prevent construction of competing street railway, see United Railroads of San Francisco v. San Francisco, 180 Fed. 948.

55. § 1791 *post*.

56. Helena Waterworks Co. v. Helena, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245, *aff'g* 122 Fed. 1, 58 C. C. A. 381.

Meridian v. Farmers' Loan & Trust Co., 143 Fed. 67, 74 C. C. A. 221, *rev'g* 139 Fed. 673; Blen-ville Water Supply Co. v. Mobile, 95 Fed. 539, *aff'd* in 175 U. S. 109,

nor does the fact that it has granted a franchise, which will not terminate for some time, to a private company engaged in the same business, provided the franchise is not exclusive.⁵⁷ So a municipality, with authority to

20 Sup. Ct. 40, 44 L. Ed. 92 and 186 U. S. 212, 22 Sup. Ct. 820, 46 L. Ed. 1132.

Contra, *Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Co. v. Dawson*, 130 Fed. 152, 173; *Mercantile Trust & Deposit Co. v. Columbus Waterworks Co.*, 130 Fed. 180.

Contract for supplying does not preclude right to erect competing plant. In *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 113, 114, 20 Sup. Ct. 40, 44 L. Ed. 92, the legislature empowered the water company to construct waterworks and to supply the city of Mobile and its inhabitants with water. The company did so and thereafter made a contract with the city of Mobile that it would furnish to that city the use of 260 hydrants for the term of six years, and that it would not charge the citizens higher rates than those specified in the contract, but it did not undertake by the agreement to supply the inhabitants and the city with water. The city strictly complied with the terms of the agreement but proceeded to construct waterworks of its own. The court held that it had the power to build waterworks and that its action in no way impaired the obligation of its contract with the water company.

The fact that a public service company enters into a contract with the municipality to furnish a supply or service, does not

give it an exclusive right, especially where no duty is imposed on the company to furnish such supply or service. *Peoples' Electric Light & Power Co. v. Capital Gas & Electric Light Co.*, 116 Ky. 76, 75 S. W. 280.

57. *California*. *Clark v. Los Angeles*, 160 Cal. 30, 317, 116 Pac. 723.

Michigan. *Muskegon Traction & Lighting Co. v. Muskegon*, 167 Mich. 331, 132 N. W. 1060.

Ohio. *State ex rel. v. Hampton*, 47 Ohio St. 52.

Pennsylvania. *Olyphant Sewage Drainage Co. v. Olyphant*, 211 Pa. 526, 61 Atl. 72.

United States. *Hamilton Gas L. & C. Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; *Thompson-Houston Electric Co. v. Newton*, 42 Fed. 723.

Grant of franchise not a contract to not compete. A municipal grant of the right to erect and maintain an electric light plant for twenty years is not an implied contract that the city will not for such time enter into the business of commercial electric lighting. *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127, rev'g on this ground 113 Fed. 817, and 101 Fed. 23.

A franchise which is not exclusive is not a contract, the obligation of which is impaired by the municipality afterwards establishing a competing system.

erect or purchase gasworks, can erect them at its pleasure without regard to whether the private company furnishing gas at the time is fulfilling its duties.⁵⁸

On the other hand, if an exclusive franchise is granted, and the municipality had power to grant such a franchise, or it lawfully contracts with the company not to operate a competing plant, the city cannot construct or maintain a competing system, since to do so would constitute an impairment of the obligation of a contract.⁵⁹

North Springs Water Co. v. Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

The fact that a village has granted a franchise to a company to construct and maintain a water works system just prior to its annexation to a city, will not, in the absence of express stipulation, prevent the city from supplying water from its own mains within the territory formerly comprising the village. *Rogers Park Water Co. v. Chicago*, 131 Ill. App. 35.

58. *State v. Hamilton*, 47 Ohio St. 52, 23 N. E. 935; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, aff'g 37 Fed. 832.

59. *Mitchell v. Tulsa Water, Light, Heat & Power Co.*, 21 Okla. 243, 95 Pac. 961; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, aff'g 60 Fed. 957; *Monett Electric Light, Power & Ice Co. v. Monett*, 186 Fed. 360; *Mercantile Trust & Deposit Co. v. Columbus*, 161 Fed. 135; *American Waterworks & Guaranty Co. v. Home*

Water Co., 115 Fed. 171; *Columbia Avenue Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson*, 130 Fed. 152.

Exclusive franchise precludes right to erect competing plant. In *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, the city of Vicksburg made an ordinance contract to give to the waterworks company the exclusive right to construct and maintain waterworks in that city for the term of thirty years, and it was enjoined from proceeding to issue bonds for the purpose of constructing or purchasing other works upon the ground that a subsequent law of the state which empowered it to do so impaired the obligation of its contract with the company. The rule that nothing may be taken by implication against the city and that a contract regarding a public franchise should be construed most favorably to the municipality was earnestly invoked, and the decision in the case of *Lehigh Water Company's Appeal*, 102 Pa. 515, wherein the word "exclusive" was held to except the city, was cited and urged upon the attention of the

However, the grant of an exclusive franchise for a certain term of years as against "any other person or corporation" does not preclude the municipality from erect-

court and it was argued that the contract to give an exclusive right meant exclusive of other corporations and not of the city. But the argument did not prevail. The supreme court held that the exclusive right which the city agreed to give was a sole and undivided privilege, and that its contract as effectually estopped it from exercising or sharing this privilege as from granting it to another.

A city having power to contract with a water company for a supply of water for a term of years may grant an exclusive contract or franchise for such time so as to preclude itself from entering into competition within such time, where it is necessary to grant such exclusive privilege to obtain the contract. *Mercantile Trust & Deposit Co. v. Columbus*, 161 Fed. 135, 142.

California constitution, by providing that any person or domestic corporation may use streets to supply water or light to the inhabitants of the city, provided the city is not itself operating works for a like supply, does not grant exclusive franchise to a corporation constructing waterworks thereunder so as to preclude city from constructing competing works. *Madera Waterworks v. Madera*, 185 Fed. 281. In other words in California, after private capital has, in a city where there are no public works, occupied the streets for the pur-

poses of supplying a city and its inhabitants with the water under such a constitutional provision, the city itself may, while the privately owned plant is engaged in the business of supplying the municipality and its inhabitants with water, install a plant and operate it in competition with the privately owned plant. *Madera Water Works v. Madera*, 185 Fed. 281; *Clark v. Los Angeles*, 160 Cal. 30, 317, 116 Pac. 723.

In Illinois, however, a grant of exclusive franchise has been held not to preclude the erection of competing works, on the theory that exclusive means that the municipality will not grant a similar franchise to another. *Rogers Park Water Co. v. Chicago*, 131 Ill. App. 35, 53.

Invalid exclusive franchise. In Texas, it is held that an ordinance, granting to a citizen, his heirs and assigns, for a specified term of years, the *right and privilege* to supply to a city and its inhabitants water for domestic and other uses, must be construed as an exclusive one so as to be invalid because creating a monopoly which is forbidden by a constitutional provision. *Ennis Waterworks v. Ennis* (Tex., 1912), 144 S. W. 930, aff'g (Tex. Civ. App., 1911), 136 S. W. 513, and refusing to overrule *Brenham v. Brenham Waterworks Co.*, 67 Tex. 542, 4 S. W. 143.

ing a competing plant;⁶⁰ and an exclusive franchise to supply water for *public purposes* and for extinguishing fires does not preclude it from erecting a plant to provide water for domestic uses and to supply it to the inhabitants.⁶¹ So statutory authority to purchase or erect waterworks "or" to authorize their erection by another does not preclude a municipality which has granted a franchise for a water supply to construct thereafter waterworks of its own,⁶² except that in Pennsylvania a contract for a supply precludes municipal ownership during the term of the contract.⁶³

60. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353.

61. *Mitchell v. Tulsa Water, Light, Heat & Power Co.*, 21 Okla. 243, 95 Pac. 961.

62. *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665; *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

63. *Pennsylvania Water Co. v. Pittsburg*, 226 Pa. 624, 75 Atl. 945 (Judges Mestrezat and Potter dissenting in lengthy opinions in which Judge Brown concurs), holding also that contract binds a city which annexes a borough which had made the contract, where it agreed to recognize all contracts for the supply of water made by the borough. *Potter County Water Co. v. Austin*, 206 Pa. St. 297, 55 Atl. 991; *Troy Water Co. v. Troy*, 200 Pa. St. 453, 50 Atl. 259; *Warren Water Co. v. Warren*, 200 Pa. 504, 50 Atl. 250; *Tyrone Gas & Water Co. v. Tyrone*, 195 Pa. St. 566, 46 Atl. 134; *Union Water Co. v. Rochester*, 180 Pa. 509, 38 Atl. 136; *White v. Meadville*, 177 Pa. St. 643, 35 Atl. 695, 34 L. R. A. 567.

In Pennsylvania, by statute, a municipality may adopt one of two methods to supply itself with water i. e., it may construct and operate its own works by municipal taxation, or it may contract with a private corporation to construct works and supply the municipality, but when it has adopted either of these methods it is held that it rejects the other, so that if it has contracted with a private corporation to construct works, it cannot thereafter erect a competing plant. *Carlisle Gas & Water Co. v. Carlisle Water Co.*, 188 Pa. St. 51, 41 Atl. 321; *Dorrance v. Bristol Borough*, 224 Pa. St. 464, 73 Atl. 1015, holding, however, that in the particular case there was no such contract between the company and the municipality as to preclude the latter from erecting its own plant.

This rule adopted in Pennsylvania applies without regard to whether the water company was incorporated under a statute conferring on it the exclusive right to provide water within the district or under a statute denying such exclusive privilege to companies thereafter incorporated.

It would seem, however, that a municipality may, in

Pennsylvania Water Co. v. Pittsburgh, 226 Pa. 624, 75 Atl. 945.

Reason for rule. "If anything be manifest, it is that if two water mains be laid side by side on the same street, equally accessible to the householder on each side, conveying double the quantity needed, with double sets of hydrants, pumping stations, offices, salaries, and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory taxation, support the municipal system, he will not voluntarily support the private corporation system; such a conflict of interests will inevitably bankrupt the system which depends on the voluntary patronage of the public. We hesitate to assume—every court is bound to hesitate long before assuming—the legislature intends, by grants to distinct corporations for public purposes, there shall arise such conflict in the exercise of the franchises as will result in practical destruction of property of any citizen without compensation. It is a cardinal rule of construction between older and younger grants of franchises, the sovereign does not intend the younger shall infringe on the older; but to assume these franchises can be in existence and in operation at the same time is to assume the commonwealth has granted precisely the same thing to the municipality that it had already granted to the water company, for, in a business

view, the contemporaneous exercise of the franchise is impossible." *White v. Meadville*, 177 Pa. St. 643, 651, 35 Atl. 695, 34 L. R. A. 567.

Rule cannot be indirectly evaded by contracting with another company to supply the municipality with water at certain rates, and to sell the plant to the municipality at a price not exceeding its cost. *Welsh v. Beaver Falls*, 186 Pa. St. 578, 40 Atl. 784.

Where no contract, rule different. *Boyertown Water Co. v. Boyertown*, 200 Pa. St. 394, 50 Atl. 189.

Rule modified. Where a water company had the right by statute to use the streets of a borough, and thereafter the borough made a contract with the company for water for municipal purposes and a part of the consideration was the agreement of the company not to charge the inhabitants any excess over the previous rates, the borough was not thereby precluded from establishing a competing system, since there was no contract to provide the inhabitants of the borough with water. *Tarentum Water Co. v. Tarentum Borough*, 230 Pa. 148, 79 Atl. 402.

Limitations on rule: There must be contract to supply water for use of "inhabitants." The fact that when a borough is created from a portion of the territory supplied with water by a certain company, such company continues to supply the borough and its citizens with water at fixed rates and that it agreed to

a proper case, be *estopped* by its conduct from erecting and maintaining a competing plant.⁶⁴

§ 1787. Same—power to make contract not to compete.

The power to grant an exclusive franchise⁶⁵ or to make a contract giving the exclusive right *as against all third persons* to erect a water or light plant or the like, is to be distinguished from the power to make a contract not to erect or operate a competing plant.⁶⁶ There may be no power as to the former but at the same time power to make a contract not to erect competing works.⁶⁷ For example, in the much cited Walla Walla

pay the company for fire plugs if it would extend its mains to certain points, does not establish an implied contract so as to preclude the borough from supplying water through its own municipal agency. *Bethlehem City Water Co. v. Bethlehem Borough*, 231 Pa. St. 454, 80 Atl. 984, in which it is said that it is for the purpose of supplying water for the use of the inhabitants "and not for supplying water for municipal purposes that a borough may adopt one of two methods which exhausts its municipal power and prevents it from resorting to the other for a supply of water."

Decisions in water cases not applicable to light cases. Conferring power on company to supply light does not preclude the city from subsequently supplying light in parts of city not lighted prior to passage of ordinance conferring power. *Titusville Light & Power Co. v. Titusville*, 196 Pa. St. 3, 46 Atl. 195.

May recover damages. *Bennett Water Co. v. Millvale*, 200 Pa. St. 613, 50 Atl. 155, *aff'd* on rehearing

in *Bennett v. Millvale*, 202 Pa. St. 616, 51 Atl. 1098.

Measure of damages where municipality illegally constructs and maintains a competing plant. *Bennett Water Co. v. Millvale*, 202 Pa. St. 616, 51 Atl. 1098.

64. See *Dorrance v. Bristol Borough*, 224 Pa. St. 464, 73 Atl. 1015, where, however, it was held that there was no estoppel.

65. § 1633 *ante*, vol. 4.

66. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 465, 26 Sup. Ct. 660, 50 L. Ed. 1102.

67. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 14, 19 Sup. Ct. 77, 43 L. Ed. 341.

Power to make contract not to compete. "An agreement of this kind was a natural incident, to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of water

case, decided by the federal supreme court, the charter of the city authorized the erection of waterworks by the municipality and also to grant the right to use the streets for water pipes "provided always that none of the rights or privileges hereinafter granted shall be exclusive or prevent the council from granting the same rights to others." It was held that the municipality, in granting a franchise to a water company, could agree not to compete during the period of the contract, notwithstanding it could not grant an exclusive franchise.⁶⁸ There is, however, some authority at least tending to the contrary.⁶⁹

§ 1788. Power to acquire property outside territorial limits.

The power to purchase property in general outside

works the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. Cases are not infrequent where, under a general power to cause the streets of a city to be lighted or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in

good faith and with decent regard for the rights of the other party." *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 665.

68. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, followed in *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 467, 26 Sup. Ct. 660.

Rights after termination of contract. A contract for a supply, giving exclusive rights for a term of years, does not prevent the city building its own waterworks after the expiration of such period. *Sioux Falls v. Farmers' Loan & Trust Co.*, 136 Fed. 721, 729, 69 C. C. A. 373, rev'g 131 Fed. 890.

69. *Long v. Duluth*, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 181; *Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143.

§ 1718-1722 *ante*, vol. 4.

the municipal limits has already been considered in a preceding volume,⁷⁰ and the right to obtain property outside the limits by condemnation has been noticed in a preceding chapter in this volume,⁷¹ as has the power of a municipality to acquire property outside the municipal limits by dedication.⁷² Generally, a municipality may purchase or otherwise acquire property outside its limits, where necessary for use in connection with its plant.⁷³ For instance, it is so seldom that a water supply can be obtained within the limits of a city, that a mere grant of power to provide and supply water to the city and its inhabitants will be construed to give power to acquire for that purpose water supplies outside the city.⁷⁴ So in the exercise of the power to establish a municipal plant to furnish water, the municipality has the right to buy from any corporation or person, engaged in supplying water for public use outside the municipality, any surplus water which such corporation or person possesses, and may purchase the entire water supply of such person or corporation and the water plant or system used in connection therewith.⁷⁵

§ 1789. Power to acquire plant of existing company.

In a proper case, the plant of a private company may be acquired by a municipality, instead of constructing its own plant wholly or in part, either by purchase or condemnation.⁷⁶ A municipality may *condemn* the existing plant of a water or light company,⁷⁷ and this rule

70. § 1108 *ante*, vol. 3.

71. § 1495 *ante*, this volume.

72. § 1544 *ante*, this volume.

73. *Hibbard v. Barker*, 84 Kan. 848, 115 Pac. 561.

74. *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490.

Acquiring property outside of city limits. In some states a city may acquire water systems in operation although they extend

beyond the city's limits. *Omaha Water Co. v. Omaha*, 162 Fed. 225, 89 C. C. A. 205.

75. *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. 137.

76. Construction of statutory authority to buy plant of water company, as to time, see *Ziegler v. Chapin*, 126 N. Y. 342, 27 N. E. 471, *aff'd* 59 Hun (N. Y.) 214, 13 N. Y. S. 783.

77. § 1498 *ante*, vol. 4.

is reiterated by statute in some jurisdictions,⁷⁸ but the power to *purchase* the property of an existing company is to be distinguished from the power to *condemn* the property under the right of eminent domain, since there may be a right to condemn without any right to purchase pursuant to proceedings at variance with the condemnation statute.⁷⁹

The municipality may ordinarily purchase the plant of an existing company, provided power so to do has been delegated; but it has been held that if a municipality is merely authorized to "erect, construct, build, operate, and maintain" a water or light plant, it has no power to "purchase" a plant already in existence.⁸⁰ The right to purchase may exist because of conditions contained in the charter of the company,⁸¹ or because of the provisions in a statute in existence at the time,⁸² or by reason of a contract between the municipality and the public service company.⁸³ A municipality may purchase a plant subject to an incumbrance,⁸⁴ and the power of a municipality to purchase the plant of a public serv-

78. Statutory power to condemn waterworks, see *Leavenworth v. Leavenworth City & Ft. L. Water Co.*, 69 Kan. 82, 76 Pac. 451.

79. See *Re Board of Water Com'rs of White Plains*, 176 N. Y. 239, 68 N. E. 348, rev'g 76 N. Y. S. 11, 71 App. Div. 544.

80. *Austin v. McCall*, 95 Tex. 565, 573, 574, 68 S. W. 791, rev'g (Tex. Civ. App., 1902), 67 S. W. 192.

81. *St. Louis v. St. Louis Gas-light Co.*, 70 Mo. 69.

82. *Southington v. Southington Water Co.*, 80 Conn. 646, 69 Atl. 1023.

§ 1791 *post*.

Construction of statutes. Statutes providing that a certain board may contract for purchas-

ing, etc., for the municipality all "lands, streams, water, water rights, or other property, real or personal, or rights therein, which may be required for the purpose of supplying" the municipality with water, have been held to refer only to the property of individuals and not to authorize the board to purchase the property owned by waterworks corporations and already devoted to a public use. *Re Board of Water Com'rs of White Plains*, 176 N. Y. 239, 68 N. E. 348, rev'g 76 N. Y. S. 11, 71 App. Div. 544.

83. § 1790 *post*.

84. *Norwich Gas & E. Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746; *State v. Topeka*, 68 Kan. 177, 74 Pac. 647.

ice company exists independent of its power to raise money to pay for it.⁸⁵

§ 1790. Same—option to purchase existing plant.

It is very common for a grant of a franchise to use the streets, or other contract relating to the use of the streets by a public service company, to reserve a right, on behalf of the municipality, to purchase the plant at the end of a certain number of years, and such provisions are held valid and enforceable against the company.⁸⁶ But where the municipality has no authority to

85. *Slocum v. North Platte*, 192 Fed. 252, 263.

See vol. 5, chapter on Municipal Indebtedness.

86. *California*. *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 57 Pac. 210, 571.

Indiana. *Valparaiso City Water Co. v. Valparaiso*, 33 Ind. App. 193, 69 N. E. 1018.

Kansas. *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 Pac. 176.

Maine. *Mayo v. Dover & Foxcroft Village Fire Co.*, 96 Me. 539, 53 Atl. 62.

New Jersey. *Livermore v. Millville*, 74 N. J. 158, 67 Atl. 605.

West Virginia. *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320.

Wisconsin. *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555 (where valuation determined by arbitrators). *Eau Claire Water Co. v. Eau Claire*, 132 Wis. 411, 112 N. W. 458 (holding right to purchase had not been waived).

United States. *Omaha Water Co. v. Omaha*, 162 Fed. 225, 89 C. C. A. 205, holding that majority of appraisers could fix the value and that in determining the value

the appraisers were not bound by the rules relating to arbitrations.

Ultra Vires. Contract with water company reserving right to purchase plant at an appraised value, is *ultra vires* where municipality had no authority to own a plant. *Phillips Village Corp. v. Phillips Water Co.*, 104 Me. 103, 71 Atl. 474.

Ohio. Natural gas. Ordinance granting a franchise to a gas company need not reserve the right to purchase the gas plant, since the statute so requiring applies only to the purchase of gas works for the manufacture and supply of artificial gas and does not apply to natural gas companies. *Logan Natural Gas & Fuel Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 122.

Sale of part: effect on option. Option to purchase in grant of franchise to gas company is not defeated by disposal of part of the property by the company before the exercise of the option by the municipality. *Indiana v. Consumers Gas Trust Co.*, 144 Fed. 640, 75 C. C. A. 442.

Construction of contract for purchase of plant of water supply

acquire the property of a waterworks company by agreement, a contract contained in a franchise, under which an option to purchase was given and the appraisement was required not to exceed the cost of the works plus ten per cent. cannot be enforced for or against the municipality, notwithstanding an appraisement has been made.⁸⁷ However, if the municipality had no power to enter into the contract, the company is *estopped* to assert its invalidity, where the grant with such a condition has been accepted by the company,⁸⁸ and the company cannot attack an attempt to purchase on the ground that the intent of the municipality is to sell the property to another company.⁸⁹ This option to purchase, it has been held, is *assignable*.⁹⁰

If the right to purchase is reserved, the actual election to purchase is binding upon the municipality and cannot be revoked,⁹¹ and in some jurisdictions it is held that a

company. *Jersey City v. Flinn*, 74 N. J. Eq. 104, 78 Atl. 391.

Construction of contract contained in a franchise granted by a municipality to a water company, as to right of municipality to purchase the plant at the end of a certain number of years, see *Salina Waterworks Co. v. Salina*, 195 Fed. 142; *New Cumberland Borough v. Riverton Consolidated Water Co.*, 232 Pa. St. 531, 81 Atl. 548.

87. *Re Board of Water Com'rs of White Plains*, 176 N. Y. 239, 68 N. E. 348, rev'g 76 N. Y. S. 11, 71 App. Div. 544.

Curative legislation. Legislature may validate contract. *Phillips v. Phillips Water Co.*, 104 Me. 103, 71 Atl. 474.

88. Where a waterworks company has contracted with a town for the sale to the town of its waterworks, it cannot be heard to

say that the town has no power to purchase, in an attempt to defeat the contract. *Bristol v. Bristol & Warren W. W. Co.*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

Estoppel. But where option to purchase in grant of franchise is beyond the powers of the public service company and in violation of the public policy of the state, the company is not estopped by its acceptance and use of the franchise to assert that the agreement is invalid. *Quinby v. Consumers Gas Trust Co.*, 140 Fed. 362, 366.

89. *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640, 647.

90. *De Motte v. Valparaiso*, 161 Ind. 319, 67 N. E. 985, 66 L. R. A. 117; *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640, 647.

91. *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 234, 69 Pac. 176.

In Massachusetts, a town can-

municipality cannot insist on the appointment of appraisers before it agrees and elects to purchase.⁹² In other jurisdictions, however, under the wording of particular options, the municipality is not bound to purchase at the price fixed by the arbitrators but is given the choice of purchasing or not, even after it has had an appraisalment.⁹³

Construction of option. If the contract giving the right to purchase is contained in the grant of a franchise, the provision relating to such right to purchase should be construed in the sense in which it may be supposed to have been understood by the parties at the time of the making of the contract, and any doubt as to their intention should be resolved in favor of the municipality rather than of the company.⁹⁴ Where the right to purchase provided for its exercise at any time after the expiration of fifteen years from the completion of the plant, on giving one year's notice in writing, such notice may be given one year before the expiration of the fifteen years.⁹⁵

Payment as condition precedent. If the municipality is entitled to a plant constructed by a private company, at the termination of a certain number of years, upon payment of the value thereof, it has no right to take

not rescind its vote to purchase a waterworks but the vote completes a contract from which the town cannot withdraw. *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 16 N. E. 420; *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168.

92. *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245, 252, 6 So. 113, 4 L. R. A. 616.

93. *Livermore v. Millville*, 71 N. J. L. 503, 59 Atl. 217, aff'd in 72 N. J. L. 221, 62 Atl. 408; *Eau Claire Water Co. v. Eau Claire*, 132 Wis. 411, 420, 421, 112 N. W. 458.

One appraisal does not exhaust power to exercise option. Appraisal of plant, at instance of municipality, but not followed by purchase, does not exhaust the right to exercise the option to purchase on a new appraisal at some subsequent time. *Eau Claire Water Co. v. Eau Claire*, 132 Wis. 411, 419, 112 N. W. 458.

94. *Valparaiso City Water Co. v. Valparaiso*, 33 Ind. App. 193, 69 N. E. 1018.

95. *Valparaiso City Water Co. v. Valparaiso*, 33 Ind. App. 193, 69 N. E. 1018.

possession at the end of such time without payment.⁹⁶

Specific performance. Where the franchise of a company is conditioned on the sale of its property at the option of the municipality at the end of a certain number of years, the municipality may sue for *specific per-*

96. Payment must precede possession. Where a municipality agrees to give immediate possession to a water company of a small line of wooden pipes which the city then owned and to allow it to build new waterworks throughout the city as necessity demands, with covenants on the part of the water company that it would change what little the city then had in the way of waterworks into better ones and would create now works as fast as the demands of the city required, and that upon the expiration of thirty years the city would pay the company for all the works which it should have created and the company should then deliver possession of all the waterworks to the city, the agreement is a contract and not a lease, and at the expiration of the thirty years the city has no right to the possession of the property or to the appointment of a receiver for the company where it does not pay or tender the value of the improvements. *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 381, 57 Pac. 210, 571.

"We dissent *in toto* from the claim of the city that at the lapse of the twenty years the title to this property, with the right of possession, passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compen-

sation by agreement or litigation, as best it could. * * * Now, the familiar and ordinary law of business transactions is that he who parts with title receives, at the time, payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts. When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to, property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance. While it is true that the act provides that no grant so made shall confer the right to operate the waterworks for any period beyond twenty years, yet such provision is no more imperative than the one that at the expiration of the twenty years the city shall purchase and pay therefor. * * * In so far, therefore, as the decree of the circuit court attempts to transfer the title and the possession to the city before payment, we are constrained to hold that it was erroneous." *National Waterworks v. Kansas City*, 62 Fed. 853.

formance of the contract to sell;⁹⁷ and this is so not-

97. *Fayetteville v. Fayetteville Water, Light & Power Co.*, 135 Fed. 400.

Specific performance. Arbitration clause does not preclude specific performance. *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 234. The contrary, however, is held in Alabama, and in that state there can be no specific performance where the breach consists in failure to appoint appraisers. *Montgomery Gas-Light Co. v. Montgomery*, 87 Ala. 245, 251, 6 So. 113, 4 L. R. A. 616.

In Rhode Island, a town contracted with a waterworks company to purchase its works at a price to be agreed upon, or, if they failed to agree on the price, it should be fixed by arbitrators. It was held that the contract will be enforced by the court where the company refuses to agree or to appoint arbitrators, especially where the parties have incurred obligations by reason thereof and cannot be placed in *statu quo*, and it was said: "If the case was that of a simple agreement or contract for the sale of land or other property at a price to be fixed by arbitrators, where one of the parties had refused to appoint an arbitrator, the court probably could not, upon the application of the other party, either fix a price itself or appoint arbitrators, for the reason suggested in the demurrer, viz.: that the contract, being simply for a sale at a price to be fixed in a certain manner, the parties could not be compelled either to sell or buy at a price

not so fixed. Such is the English doctrine. *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Mer. 507; *Vickers v. Vickers*, L. R. 4 Eq. 529. The same rule has been followed in this country when there have been no circumstances to distinguish the case from *Milnes v. Gery*. Pom. Spec. Perf. Const., § 150. The cases of *City of Providence v. St. John's Lodge*, 2 R. I. 46, and *Dike v. Greene*, 4 R. I. 285, would seem at first blush to establish a different rule. But in these cases the contract was to sell at a price to be fixed by appraisement, with no stipulation as to how the appraisers should be appointed. The court held in these circumstances that it could itself appoint a master to make the appraisal, and would decree a specific performance at the price so determined. But, as well stated by complainant's counsel, where the contract to sell does not stand alone, but is merely a subsidiary part of another contract for a more extensive purpose, the performance of which has already been entered upon, a different rule prevails. In such a case the courts hold that the manner of determining the price is a matter of form, rather than of substance; and if it becomes evident that it cannot be determined in the manner provided for in the contract, by reason of the refusal of one party to do what in equity he ought to do, the court will determine it upon the application of the other. *Coles v. Peck*, 96 Ind. 333. In other words, if the parties have incurred obliga-

withstanding the company repudiates the appraisement of the value of the property on the ground that the appraiser selected by the company substituted another in his place without the formal consent of the company, where the company participated in the appraisement proceeding without objection, after full knowledge of the substitution.⁹⁸

tions under the contract so that they cannot be placed in *statu quo*, the court will itself enforce the agreement." *Bristol v. Bristol & Warren Waterworks*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

"The contract has been so far performed by the city that the streets are occupied and other rights held by the water company at least practically obstructive of the city's right and duty to furnish general water supply. These rights and privileges have been conferred on the faith of this contract for purchase. The *statu quo* can be re-established and the city placed in its former situation only in case conveyance be compelled. In other words, equity cannot be done, and the rights of the city and the public cannot be protected, except by compelling performance of that promise by which defendants obtained and enjoyed the franchises it now holds. Such considerations have induced courts unhesitatingly to specifically enforce similar contracts." *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

98. Specific performance of contract to sell. "Upon the exercise of this option the contract became, *eo instante*, executed, and the sale was perfected. The con-

tract not having contemplated anything but a fair market value, it was not of the essence of the contract how this should be ascertained, as this was a matter of detail, subordinate to the fundamental provisions thereof. If the arbitration, for any reason, failed, the court would itself ascertain the value of the property, and would base its action on the ground that the fixing of a fair market price was a matter of detail, and not fundamental or of the essence of the contract. Then, if the fixing of the value in the case at bar is not of the essence of the contract, but merely subsidiary to the contract itself, the appointment of the arbitrators was not a vital or fundamental act, but was an act of administrative detail, incident to the contract itself, and the acts of defendant's agents, officers, and attorney in constituting and conducting said arbitration were such as were binding upon the defendant corporation, and by such acts it waived any alleged irregularity, and is estopped and bound by the award. If the defendant in the case at bar had refused to name an arbitrator, the court would itself have ascertained the value of the property; but inasmuch as the arbitrators were appointed by

Moreover, a contract contained in a franchise granting the water company the right to construct water-works, which gives an option to the municipality to purchase the plant, is not so unreasonable that it will not be enforced by a court of equity in a suit for specific performance, merely because the municipality is given the option to purchase without any corresponding right on the part of the company to enforce a sale.⁹⁹ If the company refuses to convey the plant to the municipality, where the municipality has the right to purchase and has tendered the amount found to be the value of the property by arbitration, the company will be treated as a trustee from the time the property ought to have been transferred, so as to be liable to account at least for the profits actually received.¹

Exercise of option. Where an option to purchase is contained in the grant of a franchise, the grant usually provides the length of notice of the intention to purchase which must be given and also fixes the manner of appointing appraisers which ordinarily is by the company choosing one and the municipality another and the two so chosen selecting a third.² So a franchise, in some in-

the agents and officers of the defendant, and the defendant was fixed with notice of such appointment, and did not object or repudiate such appointment, but actually, through its agents, officers, and attorney, appeared and participated in such arbitration thirty-four days after said appointment, and by its silence and representation induced the complainant in good faith to do the same, the defendant is bound by the award." *Fayetteville v. Fayetteville Water, Light & Power Co.*, 135 Fed. 400, 404.

99. *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

1. *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

2. **Validity of delegation of power to fix value.** It cannot be objected that the common council cannot delegate to third persons the ascertainment of the amount to be paid for the plant, and that by reason of such attempted delegation of power the option clause is invalid, where the commissioners are merely to fix an amount for the guidance of the common council, who are then to exercise its discretion whether it will take the property at the sum so fixed. *Livermore v. Millville*, 71 N. J.

stances, provides that the valuation by the appraisers shall in no case exceed the cost of the works and a certain per cent.³ Where the grant of a franchise reserves the right, after the expiration of a certain number of years, to purchase the works of the company at a valuation to be fixed by three appraisers, one of whom is to

L. 503, 59 Atl. 217, aff'd in 72 N. J. L. 221, 62 Atl. 408.

Necessity for exercise of option. Exclusive right of laying gas pipes under streets was granted for a term of years on condition that the city have the privilege of purchasing the plant at the expiration of twenty-five years at such price as might be agreed upon by a committee. The city in such case must make its election, otherwise there is no breach of the contract on the part of the gas company. *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

Time for exercise of option. A grant of an exclusive privilege to use the streets for gas pipes provided the city shall have the right to purchase the plant "at the expiration of twenty-five years," does not give the city a right to purchase against the wish of the grantee twelve years after the expiration of the twenty-five years. *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

Notice of option to purchase waterworks given by motion or resolution is sufficient although statute provides that *ordinances* may be enacted to provide for the purchase of water works, etc. *Slocum v. North Platte*, 192 Fed. 252, 258-263.

On whom notice served. Where notice of appointment of arbitrators to determine the value of the plant was required to be served on the company, as the first step in exercising the option to purchase, notice to the secretary and superintendent of the company, who was in charge of the property, is sufficient. *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

Tender. What constitutes tender of price, to comply with option to purchase, see *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497; *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

3. **Cost plus ten per cent.** Where the option to purchase, contained in the grant of a franchise, provides that the valuation of the plant by the appraisers shall in no case "exceed the cost of the said works more than ten per cent," it seems that the word "cost" means the amount expended in the construction of the plant and also in the establishment of the business, and hence includes the franchise and good will. See *Re Board of Water Commissioners of White Plains*, 176 N. Y. 239, 68 N. E. 348, rev'g 76 N. Y. S. 11, 71 App. Div. 544, where question not actually decided.

be chosen by the company and one by the municipality, and the other to be chosen by the two appraisers, the legislature cannot thereafter require a sale to be made at a valuation to be fixed by appraisers none of whom are chosen by the company.⁴ The award of arbitrators appointed solely to decide the value of a plant, where responsive to the submission, is final and conclusive between the parties.⁵

If the option to purchase has been exercised, the company, pending the determination of the amount to be paid, must take such care of the property as an ordinary, prudent man would take of his own, such as repairing leaks, etc., but need not establish filters which have never existed, nor fence out cattle from access to the water supply, where the municipality had elected to purchase the plant without such safeguards.⁶

§ 1791. "Duty" to purchase existing plant.

A municipality, when it determines to own a water or light plant, is under no obligation to purchase the plant of a company already doing business in its corporate limits,⁷ notwithstanding the municipality had granted

4. *Leavenworth v. Leavenworth City & Ft. L. Water Co.*, 69 Kan. 82, 76 Pac. 451.

5. *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

6. *Bristol v. Bristol & Warren Waterworks*, 25 R. I. 189, 55 Atl. 710.

7. *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687, aff'd in 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585.

See also *dicta* in *Philipsburg Water Co. v. Philipsburg Borough*, 203 Pa. St. 562, 53 Atl. 347.

Right to erect plant without purchasing existing plant. Unless statute or charter granting

the right of municipal ownership so provides, a municipality may erect a competing plant in the absence of an exclusive franchise, without first acquiring the property of the private company. *Colby University v. Canandaigua*, 69 Fed. 671.

Statutes authorizing purchase not mandatory. Statutes authorizing the purchase by the municipality of a private plant, in connection with municipal ownership, are not mandatory. *Carlson v. Helena*, 39 Mont. 82, 102 Pac. 39; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687, aff'd in 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585; *Warsaw Waterworks Co.*

such company its franchise to use the streets or had contracted with it for a supply for a term of years—unless there is a statute to the contrary,⁸ or a contract between the municipality and the company provides that the former must purchase the plant of the latter in such a case. Moreover, the municipality cannot be compelled to purchase an existing plant merely to protect the stockholders of the company. This proposition is well illustrated in a recent case in the supreme court of the United States where it appeared that a municipality made a contract with a waterworks company to furnish water

v. Warsaw, 44 N. Y. S. 876, 16 App. Div. 502, mod'fd in 161 N. Y. 176, 55 N. E. 486.

8. *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 24 Sup. Ct. 553, 48 L. Ed. 795, aff'g 103 Fed. 584.

Statute as mandatory. Statute authorizing granting of twenty year franchises with power to renew them for twenty years, and providing that if not renewed the municipality should purchase the works, held mandatory as to purchase. *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653.

Montana statute held unconstitutional. A statute which provides that a city may acquire a waterworks only by purchasing one from the persons owning the same, if it has given them a contract for supplying water, is unconstitutional as a levying of a tax by the legislature on the inhabitants of a municipal corporation for municipal purposes. *Helena Con. Water Co. v. Steele*,

20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.

In Connecticut, a statute providing that if a municipality, after deciding to establish a municipal lighting plant, refuses to purchase a private plant in operation, it may be compelled to do so, is not unconstitutional as violating the provision against granting exclusive special privileges or immunities. *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746, holding also that judicial powers were not conferred on commission created by the statute to determine the value of the property.

A Massachusetts statute, which is compulsory only as to the municipality, has been held to be constitutional. *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497. Construction of statute as to purchase of plant of gas and electric light company by town, see *Citizens' Gas-light Co. v. Wakefield*, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457; *Hudson Electric Light Co. v. Hudson*, 163 Mass. 346, 40 N. E. 109.

for a period of years and that, because of failure to furnish sufficient wholesome water, the city revoked the contract, as it had a right to do, whereupon the holders of the bonds of the water company, through the trustee of the mortgage, sued the local corporation to enjoin it from constructing a municipal water system of its own. The lower court granted the relief, although holding that the municipality had the right to revoke the contract, unless it should purchase the usable parts of the water-works system, on the theory that "*he who seeks equity must do equity*;" but it was held by the supreme court in an able opinion delivered by Mr. Justice Lurton that the chancellor had no power to impose such a condition on a municipality, and that a consideration of the consequence to creditors of the contracting company was no answer to the legal rights of the city, and the city should be left its freedom of contract in respect to buying such parts of the company's plant as it could profitably use.⁹

So where a municipality is prohibited by statute from granting a franchise for a period longer than a certain number of years, a provision in a franchise compelling the municipality to purchase the plant at the expiration of such term of years, in case of refusal to extend the franchise, has been held void as an indirect evasion of the statutory prohibition;¹⁰ but there is authority to the contrary.¹¹

9. *Columbus v. Mercantile Trust & Deposit Co.*, 218 U. S. 645, 31 Sup. Ct. 105, 54 L. Ed. 1193.

10. *Clay Center v. Clay Center Light & Power Co.*, 78 Can. 390, 97 Pac. 377.

11. *Denver: purchase of water-works.* In a recent Federal decision involving the water supply of Denver, it appeared that the city granted a water franchise in 1890 for twenty years, which

was at that time the statutory limit for such franchise, and such ordinance provided that on the expiration of the twenty years the city could elect to purchase property of the company at its value as appraised or could renew the franchise for another twenty years with a reduced rental for its hydrants. It was held, by Judge Hook, that although the city had no power to bind itself by a contract to re-

§ 1792. Value of plant bought by municipality and price to be paid.

In determining the value of a plant of an existing company, where the municipality obtains it by condemnation proceedings or by a purchase pursuant to conditions in a franchise contract or otherwise, and the mode of estimating the value is not regulated by statute, reference should be made to a preceding chapter where the question of the value of property of a public service company is considered at length in relation to the reasonableness of rates of the company as regulated by the municipality, and including as analogous certain cases where the valuation of the property arose in condemnation proceedings or other proceedings to acquire the property of the company by the municipality.¹²

Where the property of a private plant is taken over, the question of the price which should be paid therefor is a perplexing one,¹³ although governed to some

new the franchise, yet it did have power to contract to purchase in case of failure to renew, and that the two alternative provisions should be construed together so as to require the municipality to purchase the property at the end of the term in case of failure to renew the franchise; and that, where the city created a public utilities commission before the termination of the original twenty years, pursuant to a charter amendment which also authorized the purchase of the property of the water company if it would accept a certain sum in city bonds, but if not accepted providing for an election to vote bonds to be used to construct water works to supply the city, and the company rejected the offer to buy and at an

election the bonds were voted, the charter amendment was held to impair the obligation of a contract. *Denver v. New York Trust Co.*, 187 Fed. 890.

12. §§ 1744-1762 *ante*, vol. 4.

13. *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746 (holding that in determining the price to be paid there may be considered the changes necessary to reasonably improve the plant, the amount of the output, the fact that the company has an established business, and the policy of the state as shown by the statute); *Gloucester Water-Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

extent by particular statutes.¹⁴ The procedure to fix the value is generally regulated by contract or statute.¹⁵

14. *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497; *Gardner Water Co. v. Gardner*, 185 Mass. 190, 69 N. E. 1051; *Falmouth v. Falmouth Water Co.*, 180 Mass. 325, 62 N. E. 255; *Gloucester Water-Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977 (holding evidence of past earnings properly excluded, under particular provisions of statute); *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533; *Inhabitants of West Springfield v. West Springfield Aqueduct Co.*, 167 Mass. 128, 44 N. E. 1063; *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168; *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 16 N. E. 420; *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 U. S. App. 165, 27 L. R. A. 827.

Actual cost with interest. Where municipality was given the right by statute to buy the property of a public service company on payment of the actual cost with interest, such actual cost means the amount actually paid to the contractor, notwithstanding he had done the work under a peculiar contract, netting him a somewhat unusual profit. *Falmouth v. Falmouth Water Co.*, 180 Mass. 325, 62 N. E. 255.

Franchise as item of value. Franchise for unexpired term is item of value. *Bristol v. Bristol & Warren Waterworks*, 23 R. I. 274, 49 Atl. 974.

If the option to purchase is exercised by the municipality, it has been held that the company cannot thereafter, by any act, forfeit its franchise so as to deprive itself of the right to compensation for such franchise as a part of the plant. *Bristol v. Bristol & Warren Waterworks*, 25 R. I. 189, 55 Atl. 710.

15. *Maine. Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774.

Massachusetts. Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 16 N. E. 420.

New York. Re Board of Water Com'rs of White Plains, 176 N. Y. 239, 68 N. E. 348.

Wisconsin. Eau Claire Water Co. v. Eau Claire, 127 Wis. 154, 106 N. W. 679.

United States. Fayetteville v. Fayetteville Water, Light & Power Co., 135 Fed. 400.

§ 1795 *post*.

In Pennsylvania, the 1907 statute fixing the procedure where a municipality desires to obtain possession of waterworks owned by a private corporation does not apply to the purchase of the property of a water company incorporated under the 1874 statute providing that the franchise shall be an exclusive one and fixing the procedure for municipal ownership after twenty years, since to hold otherwise would impair the obligation of a contract. *Manheim Borough v. Manheim Water Co.*, 229 Pa. 177, 78 Atl. 93.

§ 1793. Municipal ownership as question solely for decision of municipality.

If a municipality is merely authorized, by a statute or its character, to own and operate certain, or all, public utilities, it ordinarily rests in the discretion of its proper corporate authorities whether it shall exercise the privilege.¹⁶ So it is held that the furnishing of water to a city and its inhabitants is a purely local matter, and is not within the power of the legislature to compel taxation for that purpose, without the action of the inhabitants of the city or their chosen representatives.¹⁷ However, there is some authority, more or less *dicta* to support the statement that the legislature may, without the consent of the local corporation or its inhabitants, compel a municipality, at its expense or at the expense of property owners benefited thereby, to acquire or construct subways,¹⁸ or even waterworks.¹⁹

§ 1794. Municipal ownership or mode of operation as discretionary.

The power of a municipality to construct and operate a public utility plant or a street railway or the like, where conferred either expressly or by necessary implication, is not mandatory, but vests a discretion in the corporate authorities which will not be interfered with by the courts in the absence of bad faith;²⁰ and the same

16. § 1794 *post*.

17. *Blades v. Detroit*, 122 Mich. 366, 81 N. W. 271, following *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

18. *Prince v. Crocker*, 166 Mass. 347, 359, 44 N. E. 446, 32 L. R. A. 610.

19. *David v. Portland*, 14 Ore. 98, 122, 12 Pac. 174.

See § 219 *et seq.*, *ante*, vol. 1.

20. A city council may judge what public improvements are most needed by the city, and its

contracts for the erection of a light plant are not affected by the fact that on that account it neglects the repair of the streets and other duties. *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

Light plant. Whether a municipality shall exercise its option to operate a lighting plant is within its discretion. *Bailey v. Philadelphia*, 184 Pa. St. 594, 39 Atl. 494, 41 Wkly. Notes Cas.

rule applies as to its contracts for services and supplies in the construction or operation of the municipal plant.²¹ Thus, a municipality, in the exercise of its discretion, may select any system that will furnish lights of the required brilliancy at the lowest rates.²² Furthermore courts cannot restrain a municipality which has elected to construct an electric light plant, from so doing, notwithstanding the undertaking will result in loss to it as well as to a private competitor.²³

In the management and operation of its plant, a "city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters."²⁴

529, 39 L. R. A. 837, 63 Am. St. Rep. 812.

Bad faith: excessive purchase price. But if the price to be paid for an existing plant is nearly three times its actual value, and such plant is also unsuitable for the purpose, the purchase may be enjoined. *Avery v. Job*, 25 Ore. 512, 525, 36 Pac. 293.

21. In installing a light plant the city council may act in its discretion as to the kind, cost, when and where it will buy, and how much at a time—it may buy by piecemeal. *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

Where the method by which waterworks are to be provided is not indicated in the law, the city may exercise a lawful discretion in using the charter powers "to provide for the establishment of waterworks and

to do and regulate any other matter or thing that may tend to promote the peace, health, welfare, prosperity and morals of the said city." *State ex rel. v. Tampa Waterworks Co.*, 56 Fla. 858, 47 So. 358, 19 L. R. A. (N. S.) 183.

22. *Detroit v. Circuit Judge of Wayne County*, 79 Mich. 384, 44 N. W. 622.

23. *Muskegon Traction & Lighting Co. v. Muskegon*, 167 Mich. 331, 132 N. W. 1060.

An ordinance providing for the construction of a waterworks system, and appropriating a sum of money for sinking an artesian well, is not invalid because the system may prove a failure, nor because the cost cannot be ascertained in advance. *Taylor v. McFadden*, 84 Ia. 262, 50 N. W. 107.

24. *Henderson v. Young*, 119 Ky. 224, 227, 26 Ky. L. Rep. 1152, 83 S. W. 583.

So where a municipality owns a water or light plant or other public utility, the question of the extension of the system is within the sound discretion of the authorities of the municipality.²⁵

§ 1795. Procedure to determine whether municipality shall own its own plant.

If the constitution, statute or charter provides and fixes the procedure to be followed in acquiring public utilities, such procedure should be at least substantially followed.²⁶ In some jurisdictions, the power conferred

In administering a public utility, even within its own limits, a municipality does not act in its governmental capacity but in a proprietary and only *quasi* public capacity. *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490.

"Waterworks are public utilities. The power to own or otherwise provide a system of waterworks, conferred upon cities, has relation to public purposes, and for the public, and appertains to the corporation in its political or governmental capacity. They are supported at public expense, and are subject to the exclusive control of the city in its governmental capacity, for the convenience, health and general welfare of the city. The city determines the amount of watermains, where to be laid, and the number and location of fire-hydrants. Over these the individual has no control. In the exercise of this political power the city has discretion, with which the courts have no right to interfere." *Asher v. Hutchinson Water, L. & P. Co.*, 66 Kan. 496, 500, 71 Pac. 813, 61 L. R. A. 52.

25. *Crouch v. McKinney*, 47 Tex. Civ. App. 54, 104 S. W. 518.

Mandamus will not lie at the instance of a tax payer to compel a city to extend its electric light lines, to supply him with light. The exercise of such discretion on the part of the city authorities will not be interfered with by the courts in the absence of fraud, corruption or arbitrary action. *Moore v. Harrodsburg*, 32 Ky. L. Rep. 384, 105 S. W. 926.

26. Two-thirds vote of aldermen: time for. Under a charter provision requiring a two-thirds vote of the aldermen to acquire by purchase electric light works, the passage of a resolution of expediency after the laying of the tracks for the plant is ineffective where there was no such resolution before that time. *Bay City Traction & Electric Co. v. Bay City*, 155 Mich. 393, 119 N. W. 440.

In San Francisco, under charter provision authorizing acquisition of public utilities, offers to sell existing utilities may be solicited before ordinance declaring necessity for acquiring a utility

upon a municipality to purchase or construct public utilities is limited by a provision that the proposition must be decided by a majority vote of its electors.²⁷ And if

is adopted; solicitation of offers for public utilities may be by resolution; such resolution need not be published for five successive days before final action thereon; and the determination by the municipal authorities of the necessity for an acquisition is conclusive on the courts in the absence of fraud. *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 304.

In Pennsylvania, the act of 1907 fixing the procedure where a municipality desires to possess waterworks owned by a private corporation, does not apply to the purchase by a borough of the property of a water company incorporated under the act of 1874 which provides that after twenty years the municipality may become the owner by paying the net cost of erecting the plant with ten per cent interest less all dividends declared. *Manheim Borough v. Manheim Water Co.*, 229 Pa. St. 177, 78 Atl. 93.

27. *Iowa*. *Taylor v. McFadden*, 84 Ia. 262, 50 N. W. 1070.

Michigan. *Mitchell v. Negau-nee*, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468; *George v. Wyandotte Electric Light Co.*, 105 Mich. 1, 62 N. W. 985.

Missouri. *State ex rel. v. Allen*, 183 Mo. 283, 82 S. W. 103.

New Jersey. *Marcellus v. Garfield Borough*, 71 N. J. L. 373, 58 Atl. 1099, holding that vote on

construction "or" purchase of waterworks was not conclusive.

New York. *Re Village of Le Roy*, 55 N. Y. S. 149, 35 App. Div. 177, aff'g 50 N. Y. S. 611, 23 Misc. Rep. 53.

Ohio. *Stewart v. Norwalk*, 22 Ohio St. 323.

South Carolina. *Johnson v. Rockhill*, 57 S. C. 371, 35 S. E. 568; *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322.

Washington. *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. Rep. 836; *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077.

United States. *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Thompson-Houston Electric Co. v. Newton*, 42 Fed. 723.

Submitting proposition to voters, see *Aylmore v. Seattle*, 48 Wash. 42, 92 Pac. 932.

Majority. Where option given to town to purchase works of water company, on a majority vote of the legal voters, majority of those voting is sufficient. *Southington v. Southington Water Co.*, 80 Conn. 646, 69 Atl. 1023.

In Wisconsin, purchase by city, under 1897 statute, of equity of redemption in water works and lighting plant, is not void for want of a popular vote. *Connor v. Marshfield*, 128 Wis. 280, 107 N. W. 639.

Vote of electors as conclusive. Decision of voters of municipality

a majority of the voters have cast their votes in favor of the construction of a municipal light plant, the municipality cannot thereafter contract with a private company for lighting for a term of years;²⁸ but a mere vote to borrow money to construct the plant has been held in Pennsylvania not to preclude such a contract.²⁹

Propositions submitted to a vote must be clearly stated and not in fact contain two or more.³⁰ But in submitting the question of indebtedness to pay therefor under a statute requiring that each question shall specify a single object or purpose only, a question submitted to a vote as to whether the city shall acquire "and" construct electric works does not submit two separate objects or purposes.³¹ So the question of municipal ownership of a combined plant to supply water and light may be submitted as a single proposition.³² Questions relating to elections to determine whether bonds shall be issued for the purpose of municipal ownership of a public utility are considered in a subsequent chapter.³³

It has been held that the proper remedy to compel a public service company to render to the municipality an

as to ownership of water plant held not subject to any review. *Waverly v. Waverly Waterworks Co.*, 125 N. Y. S. 339, 69 Misc. Rep. 373.

28. *George v. Wyandotte Electric L. Co.*, 105 Mich. 1, 9, 62 N. W. 985.

29. *Seitzinger v. Tamaqua*, 187 Pa. St. 539, 41 Atl. 454.

30. In New Jersey, the act of 1906 enabling cities to own their own waterworks provides that it shall remain inoperative in any city until assented to by a majority of the voters of such cities who shall vote either for or against the adoption of its provision; but there cannot be sub-

mitted together with the question of municipal ownership the question whether the city shall cause to be issued bonds to a certain amount, so coupled that the voters could not vote for or against one proposition without voting for or against the other. *Twitchell v. Sea Isle City*, 78 N. J. 165, 73 Atl. 75.

See chapter on Municipal Indebtedness, *post*, vol. 5.

31. *Clark v. Los Angeles*, 160 Cal. 30, 317, 116 Pac. 722.

32. *Cary v. Blodgett*, 10 Cal. App. 463, 102 Pac. 668.

33. See chapter on Municipal Bonds, *post*, vol. 5.

itemized statement of the net cost of erecting and maintaining its works, together with a detailed statement of dividends declared, and to exhibit books, papers, etc., as authorized by statute, is by *mandamus* and not by bill in equity, the purpose being in effect to compel a conveyance of the property for municipal ownership.³⁴ Defects in the proceedings by a municipality to acquire an existing plant cannot be urged on a *collateral attack*.³⁵

§ 1796. Special assessments to pay for water works.

Where a municipality is authorized to levy special assessments for local improvements only, it cannot levy them for a general improvement; and the construction of a water works plant to furnish water for fire purposes and to individuals, other than pipes and other property local in character, is not a local improvement.³⁶ In other words, water works, considered as a whole, do not constitute a local improvement for which a special assessment may be levied. However, on the theory of special benefits, it is generally held that a special assessment may be levied on abutters to pay the costs of water mains along the street,³⁷ although there is some author-

34. *Williamsport v. Citizens' Water & Gas Co.*, 232 Pa. 232, 81 Atl. 316.

35. *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. 259.

36. *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611.

See also *Lemont v. Jenks*, 197 Ill. 363, 64 N. E. 362, 90 Am. St. Rep. 172.

Contract for plant to be paid for by special assessment. A city, in South Carolina, has no power to contract for the purchase of a light plant to be paid for by special or local assessment. *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322.

Stand pipes, engine house, and

the like are not a public improvement for which a special assessment may be levied. *O'Neil v. People*, 166 Ill. 561, 46 N. E. 1096; *Harts v. People*, 171 Ill. 458, 49 N. E. 538.

Judicial review. The question of whether or not an improvement is local in character is one of fact which may be judicially reviewed. *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611; *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922.

37. *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; *Hughes v. Mommence*, 163 Ill. 535, 45 N. E. 300; *Vreeland v. Tacoma*, 48 Wash. 625, 94 Pac. 192.

Nature of tax, see *Philadelphia v. Union Burial G. S.* for Phila-

ity to the contrary, and the reasons for and against the proposition are stated in the cases in the notes.³⁸ If the

delphia, 178 Pa. St. 533, 36 Atl. 172, 36 L. R. A. 263.

The benefit offered, and not the extent of the use thereof, is the test. *Batterman v. New York*, 73 N. Y. S. 44, 46, 65 App. Div. 576.

Waterworks — local assessments.

An ordinance providing that the reservoirs and works of a water supply system shall be paid for by general taxation, and the mains to be paid for by local assessment, is not void as providing for a double assessment. *Hughes v. Momence*, 163 Ill. 535, 45 N. E. 300.

And the fact that the city has not provided means to pay for the reservoirs and works, cannot be used as a defense to the special assessment. *Hughes v. Momence*, 163 Ill. 535, 45 N. E. 300.

The mere fact that a special assessment is for more than is required to lay the water pipes does not render it excessive or invalid. The assessment may include the cost of maintenance and repair. *Parsons v. District of Columbia*, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943.

A city having borrowed money and expended the same on a waterworks system, may still create local districts where the water supply has not been extended or is inadequate, and assess the same for the improvements. *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612.

A city may lay water pipes in a road in a rural part of the city

at the expense of the owners of the land. Such a road is a street of the city. *Philadelphia v. McCalmont*, 6 Phila. (Pa.) 543.

An assessment for water rates against property adjacent to a street in which pipes are laid, is not invalid merely because the property has no present use for, and does not take, water. *Dasey v. Skinner*, 11 N. Y. S. 821, 33 N. Y. St. Rep. 15, 57 Hun 593.

Special assessments are supposed to cover all property within the benefited territory, and if made against only the lots which abut the streets in which water mains are laid, or without regard to the value of the lots, cannot be upheld. *Stehmeyer v. Charleston*, 53 S. C. 259, 283, 31 S. E. 322.

Judicial review. Legislative valuation of the special benefits to property from a local improvement of water mains is not subject to judicial review. *District of Columbia v. Burgdorf*, 6 App. Cas. (D. C.) 465.

Defenses. It is no defense to paying a special assessment for water mains that some changes were made in the improvement from that required by the ordinance providing for same. If tenable, it should have been taken advantage of before the work was completed by injunction. *Ricketts v. Hyde Park*, 85 Ill. 110.

38. The laying of a water pipe in a street for distributing water for a city and inhabitants is in

land in front of which water pipes are laid is farm land, it has been held that it cannot be assessed by the front foot rule,³⁹ but the contrary has been announced also.⁴⁰

no sense an appendage to, or a part of, the adjoining lots. The power to tax adjoining property a fixed sum per front foot for the expense of such pipe, cannot be supported under the power of general taxation, nor under the power to tax property benefited by a local public improvement because of, and not in excess of, benefits. Nor can the city, under its police power, compel the property owner to lay it himself. *Doughten v. Camden*, 72 N. J. 451, 63 Atl. 170, 3 L. R. A. (N. S.) 817, 111 Am. St. Rep. 680.

Water mains: special assessments for. "There may be circumstances under which a local assessment for the cost of a water supply plant is equitable and just, but there is no more reason for confining the assessments strictly within the benefit conferred in this class of improvements than in any other. The reason for the existence of a water supply is the benefit which it confers, and the local consumer is usually obliged to pay for all the special benefit to him by the charge which is made for the water which he consumes on his property. If the system extends only through the streets of a particular section of the municipality, so that the benefit from the fire protection and other advantages which come from a water supply is confined to that section, there is no reason why it should not be required to pay

for the installation of the plant, for it would be unjust to throw the cost on the entire municipality. But if all the citizens are benefited by introduction of the water into the city, the mere fact that the mains run through certain streets is not a sufficient ground to require the abutting property to pay for laying them. Improvement districts may be created when desirable for the acquisition of a water supply, and the benefit and cost confined to them, although they are portions of a larger community, and, for general matters, are subject to taxation upon an equality with them." 1 Farnham, *Waters & Water Rights*, § 152b.

In South Dakota, statute specifically designates purposes for which assessments may be made. Water mains are not included and it is held that therefore an assessment cannot be made therefor. *Lee v. Mellette*, 15 S. D. 586, 90 N. W. 855.

39. *Allentown v. Adams*, 5 Sadler (Pa.) 253, 8 Atl. 430.

Where a water main is laid in front of rural property for the benefit of people of another part of the city, such property is not liable to special assessment, since the improvement is general. *Crawford's Estate*, 14 Phila. (Pa.) 323.

40. *Minnesota*. It was held that an assessment for water pipes of so much a front foot, applying to all property, was valid, and a tract

However, under legislative authority, abutters may be assessed to cover the expense of water connections be-

of sixty-five acres of unoccupied land was subject to the statute directing the assessment to be made. Such property could not escape the assessment on the ground that the pipe was laid to conduct water into another part of the city; nor upon the ground that the city authorities denied to the owner the privilege of having it tapped for the purpose of supplying the land with water. *State v. Robert P. Lewis Co.*, 72 Minn. 87, 75 N. W. 108, 42 L. R. A. 639. On second appeal this case was overruled, the court holding that the statute directing the assessment at ten cents per lineal foot frontage to be made, was unconstitutional, being in violation of the 14th amendment of federal constitution, as a taking of private property under the guise of taxation without just compensation and without due process of law. *State v. Robert P. Lewis Co.*, 82 Minn. 390, 85 N. W. 207, 86 N. W. 611, 53 L. R. A. 421. This latter case was decided on authority of the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, holding that, while the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement and subject to special assessment to meet the cost of such improvement, still the ground on which local assessments are justified is that the locality is especially benefited by the outlay of money to be raised, and that the owners

do not in fact pay anything in excess of what they receive by way of the improvement. "Unless this is the case no reason can be assigned why the tax is not general." That compelling the owner of property to pay for a public improvement in substantial excess of the special benefits accruing to him, amounts, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. However, upon a rehearing, the court held, in view of a later case (*French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879), that its reversal of the case was wrong, and it went back to its former decision. In the *Barber Asphalt* case, the court stated that the phrase "due process of law" means the same in both the 14th and 5th amendment of the federal constitution; that in the 14th it was not intended to impose on the states, when exercising their powers of taxation, any more rigid or stricter curb than is imposed on the federal constitution by the 5th in a similar exercise of power. And it held that the federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of per-

tween their property and the street main;⁴¹ but if there is no such authority, and the connections are made without authority or request of the abutters, a special assessment therefor has been held illegal.⁴²

§ 1797. Same—assessments to pay for electric light system.

Poles and wires in an electric light system, and also the lamps attached to the wires, have been held to be local improvements in Illinois.⁴³

sonal rights. The court then adopts the well known rule of law applicable to the question as stated by both Cooley and Dillon. It considers the case of *Norwood v. Baker* (*supra*) and holds these views not inconsistent with that case. A note in 3 L. R. A. (N. S.) 819, adds, in reference to this Minnesota case: "But it is difficult to see how that decision may be sustained on any theory of taxation, for the only possible ground for upholding the assessment would be special benefit to the property, and it would be difficult to show such benefit by the mere fact that the main passed the property in the street without any right of the property owner to utilize the water."

41. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067; *Donovan v. Oswego*, 86 N. Y. S. 155, 90 App. Div. 397.

42. *Landon v. Syracuse*, 46 N. Y. S. 1053, 19 App. Div. 41, *aff'd* without opinion in 163 N. Y. 562, 57 N. E. 1114.

43. Electric light poles and wires as local improvement. "If the water mains and hydrants of a system of waterworks, which extend along the streets of a city,

are a local improvement, we see no reason why the poles, wires, and lamps in an electric light system are not also a local improvement. So far as the plant for lighting the streets by electricity includes the powerhouse and electric generator engine, the latter may be regarded as improvements of general utility, and as not coming within the legal definition of 'local improvements.' But the poles, wires, and lamps in an electric light system are the means of furnishing the necessary light for the protection of the property of the citizens, just as the water mains and hydrants of a system of waterworks are the means of furnishing needed water for fire protection and other uses of the citizens. It cannot be said that property upon a street lighted with electric light is not more valuable than property upon a street where there is no such electric light. Property is in fact specially benefited by electric or other adequate lighting along the street on which it is situated, quite as much as it is benefited by water mains. It follows that, if water mains are local improve-

§ 1798. Contracts in connection with municipal ownership, and scope of business.

A municipality which has its own water or light plant, or a street railway or the like, may make all contracts and engage in any undertakings, as an incident to the municipal ownership of such plant, which is necessary to render the system efficient and beneficial to the public.⁴⁴ Thus if a municipality has express authority to maintain a water supply, it has implied power to acquire all necessary water rights, by appropriation and use, or other lawful ways.⁴⁵ And power to supply a municipality with water authorizes it to purchase the works of more than one company.⁴⁶ So the grant of power to a municipality to construct and operate street

ments, poles and wires in an electric light system are also local improvements. The former are conduits for water; the latter, for electricity. So, also, it must be said that, if hydrants attached to the water mains are a local improvement, lamps attached to the wires in an electric lighting system are local improvements, because the latter are the means of using the electricity, as the former are the means of using the water. The test whether an improvement is local or not depends upon the question whether or not it specially benefits the property assessed. The improvement which consists in the erection of poles, wires, and lamps in an electric light system is certainly as much a permanent improvement as the water mains and hydrants in a system of waterworks." *Ewart v. Western Springs*, 180 Ill. 318, 320-323, 54 N. E. 478.

44. See *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

City may maintain irrigation

ditches in connection with supplying water. *Ysleta v. Babbitt*, 8 Tex. Civ. App. 432, 28 S. W. 702.

Towns, in New York, cannot be sued to recover for breach of a contract made by water commissioners. *Holroyd v. Indian Lake*, 180 N. Y. 318, 73 N. E. 36, aff'g 83 N. Y. S. 533, 85 App. Div. 246.

45. *Springville v. Fullmer*, 7 Utah 450, 452, 27 Pac. 577.

Power to construct waterworks implies the power to purchase a supply of water for the same. *Fremont v. June*, 8 Ohio Cir. Ct. 124, 4 Ohio Cir. Dec. 326.

Waterworks trustees authorized to make contracts in connection with the waterworks held to have power to contract with the owners of mills for the use of a portion of the slack water above the dam for waterworks purposes. *Fremont v. June*, 8 Ohio Cir. Ct. Rep. 124, 4 Ohio Cir. Dec. 326.

46. *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422, 425, 28 Atl. 578.

railways implies authority to contract for electricity therefor.⁴⁷

But the municipality cannot carry on as an incident a business which is not essential to the accomplishment of any of the purposes for which the water or light or street railway plant was acquired.⁴⁸ It has been held, however, that a municipality may operate an ice plant as an incident to the operation of its waterworks, on the theory that the furnishing of ice is merely the furnishing of water in a frozen condition and largely used in cooling the water used for drinking purposes.⁴⁹

47. *Riverside & A. R. Co. v. Riverside*, 118 Fed. 736, 745.

48. *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

The question which has arisen and which will undoubtedly arise with more frequency in the future is whether a municipality which owns its own water or light plant, or a street railway or the like, may incidentally engage in an independent enterprise in connection with and as an incident to the operation of such a plant, where much of the labor and machinery necessary for the incidental enterprise are already owned by the municipality in the operation of its public utility plant, and must necessarily be continued by the municipality in the operation of such plant, and where the incidental enterprise may be operated largely with the same labor already used in the public utility, between the intervals of its employment in said public utility, and where only a small additional expense in the form of labor and machinery will be necessitated by the operation of the incidental enterprise, and large profits will

accrue to the municipality therefrom.

The generation of electrical power for distribution in connection with the municipal ownership of waterworks or the like and the authority of the municipality to sell such electrical power, as an incident to the operation of the municipal plant, does not seem to have been adjudicated, although there are a number of decisions as to whether condemnation proceedings may be instituted to acquire property for the development of electrical power generally for manufacturing purposes, the line of division generally being as to whether the generation of such power is for a private or a public use. *Lewis, Eminent Domain* (3d Ed.), § 268.

49. *Power of municipal waterworks to make and sell ice*. "If a city has the right to furnish heat to its inhabitants because conducive to their health, comfort, and convenience, we see no reason why they should not be permitted to furnish ice. The object in bringing, by means of a waterworks system, water in

Where the cost of materials used in erecting a water or lighting system by a municipality is in excess of the

pipes from a distance for use in supplying the needs of a city, is not alone to obtain a sufficient quantity, but also to secure that which is freer from impurities than it is possible to obtain in the city itself. If, in the hot season of the year, the inhabitants of the city must, for sanitary reasons, relinquish the cool draught from the well because, as has been demonstrated, wells of pure water cannot be maintained in populous communities, surely the city would have the right, were it practicable, to cool the water which it delivers through pipes as a substitute, and which oftentimes is scarcely drinkable in its heated condition. If not practicable to cool it in the pipes, and if it be necessary to the welfare, comfort, and convenience of the inhabitants that its temperature be lowered before being used for drinking purposes, why cannot the city provide for the delivery of a part of it in a frozen condition, to be used in cooling such part of the balance as is used for drinking purposes? Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in a liquid form, we fail to see any reason why it

cannot furnish it to them in a frozen condition. The answer of the defendant, which was introduced in evidence and considered upon the trial, states that in the hot climate in which the city of Camilla is situated ice is necessary for the comfort, health, and convenience of its inhabitants. If this is true, why should not the city be permitted to furnish ice to its inhabitants? And if the furnishing of ice to its inhabitants is conducive generally to their health, comfort, and convenience, it is certainly being furnished for a municipal or public purpose. It is a well-known fact that one of the main uses to which ice is put is the cooling of water for drinking purposes; and when it is used for this purpose, if impure, it is as apt to be deleterious to the consumer as any other impure water. Why, then, in the exercise of its police power, may not a city guard against impurities in the ice, as well as the water, used by its inhabitants. Nor do we see any rational objection to the idea that the city will be engaging in a manufacturing enterprise. The city might perhaps equally as well be said to be manufacturing when by the use of a filtering process it changes impure water into that which is pure. When, in connection with its waterworks system, it produces ice, it merely, by certain processes, changes the form and temperature of a part of the water supplied by that system. We do not think

sum above which all municipal contracts are required to be let on competitive bids, the municipality must let such contracts to the *lowest bidder*.⁵⁰

§ 1799. Power of municipality to sell supply for private purposes.

Undoubtedly a municipality cannot go into the business of merely furnishing a supply of water or electricity or gas to others for their private purposes. It may, however, in most jurisdictions furnish a supply to individuals as an incident to the operation of its plant.⁵¹ And where there is a surplus, the municipality may make a contract to dispose of it, without⁵² or within its corporate area.⁵³ Accordingly a municipality which has

that the operation by the city of Camilla of an ice plant in connection with its waterworks system, for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the constitution referred to in the plaintiff's petition, or that it is illegal for any reason." *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116.

50. *Jones v. Atlantic City*, 81 N. J. L. 259, 80 Atl. 24.

Competitive bids for municipal contracts in general, see § 1183, *et seq.*, *ante*, vol. 3.

51. § 1785 *ante*.

52. § 1800 *post*.

53. *Henderson v. Young*, 119 Ky. 224, 83 S. W. 583; *Rogers v. Wickliffe*, 94 S. W. 24, 29 Ky. L. Rep. 587; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Overall v. Madisonville*, 125 Ky. 684, 51 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

Sale of surplus. "Whether a municipal corporation, an arm,

as it were, of the state government, set up for governmental purposes only, ought to be privileged to engage in a purely commercial business, is a question of politics as well as, perhaps, of constitutional power. It involves the requiring of every citizen, who is a taxpayer, to contribute to the enterprise, to become a member of it in a sense, whether he wills to or not. Whether it is a governmental function to embark the public revenues in a commercial enterprise in order to cheapen a commodity of very common use, or which is even a necessity, may be a disputable question; but there is no doubt that the lighting of the public streets and places is a purely governmental matter. If the municipality may build and operate its own light plant for that purpose, and it may, it ought to be permitted to sell the surplus of its product as it would be to sell any of the horses bought for its fire department when they were

its own water plant may lease to private individuals the use of water flowing through its pipes, to enable the lessee to generate electrical power, where the usefulness of the waterworks or the efficiency of the system are not thereby impaired.⁵⁴ So it is held that where a city had legislative authority to erect a dam for the purpose of water works for the city, it might lawfully lease for private purposes any excess of water, not required for its water works.⁵⁵ And it cannot be successfully contended that so long as portions of the city remain unlighted there cannot be an excess of electricity which can be disposed of by the city to private citizens, where the city operates its own electric light plant, where no fraud is alleged on the part of the municipality.⁵⁶

§ 1800. Power of municipality to furnish supply outside territorial limits.

Generally, it is held that a municipality which owns its water or light plant has no implied authority to furnish water or light beyond its territorial limits,⁵⁷ or at least

no longer needed in the public service, or to sell anything else it rightfully had, but had no further use for." *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

54. *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333.

55. In connection with its water-works, the legislature may authorize a municipal corporation to erect a dam and to lease surplus water power, but it cannot maintain the dam merely to lease power. And it cannot maintain the dam merely for the purpose of supplying private persons with water. *Attorney General v. Eau Claire*, 37 Wis. 400, 436. And see *Green Bay & Miss. Canal Co. v.*

Kaukauna Water Power Co., 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

56. *Crouch v. McKinney*, 47 Tex. Civ. App. 54, 104 S. W. 518.

57. *Steitenroth v. Jackson* (Miss., 1911), 54 So. 955; *Stauffer v. East Stroudsburg*, 215 Pa. St. 143, 144, 64 Atl. 411; *Bly v. White Deer Mt. Water Co.*, 197 Pa. St. 80, 98, 46 Atl. 929; *Haupt's Appeal*, 125 Pa. St. 511, 17 Atl. 436; *Paris v. Sturgeon*, 50 Tex. Civ. App. 519, 110 S. W. 459; *Sturgeon v. Paris* (Tex. Civ. App., 1909), 122 S. W. 967.

Right of city to recover from county for water furnished to the latter, see *Mobile v. Mobile County*, 169 Ala. 539, 53 So. 793.

Power to contract to furnish supply outside city. "It will be

no power to make a contract to extend its water-works system to an adjoining municipality;⁵⁸ but in some jurisdictions it is held that a municipality may contract to furnish a supply from its plant, for use outside of the city, where not prohibited by statute or charter provision, and where there is sufficient water to furnish the residents all that is necessary for their use.⁵⁹ So it is held that a municipality which owns its own water plant may make a contract with another municipality, to furnish it water, where the supply is sufficient to meet the demands of both municipalities.⁶⁰ And it has been judicially declared that a municipality owning its water plant may make a contract with an adjoining municipality to furnish it water free of charge for public purposes in consideration of a right of way for its pipes through

observed that the power conferred is to provide the city with water, and to establish hydrants, etc., for the convenience of its inhabitants. No power is conferred to provide any other territory than that embraced within the city with water, nor is any power to establish hydrants, etc., for the convenience of other persons than its inhabitants conferred upon it. This being true, we think it must be said that the city was not authorized to contract to furnish to one not an inhabitant of its territory water for use outside of its territory." *Paris v. Sturgeon*, 50 Tex. Civ. App. 519, 110 S. W. 459.

Land partly outside city. If a person resides outside a municipality, the fact that part of his land is within the municipality does not entitle him to be furnished with water from the plant of the municipality, for his residence which is outside the limits,

where the charter of the municipality prohibits it from granting the use of any public utility operated by it to any one living beyond its limits. *Sturgeon v. Paris* (Tex. Civ. App., 1911), 122 S. W. 967. But in Massachusetts, where person or company owns land on both sides of the boundary line, and the land is a continuous parcel, wholly in the occupation of the owner, the municipality may furnish all the water necessary for use on the entire premises. *Lawrence v. Methuen*, 166 Mass. 206, 44 N. E. 247.

58. *Dyer v. Newport*, 123 Ky. 203, 94 S. W. 25.

59. *Rogers v. Wickliffe*, 29 Ky. L. Rep. 587, 94 S. W. 24.

60. *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316, following *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333.

the streets of the latter municipality.⁶¹ Accordingly a municipality which has agreed to furnish water from its plant to an adjoining municipality on certain terms may be estopped from repudiating the contract where it has been acquiesced in for some thirty years, notwithstanding the requirements of the law were not strictly complied with in entering into the contract.⁶² And it seems that a municipality owning its own water plant has power to deliver within the city water to a railroad company which has large property interests there, although it stores the water outside of its corporate limits for use partly within and partly without such limits.⁶³

A distinction is to be drawn between contracts whereby a municipality owning its own plant agrees to furnish a certain supply outside its territorial limits, without regard to whether a supply is merely of a surplus, and contracts whereby it merely disposes of a surplus, since it is the general rule that as to the latter there exists no implied power to contract.⁶⁴ Moreover a distinction is drawn by some of the cases between a sale by a muni-

61. *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316.

Contract between cities for water supply. A contract whereby a municipality owning its own plant agrees to sell water to another municipality or the inhabitants of the other municipality at a certain price, is not subject to the objection that it operates as a surrender of the legislative power of the city council which will be perpetual, since the construction and management of a water works system by a municipality is not an exercise of its legislative or governmental power, but is an exercise of a business power. *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316, following *Pike's Peak Power Co. v. Colorado*

Spring, 105 Fed. 1, 44 C. C. A. 333.

62. A municipality owning its own water works, which has received the consideration and accepted the benefits of the agreement with another municipality to furnish it water for public use, free of charge, in consideration of a right of way for its pipes through the streets of the latter municipality, cannot complain that its council made the agreement in an illegal manner. *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316.

63. *Delaware, L. & W. R. Co. v. Buffalo*, 115 N. Y. S. 657, following *Lawrence v. Methuen*, 166 Mass. 206, 44 N. E. 247.

64. *Henderson v. Young*, 119 Ky. 224, 83 S. W. 583.

municipality, which owns its own water or light plant, of any excess of its product, to persons or companies outside the corporate limits, and a contract to extend the system to an adjoining municipality, on the theory that in the one case the outside purchasers take the supply from the plant as constructed and operated by the municipality, which is not bound to extend its facilities beyond its area in order to accommodate such purchasers, while in the latter case the contract would impose the obligation on the municipality to put in all necessary mains, hydrants, poles, or what not, outside its limits, at its own expense.⁶⁵ So a distinction is to be drawn between a

65. "It is not within the power of the city of Newport to embark in even governmental enterprises beyond its territorial jurisdiction. It is not authorized to undertake by contract or otherwise to discharge a governmental duty to localities other than its own territory, for the reasons (1) that a municipality has only such power as is expressly delegated to it by the legislature, and such as is incidentally included therein; and (2) that to execute any power of government presupposes the power to levy and collect taxes from its inhabitants and property within its jurisdiction to defray the expenses incurred in its execution. There is no express and no implied grant of power to Newport to engage in such enterprise beyond its corporate limits; nor has it the right, therefore, to levy and collect taxes for such purpose. The contract in this suit if valid would impose the obligation on the city to put in all necessary water mains, and fire hydrants in Clifton at the expense of the city

of Newport. To raise the money to do this, it would have to impose a tax on the people and property liable to city taxes, or appropriate money out of the city treasury put there by taxation. In either event, it is equivalent to the imposition of a tax on the people and property of Newport to install and maintain water facilities in the municipality of Clifton. And, if the contract with Clifton should prove unprofitable to Newport, and the latter should lose money in the enterprise, the loss would have to be made up by the latter by collecting funds to defray it by taxes levied on the property in Newport. Nor could Newport acquire a franchise by purchase, or otherwise, in the absence of express legislative authority, to operate a water-works system in and for the benefit of another municipality. We conclude that the contract in suit was void. It was beyond the power of the city of Newport to enter into it." *Dyer v. Newport*, 123 Ky. 203, 94 S. W. 25.

municipality which has contracted for a supply of water and then contracts to furnish a part of it to another municipality, which is unauthorized,⁶⁶ and a municipality which contracts to furnish a supply from its own plant.

At any event, the *legislature* has authority to confer power upon a municipality owning its own water or light plant to contract with neighboring municipalities, or persons residing outside the limits, to furnish a supply to them or to their inhabitants,⁶⁷ but such authority will be strictly construed.⁶⁸ For example, in New Jersey,

66. *Rehill v. Jersey City*, 71 N. J. L. 109, 58 Atl. 175.

Statutory authority conferred upon a municipality to distribute waters through its limits and two named counties, so far as the inhabitants might desire, does not authorize the municipality to contract to furnish other municipalities a supply for distribution by the purchasing municipality. *Rehill v. East Newark*, 73 N. J. L. 220, 223, 63 Atl. 81.

67. *Kearny v. Jersey City*, 73 N. J. L. 77, 73 Atl. 110 (holding that Jersey City controlled waterworks within the meaning of the act and that the board of street and water commissioners could make a contract to supply the Pennsylvania Railroad Company for twenty-five years with all the water it desired to purchase); *Pittsburg v. Brace Bros.*, 158 Pa. St. 174, 27 Atl. 854.

The legislature may authorize a municipality owning its waterworks to lease any surplus water power created thereby, provided it is not left optional with the municipality whether the dam creating the power shall be used for a public or for a merely pri-

vate purpose. *Attorney General v. Eau Claire*, 37 Wis. 400.

Charter power of a municipality owning its lighting plant to sell surplus electric power to other cities or to consumers outside of the city, where such power has not been exercised, does not affect the right to issue bonds to pay for the plant. *Clark v. Los Angeles*, 160 Cal. 30, 317, 116 Pac. 723.

In California, statutes authorize a municipality owning its water plant and having more water than is necessary for its inhabitants, to sell the surplus, but provide that contracts for such sale shall not be for a period longer than one year. *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490, holding, however, that such statute does not prevail as against a charter provision, since a *municipal affair* within a constitutional provision that charters of cities shall be controlled by general laws except in municipal affairs.

68. See *West Hartford v. Hartford*, 68 Conn. 323, 36 Atl. 786, construing provision for furnish-

the statute authorizing a municipality owning its water works to make contracts with any "adjoining" municipal corporation has been construed to apply only to municipalities whose corporate territories are contiguous.⁶⁹

In Texas, a statute authorizing a city owning its water plant to grant the use of water to manufacturing plants outside its territorial limits is not obnoxious to the constitutional provision forbidding a grant of a thing of value to such corporations.⁷⁰ And charter power to sell a surplus of the supply outside the territorial limits is not unconstitutional as violating a provision prohibiting municipalities from giving any property to or in aid of any individual or company or to incur a debt other than for a city purpose.⁷¹ However, a provision of a municipal charter that *surplus* water may be sold by the city to persons outside the limits does not authorize a provision in a contract to furnish water to a manufacturing plant outside the limits, that in case of failure to furnish water the city shall be liable for all damages caused thereby.⁷²

It would seem that if a municipality exercises its statutory right to purchase the plant of a private company

ing water outside limits to those who lived "within a reasonable distance from the line of main pipes."

Construction of statute. A statute authorizing municipalities to acquire water works and to supply their inhabitants with water and confining the purpose of the water works to the furnishing of the municipality, the inhabitants thereof and "any other persons" with a supply of water, should be construed according to the rule of *ejusdem generis*, in so far as the words "and any other persons" are concerned, and thereunder a municipality has no authority to

supply water to another municipality. *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, 10 Am. & Eng. Ann. Cas. 130.

69. *Rehill v. East Newark*, 73 N. J. L. 220, 63 Atl. 81, followed in *Bayliss v. North Arlington*, 80 N. J. L. 124, 76 Atl. 1024.

70. *Sturgeon v. Paris (Tex. Civ. App., 1909)*, 122 S. W. 967.

71. *Simson v. Parker*, 190 N. Y. 19, 82 N. E. 732, rev'g 98 N. Y. S. 1114, 113 App. Div. 888.

See §§ 185, 186, 393 to 395 *ante*, vol. 1.

72. *Simson v. Parker*, 190 N. Y. 19, 82 N. E. 732.

supplying the municipality with water, it must acquire the entire system, although it extends to and supplies adjacent municipalities,⁷³ and that it is under a duty to continue to supply such outside territory.⁷⁴

§ 1801. Rights, duties and liabilities of municipality as owner of plant.

In so far as the rights and duties of a municipality which owns its own plant are concerned, the rules which govern private companies are for the most part applicable, as already considered in the preceding chapter.⁷⁵ A municipality which owns its plant cannot ordinarily, while it continues to be the owner thereof, discontinue its operation.⁷⁶

The general rule is that a municipality, in constructing or in operating its municipal plant, acts in a business, proprietary, or individual capacity rather than in a legislative or governmental capacity;⁷⁷ and where

73. *Omaha Water Co. v. Omaha*, 162 Fed. 225, 234, 89 C. C. A. 205, 15 Am. & Eng. Ann. Cas. 498, aff'd in 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991.

74. *Id.*

§ 1801 *post*.

75. Chapter 34 *ante*, this volume.

Right of city to trim trees. City may trim trees to any extent necessary to prevent interference with the wires of its electric lighting plant. *Hazelhurst v. Mayes*, 84 Miss. 7, 14, 36 So. 33, 64 L. R. A. 805.

76. Municipality which owns a water plant cannot, in the absence of special circumstances, discontinue its operation. *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. 137.

Abandonment of municipal waterworks, see *Smith v. Lincoln*, 170 Mass. 488, 49 N. E. 743.

§ 1660 *ante*.

77. "A city has two classes of power, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their offices because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way

it furnishes a supply to private consumers, it must exercise the same care that ordinarily prudent persons engaged in similar business would exercise under like circumstances.⁷⁸ So where a municipality constructs and operates a public utility of its own, it is held to the same degree of liability towards its employees as an individual in like circumstances, since it exercises a private and corporate duty as distinguished from a public or governmental function.⁷⁹ And where a municipality owns its own plant, it is liable for injuries sustained by a consumer by reason of an insufficient supply.⁸⁰

If water is clandestinely taken from the main of a city water works the municipality may sue for conversion of such water,⁸¹ and a city which has lawfully ac-

and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens." *Omaha Water Co. v. Omaha*, 147 Fed. 1, 5, 77 C. C. A. 267.

78. *State Journal Printing Co. v. Madison*, 148 Wis. 396, 134 N. W. 909.

Liability for torts, see Index and vol. 5.

If a city undertakes to light its streets, under discretionary power, it will be liable for doing so in a negligent manner; the fact of insufficient light being admissible on question of negligence in an action for injuries sustained by falling into an excavation in

the street. *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407.

79. *Terrell v. Washington* (N. C., 1912), 73 S. E. 888.

80. *Jackson v. Anderson*, 97 Miss. 1, 51 So. 896.

Liability of private company, see § 1699 *ante*.

Waterworks — city's liability for fire from neglect in operating. A city incorporated under the statutes of Texas is voluntarily incorporated. When such city voluntarily, under authority of statute, maintains a waterworks for general purposes, including that of extinguishing fires, it will be liable to a patron of the works, for hire, whose property is burned on account of the neglect of the city in allowing the water in the standpipe to get so low that there is not sufficient pressure to throw water on the burning property from the hydrants. *Lenzen v. New Braunfels*, 13 Tex. Civ. 335, 35 S. W. 341.

81. *Milwaukee v. Herman Zoehrlaut Leather Co.*, 114 Wis. 276, 90 N. W. 187,

quired a water supply may restrain its diversion or appropriation by individuals.⁸²

The municipality, in its use of the streets by pipes and poles, may change the pipes and poles of a private company in a reasonable manner, without becoming liable for damages.⁸³

Where the municipality purchases the plant of a private company, it acts thereafter in a proprietary capacity in carrying on the obligations of the *quasi* public company, and is under the obligation and possesses the rights of such company,⁸⁴ and it seems that it becomes bound to supply persons outside the city limits where the private company was burdened with such duty.⁸⁵

§ 1802. Power to sell or lease municipal plant.

The general rule is that a municipality cannot sell its water or light plant without express authority.⁸⁶ However, the legislature may authorize such a sale. And a municipality may, ordinarily, lease its plant.⁸⁷ Where

82. *Springville v. Fullmer*, 7 Utah 450, 27 Pac. 577.

83. If a municipality owns its water plant, it may lay a water main in a street in the location occupied by the gaspipe of a gas company, and may remove the gaspipe to another part of the street, and the gas company cannot recover damages because thereof. *Pittsburg v. Consolidated Gas Co.*, 34 Pa. Super. Ct. 374.

84. *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490.

But where city purchased a large part of the property of a water company but the company retained some of its property, the municipality is not bound by contracts of the water company with consumers but may recover the reasonable value of water fur-

nished consumers, where it had made no contract with them, *Bordentown v. Anderson*, 81 N. J. 434, 79 Atl. 281.

85. *Fellows v. Los Angeles*, 151 Cal. 52, 63, 90 Pac. 137.

86. § 1141, p. 2516 *ante*, vol. 3.
Conditions of sale: agreement to pay taxes. A city in selling its gas plant may contract with the purchaser to light the streets for a specified time, in consideration whereof the city agrees to pay any municipal taxes assessed on the gas plant. Such agreement is not exemption from taxation. *Frankfort v. Capital Gas and Electric Light Co.* (Ky., 1895), 29 S. W. 855, 16 Ky. L. Rep. 780.

87. *Ogden City v. Bear Lake & River Waterworks & Irrigation Co.*, 28 Utah 25, 76 Pac. 1069.

Power to lease to others. Where

a municipality leases its water works, it may stipulate for free water for school houses, engine houses, and the like.⁸⁸ Where a municipality leased its waterworks to another, but the contract for water was invalid because of the long and indefinite period it was to run, yet the parties acted under it for several years and the lessee spent large sums in enlarging and improving the property, the city could not repudiate the contract and recover possession of the property without any compensation for the improvements.⁸⁹

§ 1803. Rates.

Where a municipality owns its water or light works, it is settled that it has the right to charge rents against consumers who make use of its service.⁹⁰ However, the

a city's water system was in an almost worthless condition, the city had authority to lease its water right to another in consideration of his erecting a waterworks for supplying the city with water. *Ogden City v. Bear Lake, etc. Co.*, 28 Utah 25, 76 Pac. 1069.

Construction of constitutional provision forbidding lease of water rights. *Brummitt v. Ogden Waterworks Co.*, 33 Utah 285, 93 Pac. 828.

Forfeiture of lease, see *Mahon v. Columbus*, 58 Miss. 310, 38 Am. Rep. 327.

Lessee of New York subway. Right of lessee of subway in New York City to use it for other than railroad purposes, see *New York v. Interborough Rapid Transit Co.*, 109 N. Y. S. 885, rev'g 106 N. Y. S. 296, 55 Misc. Rep. 138.

88. *St. Patrick's Church Society v. Heermans*, 124 N. Y. S. 705, 68 Misc. Rep. 487.

89. *Litchfield v. Litchfield Water Supply Co.*, 95 Ill. App. 647.

90. *Jolly v. Monaca Borough*, 216 Pa. St. 345, 65 Atl. 809, applying rule to borough.

Right to charge for supply. A municipality which owns its own plant has the same right to make reasonable charges for a supply that a private public service company has, where it serves the public. *St. Louis Brewing Assn. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

The obligation of one using water supplied by a municipal plant, to pay for it, rests on contract. *St. Louis Brewing Assn. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

Water board of municipality held to have no authority to charge city or any department for water used. *People v. Barrows*, 124 N. Y. S. 270, 140 App. Div. 24.

Right of city having no power to supply borough with water not its own, to recover price from borough of water furnished, see *East Newark v. Jersey City*, 68

rates must be reasonable,⁹¹ although the municipality

N. J. Eq. 783, 64 Atl. 1132, aff'g 67 N. J. Eq. 265, 57 Atl. 1051.

Mandamus, and not action against city to collect the rate, is the proper remedy where city does not pay for water used by it from municipal waterworks under control of a board. *Corning Board of Water Commissioners v. Corning*, 124 N. Y. S. 268, 140 App. Div. 11.

Evidence admissible in action by city for water furnished, see *Bayonne v. Standard Oil Co.*, 81 N. J. 717, 78 Atl. 146.

Right to terminate contract. Contracts between a municipality owning its plant and a customer, where not for any definite time, may be terminated by either party at any time and without cost where no duty exists on the part of the municipality to furnish the supply. *Sturgeon v. Paris* (Tex. Civ. App., 1909), 122 S. W. 967.

91. § 1725 *ante*.

Rates need not be reasonable as to outsiders. "That statute, conferring on cities and towns the authority to contract to furnish water to nonresidents, did not impose upon the municipality the duties of public service corporations in their relation to nonresidents, for the statute expressly provides that the municipalities are authorized and empowered 'to furnish the same upon such terms, rates, and charges as may be fixed by the contract and agreement between the parties in this behalf, either for lighting or for manufacturing purposes, when in the

judgment of said city or town council it is for the best interest of the municipality so to do.' Thus the making of the contract and the terms, rates, and charges are left entirely to the discretion of the municipal authorities, and the interest of the municipality is the sole factor to be considered in deciding whether the contract shall be made, and if so, on what terms, and for what period, not exceeding two years. Assuming that the city authorities had the power to contract with the plaintiff to furnish water for his residence and other houses, and that the duty devolves on them of contracting for the sale of any excess of the city's water supply beyond the municipal needs and the needs of its inhabitants, it is, nevertheless, perfectly obvious that the duty to sell the excess of its water supply did not import an obligation to make a contract with any particular person at a reasonable price; but, on the contrary, did import an obligation to sell its surplus water for the sole benefit of the city at the highest price obtainable. It was a duty not owed to outsiders, but exclusively to inhabitants and taxpayers of the city. It follows that the plaintiff as a mere non-resident had no rights whatever against the city, except such as he may have acquired by contract. In other words, the city was under no public duty to furnish water to the plaintiff at reasonable rates or to furnish it at all, and to obtain the injunction

may charge a rate which will yield a fair profit, and need not furnish the supply or service at cost;⁹² and the same rules in regard to the reasonableness of rates apply as in case of the rates of private companies owning a public utility.⁹³ It may also require the supply to be paid for at meter rates,⁹⁴ the same as private companies.⁹⁵ Neglect of a municipality to collect water taxes from year to year does not estop it to collect back taxes from a purchaser at a sheriff's sale.⁹⁶

Statutes often authorize a plant owned by a municipality to furnish supplies free to charitable institutions.⁹⁷ And, independent of statute, the "right of the

the plaintiff must show that the city is about to violate its contract with him." *Childs v. Columbia*, 87 S. C. 566, 70 S. E. 296, 34 L. R. A. (N. S.) 542.

92. *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *Preston v. Detroit*, 117 Mich. 589, 76 N. W. 92; *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149; *Twitchell v. Spokane*, 55 Wash. 86, 104 Pac. 150, 24 L. R. A. (N. S.) 290.

1 *Farnum, Water & Water Rights*, page 855, § 162.

May charge rate which nets a profit. The city of Detroit owns its water plant and the board of water commissioners has power to fix water rates "on such basis as they shall deem equitable." Statute provides for a water tax to meet deficiencies in the revenue and also for a sinking fund from the surplus water rates to pay the interest and principal on the bonds issued to construct the plant. In an action to restrain the collection of water rates on the ground that the basis of the assessment was radically in-

equitable, it was unsuccessfully contended that the water ought to be furnished the users at its cost, and that the interest account, the extension account, and the cost of the plant should be borne by the property of the city, and it was held that the statute did not contemplate a payment of the bonded debt and the interest entirely by the city, although about four per cent of the entire pumpage was used for municipal purposes without charge. *Preston v. Detroit*, 117 Mich. 589, 76 N. W. 92.

93. § 1725 *et seq.*, *ante*, vol. 4.

94. *Ladd v. Boston*, 170 Mass. 332, 49 N. E. 627, 40 L. R. A. 171.

95. § 1727 *ante*, vol. 4.

96. *Girard Life Ins. & Trust Co. v. Philadelphia*, 12 Phila. (Pa.) 293.

97. *Gallipolis v. Trustees of Waterworks*, 4 Ohio Dec. 101, 2 Ohio N. P. 161, 1 O. L. D. 101.

School district as exempt from water charges. *Emaus v. Emaus School Dist.*, 12 Pa. Co. Ct. R. 349, 2 Pa. Dist. R., 322; *St. Clair*

city to furnish water for municipal and charitable purposes free can hardly be doubted.”⁹⁸ If the municipality owns its own plant and the rates charged are reasonable in amount, consumers cannot complain that water is furnished free to the various city departments and to charitable and educational institutions.⁹⁹

The rates of a public utility owned by a municipality ordinarily are not *taxes*,¹ within the rule requiring all taxes to be uniform,² nor so as to entitle the consumer to notice, and an opportunity to be heard before they are established.³ On the other hand, if rates for water or light must be paid regardless of the quantity used or whether any is used, and the plant is owned by the municipality, such rate is a tax.⁴

§ 1804. Water rates as liens.

Water rates are not a lien on the property unless it is so provided by statute or otherwise.⁵ But in some juris-

School Dist. v. Monongahela Water Co., 166 Pa. 81, 31 Atl. 71.

Compare School Boards v. Monongahela Water Co., 15 Pa. Co. Ct. R. 329.

98. Twitchell v. Spokane, 55 Wash. 86, 104 Pac. 150.

Municipality may exempt educational and other like institutions from the payment of water rates. Chicago v. University of Chicago, 131 Ill. App. 361.

99. Preston v. Detroit, 117 Mich. 589, 76 N. W. 92.

See Detroit v. Detroit Board of Education, 137 Mich. 245, 100 N. W. 455.

1. Twitchell v. Spokane, 55 Wash. 86, 104 Pac. 150.

2. Wagner v. Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Preston v. Detroit, 117 Mich. 589, 76 N. W. 92; Powell v. Duluth, 91 Minn. 53, 97 N. W.

450; St. Louis Brewing Ass'n v. St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

3. Silkman v. Yonkers, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827, aff'g 71 Hun (N. Y.) 37, 24 N. Y. S. 806.

4. New York University v. American Book Co., 197 N. Y. 294, 90 N. E. 819, aff'g 117 N. Y. S. 387, 132 App. Div. 732.

5. Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770, aff'g 120 Ill. App. 497; Re Cornelius' Estate, 13 Pa. Super. Ct. 531.

Unless expressly authorized by the legislature, a municipal corporation cannot make delinquent water rentals, a lien on the property, as against a subsequent owner or occupant who did not contract for the water and never

dictions, by statute or otherwise, water rents, where unpaid, are a lien on the property.⁶

§ 1805. Taxes and executions.

The power to levy a tax for the operation of a municipi-

made default for water rent with the city. *Linne v. Bredes*, 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707.

6. *Michigan*. *Jones v. Detroit Water Com'rs*, 34 Mich. 273.

New Jersey. *Carpenter v. Hoboken*, 33 N. J. Eq. 27.

New York. *New York University v. American Book Co.*, 197 N. Y. 294, 90 N. E. 819, aff'g 117 N. Y. S. 387, 132 App. Div. 732; *Treadwell v. Van Schaick*, 30 Barb. (N. Y.) 444; *Moffat v. Henderson*, 50 N. Y. Super. Ct. 211. See *Cuba v. Druskin*, 120 N. Y. S. 381, 135 App. Div. 508.

Pennsylvania. *Pittsburg v. Brace*, 158 Pa. St. 174, 27 Atl. 854, 33 Wkly. Notes Cas. 390; *Appeal of Brumm*, 9 Sad. 483 (Pa.), 12 Atl. 855.

Greater New York Charter, § 1017.

Liens. When water rents become a lien, in New York City, see *Mandel v. Weschler*, 112 N. Y. S. 813, 128 App. Div. 505.

No lien where no supply furnished or used. *Hoboken Mfrs' R. Co. v. Hoboken*, 76 N. J. L. 122, 68 Atl. 1098.

A charter provision that water rents for water supplied to the owner or tenant of any lot shall be a lien paramount to any alienation or encumbrance thereof, is valid. *Vreeland v. O'Neil*, 36 N. J. Eq. 399. See also *Girard Life*

Ins. Co. v. Philadelphia, 88 Pa. St. 393.

A statute making the owner of premises liable for water used thereon by a tenant is constitutional. It does not amount to a taking of property without due process of law, nor does it compel one person to pay the debts of another. The obligation is assumed by the owner when he connects his premises with the city water system to pay in conformity with the law and the reasonable rules of the city governing the same. *East Grand Forks v. Luck*, 97 Minn. 373, 107 N. W. 393, 6 L. R. A. (N. S.) 198.

Extent of lien, see *Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co.*, 58 N. J. Eq. 59, 43 Atl. 418.

Due process of law. Statute creating a lien and giving it priority over mortgages and other incumbrances is not unconstitutional as depriving persons of property without due process of law. *Provident Institution v. Jersey City*, 113 U. S. 506, 28 L. Ed. 1102, 5 Sup. Ct. R. 612.

Sheriff's sale as affecting lien. Where an assessment of a water tax becomes a fixed lien on property, a sheriff's sale of the property under subsequent encumbrance will not affect the lien. *Northern Liberties v. Swain*, 13 Pa. St. 113.

pal plant is considered in a subsequent chapter.⁷ The works and plant of a municipality which owns its own plant are generally exempt from taxation⁸ (although there is some authority to the contrary;) and they are also generally exempt from execution.⁹

7. See Chapter on Taxation, *post*, vol. 5.

8. § 1162 *ante*, vol. 3.

Waterworks owned and operated by a municipal corporation under authority of its charter are for a public purpose and exempt from taxation under the general revenue laws; and they are subject to be taxed only when expressly included in the statute levying them. And the fact that the city charged its inhabitants for water supplied them and thereby realized revenue in excess of the expenses of operating the works which was applied to city purposes, does not affect the question. *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

9. § 1160 *ante*, vol. 3.

Waterworks not subject to execution when owned by city. Water works in the hands of a city are not liable to be sold for the debts of the city. It is clear that these works are of a character which, like the wharves owned by a city, are of such public utility and necessity, that they are held in trust for the use of the citizens. In this respect they are the same as public parks and buildings and are not liable to sale under execution for ordinary debts against the city. *New Orleans v. Morris*, 105 U. S. 600, 26 L. Ed. 1184.

CHAPTER 36.

MUNICIPAL TRADING.

Sec.	Sec.
1806. Introductory.	1811. Plumbing business.
1807. Power to engage in business in general.	1812. Quarries.
1808. Constitutional prohibitions.	1813. Ice plant.
1809. Buying and selling fuel.	1814. Sale of liquor.
1810. Buying and selling real estate.	1815. Injunction against continua- tion of business.

§ 1806. Introductory.

Municipal trading, as the term is used in other countries, includes municipal ownership of public utilities as well as the conducting of other private businesses by the municipality itself. As used in this chapter, the term is confined to the act of municipalities in engaging in a private business so as to come in competition with individuals or companies transacting a like business, other than the ownership of a public utility which has been treated in the preceding chapter.

Excluding municipal ownership of public utilities, municipal trading has so far been unable to gain foothold in the United States, although on the other side of the Atlantic, especially in England, municipalities are more or less extensively engaged in private business of certain kinds.¹

1. Municipal trading in England. "We are familiar with the industries for which powers are constantly being applied by British municipal authorities. They include the manufacture of engines, dynamos, gas and electric fittings, paving materials, bricks, cold-air storage, and ice-supply, milk-supply, besides the control of concert-rooms, hotels, Turkish baths, and cycle-tracks. Tram-car factories have been established, and even a brass foundry to make fittings. Municipal telephony has been undertaken, and, after an inglorious existence, is now moribund. Municipal fire insurance has been established, and a universal system has been

Municipal trading, as the term is herein used, means nothing more or less than municipal socialism.² It is not within the scope of this work to set forth or comment at any length upon the arguments *pro* and *con* as to the practicable value and expediency of authorizing municipalities to enter into competition with persons conducting a private business, nor to call attention to the objections so often urged that the necessary increase in the number of municipal employees will result in the control of municipal elections and the filling of positions by party henchmen, or the objection that the great increase in municipal indebtedness resulting therefrom will imperil the future of the municipality.³ To those desiring light on the economic side of the question, reference should be made to more or less recent works, which show the effect and results from such new field of operations

proposed. Municipal banks (a system of receiving deposits in many towns is now in vogue which does not greatly differ from actual banking), the issue of municipal banknotes, municipal pawnbroking, municipal bakeries, municipal collieries, municipal public-houses, municipal printers, and municipal tailors, have all been seriously suggested." Porter, *Dangers of Municipal Trading*, p. 47.

In Australasia, the labor party seeks to obtain state fire and life insurance, state breweries, distilleries, and taverns, and the importation, manufacture, and distribution of intoxicants to be entirely undertaken by a government department. Porter, *Dangers of Municipal Trading*, p. 53.

2. Porter, *Dangers of Municipal Trading*, p. 7.

3. The argument against municipal trading is based on the

right of private property and the paramount duty of the government to protect impartially and completely such property and that public funds shall not be raised by taxation for the purpose of engaging in or conducting a business which is not in the nature of a public utility, inasmuch as the right to raise funds by taxation is confined to the purposes of government and to matters properly coming within the scope of public affairs and does not apply to private businesses, the conducting of which by the municipality would transform the form of government from its present basis of individual ownership of property to the socialistic basis wherein private property does not exist. See petition for injunction set forth at length in *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116.

in other countries.⁴ However, the conclusions of an eminent writer are well worth reproducing in this connection, wherein he states: "The main criterion in any particular case should be, Can the commodity or service be worked efficiently on competitive trading principles? If this can be done, there should be no hesitation about handing it over for private contract; for competition is the life of commercial progress, and monopoly—above all, municipal monopoly—its most dangerous enemy. Those industries which cannot so well be operated on competitive lines, such as tramways, gas, electric light and power supply, should be controlled, but not, in my opinion, operated, by the municipal authorities. This procedure, if wisely enforced, will give to the community its just share of all the benefits, both in revenue, in relief of taxation, and in reasonable and efficient service. It leaves the individual free to assume the financial responsibility and to reap equitable reward for management and operation. In an ideal world, where each man's good was each man's rule, municipal trading would probably be largely extended. These conditions do not exist in either British or American municipalities, and therein lies the danger of these experiments. In the United States it would make conditions infinitely worse than they are; in Great Britain, if persisted in, it will lower the standard of municipal government. Socialism and political partisanship cast their shadow on the whole problem, so that, blinded by self-interest and transient benefit, the voter allows himself to be led into a system which in the end means the subversion of individuality, the ruin of the community, and the degeneration of all concerned."⁵

It may be suggested, however, that there is in this country a necessity for municipalities either conducting certain businesses themselves or else enacting rigid reg-

4. Avebury, *Municipal and National Trading*; Lowell, *Government of England*.

5. Porter, *Dangers of Municipal Trading*, p. 314.

ulations governing their conduct and operation by private persons, as for example pawnbroker shops which are well known to be, as at present conducted, a great menace to the welfare of the working people. Likewise, the exorbitant price charged for ice in many municipalities is a strong argument in favor of municipal ownership of ice plants, especially in the larger cities where, during the summer season, large numbers of people die as a result, at least in part, of the excessive heat and the financial inability to alleviate the effects of such heat. So there is much to be said in favor of the contention that the sale of milk, at least for infants, should be in the hands of the municipality, inasmuch as municipal regulation of such sales has been, to a large extent, of little effect. Furthermore, it may be suggested that the legislature should have power to confer authority on municipalities, and that such power should be conferred, to buy supplies and sell them to the inhabitants of the municipality at or near cost, where the conditions are such that the inhabitants cannot obtain a sufficient amount of one of the necessities of life, such as food or fuel, resulting from unlawful combinations of local dealers or from other reasons.

§ 1807. Power to engage in business in general.

A municipality has no implied power to engage in any private business.⁶ Under the rule that taxation can

6. Implied powers are confined to municipal affairs. § 358 *ante*, vol. 1.

Cannot engage in private business, § 359 *ante*, vol. 1.

Ordinances must relate to corporate as distinguished from private affairs, § 672 *ante*, vol. 2.

Power to engage in private business. A municipal corporation can engage in private enterprise only when expressly authorized. *Linn v. Chambersburg Borough*, 160 Pa. St. 511, 28 Atl.

842, 25 L. R. A. 217; *Riverside, etc. R. Co. v. Riverside*, 118 Fed. 736.

A constitutional provision prohibiting cities from being interested in any "work of internal improvement," is violated by a city laying tracks in its streets for the purpose of leasing them to private persons to operate as a street railway. *Attorney General v. Detroit*, 148 Mich. 71, 111 N. W. 860, 14 Det. Leg. N. 129.

It is not possible for a city to

only be for public purposes, it was held at an early date in Massachusetts that the buying and selling of commodities of general trade was not a public service, without regard to how essential the business might be to the welfare of the inhabitants, and that a municipality could not therefore engage in such business.⁷ So it has been held that a municipality has no power to establish and operate manufactories, and that the legislature has no au-

acquire property for any other than a public purpose "or to engage in any kind of business, not incidental to its municipal capacity as an agency of government." *Dyer v. Newport*, 123 Ky. 203, 94 S. W. 25.

Implication must be necessary one. "Under the special acts whereby Boston was authorized to maintain street lamps, it could not have been held that the town or city was authorized to *engage in the whale fisheries for the purpose of procuring oil*. The intention was that the oil for the lamps should be bought as persons generally bought oil used for lights. Towns are authorized to raise money for the support and employment of the poor; but it could not reasonably be held that it was intended that towns should at public expense *erect and maintain factories for the manufacture of all of the clothing* which the poor might wear; or all of the implements which they might use. Towns are authorized to raise money for carrying pupils to and from the public schools, but this could not be held to authorize towns to maintain a street railway or railroad. Towns are authorized to maintain public

libraries, but this does not mean that they can *maintain paper mills and printing establishments* for making books for the libraries. These are undoubtedly extreme examples, but they illustrate the necessity of a strict construction of the statutes relating to the powers of towns." *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397.

Power to make contract with private persons for use of municipal machinery and employees of municipality, in raising a sunken boat, see § 1170, note 80 *ante*, vol. 3.

Auditorium. Power to construct, see § 1117 *ante*, vol. 3.

Ferries. Power to construct, etc., see §§ 406-409 *ante*, vol. 1.

Wharves. Power of municipality to construct and control, § 397 *ante*, vol. 1.

Engaging in work of moving and repairing buildings of another, § 1168, note 70 *ante*, vol. 3.

Power to subscribe to stock in private company, see chapter on Municipal Indebtedness, *post*, volume five; also §§ 393 to 395 *ante*, vol. 1.

7. Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809.

thority to authorize a municipality to establish manufactories.⁸

§ 1808. Constitutional prohibitions.

Constitutional provisions in some states forbid the municipal corporation becoming a stockholder in any company, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual.⁹ This subject is treated at length in the chapter relating to municipal indebtedness.¹⁰

§ 1809. Buying and selling fuel.

Under the rule that a municipality cannot enter into a commercial enterprise, it has been held that it cannot buy and sell coal to its citizens as a business, thereby entering into competition with dealers in coal, inasmuch as such use of moneys is not for a public purpose.¹¹ On

8. Opinion of Justices, 58 Me. 591.

9. §§ 185, 186 *ante*, vol. 1.

Brode v. Philadelphia, 230 Pa. 434, 79 Atl. 659, 664, stating that the constitutional provision was borrowed from Ohio.

See note 33, p. 427 *ante*, vol. 1, for quotation from Walker v. Cincinnati, 21 Ohio St. 14, 54, 55, 8 Am. Rep. 24, stating reasons for constitutional inhibition which is approved in Wheeler v. Philadelphia, 77 Pa. St. 338, 355, 356.

In Pennsylvania, a statute provided that a municipality might contract with a street railway company for fixed payments in lieu of the performance of certain duties or of license fees, and the municipality was further empowered to contract for the appointment of a certain number of persons to act as directors of the company or companies in conjunction with the directors

elected by the stockholders thereof, and for the ultimate acquisition by it on mutually satisfactory terms of the franchise of the contracting company or companies. This statute was held not unconstitutional as violating the provision set forth in the text. Brode v. Philadelphia, 230 Pa. 434, 79 Atl. 659, 664.

10. Vol. 5, and see Index.

11. Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208; Opinion of Justices, 155 Mass. 601, 30 N. E. 1142, 15 L. R. A. 809; Re Municipal Fuel Plants, 182 Mass. 605, 66 N. E. 25.

Power of municipality to buy and sell fuel. "It is established that under our constitution private property cannot be taken from its owner except for a public use. This is equally true whether the property is a dwelling house, taken by right of eminent domain, or money de-

the other hand, it seems that a municipality may establish fuel or coal yards for the purpose of selling to the

manded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government, there is no way to obtain the money except by taxation. *Money cannot be raised by taxation except for a public use.* Until within a few years, it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the state to enter as a competitor into the field of industrial enterprise with a view either to the profit that could be made through the income to be derived from the business or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a

long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for, if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessities of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employes in stores and shops conducted by the public authorities. Except for the severely onerous conditions from which we are now suffering, the causes of which arose outside of this state, beyond the reach of our legislative enactments, there is nothing materially different between the proposed establishment of a governmental agency for the sale of fuel and the establishment of a like agency for the sale of other articles of daily use. The business of selling fuel can be conducted easily by individuals in competition. *It does not require the exercise of any governmental function*, as does the distribution of water, gas, and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be

inhabitants of the municipality or to others in "*an extraordinary emergency*" as where persons desiring to purchase fuel cannot supply themselves through private enterprise; and in such a case the city may constitute itself an agent for the relief of the community, in which case money expended for the purpose would be expended for the public use.¹²

§ 1810. Buying and selling real estate.

A municipality has no authority to go in the business of buying and selling real estate for profit.¹³ However, if a municipality has become the owner of a farm, it may manage and maintain the property for profit until some other disposition of it is deemed advisable.¹⁴

§ 1811. Plumbing business.

A municipality has no implied power to engage in a general plumbing business, and, in the course thereof, sell supplies and materials to private citizens, and do contract work in placing them upon their premises; and no such power exists as an incident to the operation by a municipality of its own water works system.¹⁵

conducted as a single large enterprise, with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned. It does not even call for the investment of a large capital, but it can be conducted profitably by a single individual of ordinary means." *Re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25.

12. *Re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25.

13. § 1115 *ante*, vol. 3.

Power of municipality to lease park in order to derive revenue therefrom by sub-letting or charging public for admission, denied, in *Bloomsburg Land Imp. Co. v.*

Bloomsburg, 215 Pa. St. 452, 64 Atl. 602.

Municipality as part owner of property, § 1123, note 26 *ante*, vol. 3.

14. § 1114, note 67 *ante*, vol. 3.

15. *Right of municipality to conduct plumbing business.* "The primary design of the creation of a municipal corporation is that it may perform certain public functions as a subordinate branch of government; and, while it is invested with full power to do everything incident to a proper discharge thereof, no right to do more can ever be implied. Accordingly, in the absence of express legislative sanction, such a corporation has no authority to

§ 1812. Quarries.

The power to purchase a stone quarry *outside the limits* of the municipality is the subject of conflicting de-

engage in any independent business enterprise or occupation such as is usually pursued by private individuals. In other words, its legitimate duty is to deal with public affairs, and not those which are purely private and entirely unconnected with a proper administration of its governmental duties. * * * It follows that, unless the city of Waycross can show express legislative authority to engage in the business in which it has embarked, the acts of its officials of which the plaintiff complains are clearly *ultra vires*. We have no doubt that, under the act of 1889, upon which the city rests its defense, its board of commissioners have ample power to take such steps as are needful in order to render the waterworks system of the city efficient and beneficial to the public. See Acts 1889, p. 829. But the position of the city that, to bring about this result, it was necessary to engage in the plumbing business, is utterly untenable, because obviously not well founded in fact. It might as reasonably be urged that, in order to satisfy its patrons, it was necessary for the city to embark in the ice business, as an incident to its right to supply good drinking water to its citizens. It was doubtless the intention of the legislature to confer power upon the municipal authorities to do everything essential to the establishment and maintenance of the

city's waterworks system, to provide for proper sanitation, and to promote the general success of the enterprise; but, surely, it was never contemplated that the city should engage in a general plumbing business, and, in the course thereof, sell supplies and materials to private citizens, and do contract work in placing the same upon their premises. As incident to the general powers conferred upon the waterworks commissioners, it was lawful for them to order all work done which was necessary for connecting the city's mains with the pipes of water consumers, or for protecting the city's property from injury or destruction, or for requiring citizens to pay for the water furnished to them; but they could not, without overstepping the bounds of their authority in the premises, engage in a business purely for gain, and the carrying on of which was not essential to the accomplishment of any of the purposes above indicated. The waterworks commissioners also have the power to require that all plumbing connected with the waterworks shall be done in such manner as will effectuate these purposes, and to that end may supervise the plumbing; but it is one thing to devise a plan by which such work shall be done, and quite another thing to do the work itself." *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

cisions.¹⁶ Whether a municipality may purchase and operate a quarry within its territorial limits does not appear to have been directly decided, but it would seem that if the quarry is to be used merely to provide material for the streets and other public places of the municipality, it should be held to have the power to own and operate a quarry, although there is *dicta* to the contrary;¹⁷ but if the quarry is to be operated for the purpose of selling stone to others, the engaging in such business should be held to be unauthorized.

§ 1813. Ice plant.

It has been recently held that a city which owns its own waterworks and electric light plant has authority to operate an ice plant in connection therewith for the purpose of furnishing ice to the inhabitants of the municipality.¹⁸

§ 1814. Sale of liquor.

The power of a municipality to engage in the sale of intoxicating liquors, where such authority is conferred by the legislature, has already been stated.¹⁹ That the regulation of the sale of intoxicating liquors is within the police power of the state is well settled. In dealing with such sale, the legislature strives to promote the

16. § 1108, note 31 *ante*, vol. 3.

17. "It has been repeated in the authorities that it might be convenient and even profitable for a municipal corporation, in order to perform certain duties imposed upon it as such corporation to own and operate a rock quarry or other like undertakings, yet it has no power to do so unless in express words conferred in its charter or necessarily or fairly implied in or incidental to the powers expressly granted." *Radford v. Clark* (Va., 1912), 73 S. E. 571.

18. *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, quoted from at length in preceding chapter in § 1798 *ante*.

19. § 396 *ante*, vol. 1.

In Alabama, the 1907 statute delegating authority to a town to sell liquor held not void as a grant of special privilege to the commissioners who are to be elected to conduct the business, where they are not given any direct pecuniary interest therein. *Re Hall*, 156 Ala. 642, 47 So. 199.

health, safety, and morals of the community, and acts in the exercise of its police and not its taxing power.²⁰ Dispensary laws are a comparatively recent innovation, and municipal ownership of a dispensary may result in profit or loss according to how it is managed; but it is universally held that a statute authorizing the establishment of dispensaries to sell intoxicating liquors is not unconstitutional, since such traffic or business is a mere incident of the regulation of the sale and not the object of it.²¹ However, express legislative authority is necessary to empower a municipality to establish and conduct a liquor dispensary.²² Thus power to "license and regulate the management of barrooms, saloons," etc., does not include the right to operate a dispensary,²³ nor can such power be implied from the general welfare clause.²⁴ So a statute or charter provision giving the

20. *Farmville v. Walker*, 101 Va. 323, 43 S. E. 558, 61 L. R. A. 125, 99 Am. St. Rep. 870.

Power to collect internal revenue tax from state dispensers of intoxicating liquors, see *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, aff'g 39 Ct. Cl. 257.

21. *Farmville v. Walker*, 101 Va. 323, 43 S. E. 558, 61 L. R. A. 125, 99 Am. St. Rep. 870.

22. *Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602, 68 Am. St. Rep. 80.

23. *Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602, 68 Am. St. Rep. 80.

24. **General welfare clause:** right to run dispensary. "Neither can the power to operate a dispensary be drawn from what is known as the 'general welfare clause,' because it is not ordinarily within the power of a municipal corporation to engage di-

rectly in any commercial enterprise. Such powers only as are usually incident to municipal corporations are those which can be exercised under the authority of the general welfare clause. It is only when the general assembly sees proper to delegate to a municipal corporation the right to engage in that which would ordinarily be the business of an individual, and not the business of the public, that the corporation can exercise such power. It is only under the exercise of the police power that this can be done in any case, and the sovereign power of the state must determine in each instance whether it is for the peace, good order, and welfare of the state that a particular business shall be operated directly by the state or one of its municipal corporations. The fact that the dispensaries established and in operation with-

mayor and aldermen of a municipality the exclusive right to control and direct the sale of liquors has been held not to authorize the municipality to establish a dispensary.²⁵

§ 1815. Injunction against continuation of business.

Where a municipality engages in a business for private gain, without any authority therefore, a citizen and taxpayer may enjoin the continuance of such business.²⁶ However, a municipality will not be enjoined from carrying on a private business, at the suit of a private person engaged in such business, where he was not injured in his business and no loss occurred to the municipality so as to increase taxation, and where the business was discontinued after the commencement of the suit.²⁷

in the limits of this state have been established in pursuance of express authority delegated in the charter of the particular town evidences that it is the judgment of the general assembly that express power is necessary for such purpose." *Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602, 68 Am. St. Rep. 80.

25. *Lofton v. Collins*, 117 Ga. 434, 43 S. E. 708.

Power to *regulate and control* the sale of liquors, conferred upon a municipality, does not authorize it to go into the business of buying and selling liquors. *Barnesville v. Murphey*, 113 Ga. 779, 39 S. E. 413.

26. *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

27. *Baker v. Grand Rapids*, 142 Mich. 687, 106 N. W. 208.

CHAPTER 37.

PUBLIC IMPROVEMENTS.

1. POWER TO MAKE.

2. MUNICIPAL DISCRETION.

3. EXERCISE OF POWER.

a. *General consideration including preliminary proceedings.*

b. *Ordinance or resolution providing for improvement.*

4. CONTRACT.

a. *Execution and validity.*

b. *Performance.*

c. *Payment for work.*

d. *Liens.*

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6. REMEDIES.

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1816. Nature and purpose of public improvements.

1817. Nature of power.

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1826. Same—compulsory regulations.

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1831. Same—changing width and course of streets.

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3. EXERCISE OF POWER.

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b. Ordinance or resolution providing for improvement.

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1885. Same—sewer construction ordinance.	1898. Same—time and manner of doing the work.
1886. Same—description by reference.	1899. Parol evidence of terms used in improvement ordinances.
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4. CONTRACTS.

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1900. Scope of subdivision.

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1902. Notice of power to contract.	1909. Defects in preliminary proceedings.
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1906. Contract should be in writing.	
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1914. One or more contracts for one improvement.	1919. Approval of contract.
1915. Unauthorized and void contracts.	1920. Ratification of contract.
1916. Estoppel.	1921. Modification.
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b. Performance.

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1925. Substantial performance sufficient.	1934. Right to abandon or annul contract.
1926. Defective performance.	1935. Extension of time for performance.
1927. Same—waiver of defects.	1936. Completion by municipality of abandoned work.
1928. Excuse for defective work or non-performance.	1937. Rights of third persons.
1929. Acceptance of work by municipality—effect.	1938. Certificate or approval of work.
1930. Same—what is acceptance.	1939. Same—what officer to give certificate.
1931. Delay and waiver of damages therefor.	1940. Same—necessity for certificate.
1932. Effect of partial performance.	1941. Same—sufficiency of certificate.
1933. Time as essence of contract.	

c. Payment for work.

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1942. Liability of municipality to contractor.	1948. Payment by special assessment.
1943. Same—default or neglect of municipality.	1949. Conditions as to payment.
1944. Same—assumpsit.	1950. Payment out of special fund.
1945. Same—quantum meruit.	1951. Amount of recovery.
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1959. Bond for performance of work.	1963. Same—on abandonment of work.
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1976. Same—created by constitution, statute or charter.	1992. Proceedings to assess damages.
1977. Change of grade must be of a grade legally established.	1993. Review of assessment proceedings.
1978. Nature and extent of change of grade.	1994. Payment of damages.
1979. Damages in bringing street to first established grade.	1995. Deduction of benefits.
1980. Bridges, viaducts and other structures in streets.	1996. Delay in bringing action or making claim.
1981. Damages for vacating street.	1997. Remedies of property-owner.
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	2000. Same—cost of restoration.
	2001. Same—injury or destruction of shade trees.
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	2015. Review by appeal.
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1. POWER TO MAKE.

§ 1816. Nature and purposes of public improvements.

Generally speaking, the term “public improvements,” as applied to municipal corporations, is limited to improvements which are the proper subject of police and local government regulation, and do not include private affairs or commercial enterprises.¹ What the particular

1. *Low v. Marysville*, 5 Cal. 214; *Markley v. Mineral City*, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776.

Implied powers are limited to municipal affairs. § 358, *ante*, vol. 1.

Cannot engage in private business, without express power. § 359 *et seq. ante*, vol. 1; § 396 *ante*, vol. 1; chapter 35, Municipal Ownership of Public Utilities, *ante*, and chapter 36, Municipal Trading, *ante*.

Ordinance must relate to corporate as distinguished from private affairs, § 672 *et seq. ante*, vol. 2.

Constitutional provision forbidding local corporations from becoming stockholders in corporations, etc., or to loan credit, aid railroads, etc., will not be so construed as to forbid municipal corporations from making improvements with their own means. *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

See §§ 393-395 *ante*, vol. 1.

Without express authority city cannot improve private property, as a private road, as by grading and laying stone steps therein for the public, and assess the cost on property-owners. *Culver v. Yonkers*, 80 N. Y. S. 1034, 80 App. Div. 309.

local corporation is authorized to do depends upon the state constitution, the proper construction of the municipal charter, the statutes applicable thereto and the legislative policy of the state respecting municipal government.² General and particular and miscellaneous powers of municipal corporations are fully treated in separate chapters in volume one,³ and certain other powers are considered in appropriate relations throughout this work.

Acquiring lands and other kinds of property for improvements and municipal purposes, see §§ 1105, 1114-1117 *ante*, vol. 3.

Under proper power land may be acquired to protect the view oceanward, even though the land is under water. *Murphy v. Long Branch* (N. J. Sup. 1905), 61 Atl. 593.

2. Statutory and constitutional provisions relating to this subject.

Alabama. *Allman v. Mobile*, 162 Ala. 226, 50 So. 238.

California. *Cohen v. Alameda*, 124 Cal. 504, 57 Pac. 377; *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433.

Illinois. *Brookfield v. Pabst*, 235 Ill. 355, 85 N. E. 618; *Hammond v. Leavitt*, 181 Ill. 416, 54 N. E. 982.

Indiana. *Welch v. Roanoke*, 157 Ind. 398, 61 N. E. 791; *Allen v. Salem*, 10 Ind. App. 650, 38 N. E. 425.

Kansas. *Haggart v. Kansas City*, 77 Kan. 798, 94 Pac. 789; *Atchison v. Bartholow*, 4 Kan. 124.

Kentucky. *Neff v. Covington Stone, etc. Co.*, 108 Ky. 457, 21 Ky. L. Rep. 1454, 22 Ky. L. Rep.

139, 55 S. W. 697, 56 S. W. 723; *Louisville v. Hexagon Tile Walk Co.*, 103 Ky. 552, 20 Ky. L. Rep. 236, 45 S. W. 667.

Massachusetts. *Butler v. Worcester*, 112 Mass. 541.

Minnesota. *State v. District Court*, 80 Minn. 293, 83 N. W. 183.

Nebraska. *Lincoln v. Janesch*, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762, 93 Am. St. Rep. 478.

New Jersey. *Frelinghuysen v. Morristown*, 77 N. J. L. 493, 72 Atl. 2, affirming 70 Atl. 77.

New York. *Tonawanda v. Price*, 171 N. Y. 415, 64 N. E. 191; *Re Opening of Livingston Street*, 82 N. Y. 621; *People v. Pierce*, 64 N. Y. Misc. 627, 119 N. Y. S. 21.

Ohio. *Alter v. Cincinnati*, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737.

Pennsylvania. *Re Greenfield Ave.*, 191 Pa. St. 290, 43 Atl. 225, 29 Pittsb. Leg. J. (N. S.) 373.

Wisconsin. *Bekkedahl v. Westby*, 140 Wis. 230, 122 N. W. 727.

Local improvements. *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855; *State v. Reis*, 38 Minn. 371, 38 N. W. 97; *Rogers v. St. Paul*, 22 Minn. 494; §§ 1796, 1797 *ante*.

3. Chapters 10 and 11 *ante*, vol. 1.

Adequate municipal administration necessarily includes the power to provide suitable public buildings for the convenient transaction of business,⁴ as a city or town hall,⁵ fire engine house,⁶ market houses and market places,⁷ hospitals, pest houses, and dispensaries,⁸ and it has been held an auditorium;⁹ and sometimes penal, charitable and eleemosynary institutions, as jail, work-house, poor houses, houses of refuge, industrial schools,¹⁰ and school buildings.¹¹ But the public improvements

4. Power to acquire land for public buildings, § 1105 *ante*, vol. 3.

May acquire property for municipal objects only. § 1114 *ante*, vol. 3.

Illustrations of corporate purpose. § 1115 *ante*, vol. 3.

Power to acquire, erect and repair buildings. § 1116 *ante*, vol. 3.

5. *People v. Harris*, 4 Cal. 9; *Foster v. Worcester*, 164 Mass. 419, 41 N. E. 654; *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166.

6. *Santa Barbara v. Davis*, 142 Cal. 669, 76 Pac. 495; *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715.

Power to "prevent and extinguish fires" confers authority to erect a fire engine house and general power gives authority to provide a suitable place for town business; hence a public hall may be provided over such engine house. *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243.

See § 1115 *ante*, vol. 3.

7. § 965 *ante*, vol. 3.

Municipal corporations usually have power to establish public markets. *Municipality No. 1 v. Cutting*, 4 La. Ann. 335; *Cougot v. New Orleans*, 16 La. Ann. 21;

St. John v. New York, 6 Duer (13 N. Y. Super. Ct.) 315, 13 How. Pr. (N. Y.) 527.

Authority of "appointing a market place and regulating the same" gives the implied power to build and repair a market house. *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766.

Power to build a market house and appropriate money therefor. *Spaulding v. Lowell*, 23 Pick. (40 Mass.) 71.

May purchase property for. § 1105 *ante*, vol. 3.

8. § 905 *ante*, vol. 3.

Private hospital cannot be established. *Bessonies v. Indianapolis*, 71 Ind. 189.

9. *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066, mentioned in § 1116 *ante*, vol. 3.

10. Jail. *Long v. Elberton*, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363; *Dunkin v. Blust*, 83 Neb. 80, 119 N. W. 8.

Right to use county jail on re-incorporation. *Tippecanoe County Comrs. v. Lafayette*, 7 Ind. 614.

See chapter on Penal Institutions—Charities and Correction, *post*, vol. 5.

11. *Cartersville v. Baker*, 73 Ga. 686.

most fruitful of litigation, those in which the property owners, inhabitants and the local administration are most deeply concerned, and those which most municipal corporations have express or implied power to make, relate to the opening, establishment, vacation, sprinkling and cleaning of streets, boulevards and public ways;¹² the establishment and the changing of the grades thereof;¹³ constructing and reconstructing, grading, paving, repairing and otherwise improving streets, boulevards and sidewalks,¹⁴ the construction of bridges, viaducts, and approaches thereto, of culverts under the streets, alleys and public ways;¹⁵ the construction of sewers and

12. Establishment and opening of public streets. §§ 1294-1304, *ante*, vol. 3.

The widening, opening or extension of a public street, held to be a public improvement within a law requiring notice to the property-owners. *Anderson v. Cincinnati*, 10 Ohio Dec. 794, 23 Wkly. Law Bul. 430.

Vacation of streets and alleys. § 1402 *et seq.*, *ante*, vol. 3.

The word "improvement" relating to notice to property-owners, held applicable to a proceeding to vacate a street. *Cook v. Chambersburg*, 39 N. J. L. (10 Vroom.) 257.

Sprinkling streets and removal of snow and ice from sidewalks. § 955, p. 2103 *et seq.*, *ante*, vol. 3; § 1291 *ante*, vol. 3.

13. § 1290 *ante*, vol. 3; §§ 1843, 1844, *post*.

14. The difference between an "improvement" and a "repair" is to be tested by the method of charge; if the expense is charged upon adjacent property it is an improvement. *Hawthorne v. East Portland*, 13 Ore. 271, 10 Pac. 342.

Under particular charter, held macadamizing a street was not a public improvement. *New Haven v. Whitney*, 36 Conn. 376.

Macadamizing, held to be "paving" within a law authorizing assessments therefor. *Burnham v. Chicago*, 24 Ill. 496.

15. Municipal discretion in deciding that a viaduct extending over railroad tracks and a creek is a local improvement to be paid for by special assessment, is, in the absence of fraud, final where it appears that such viaduct could not be properly constructed without making it also across the creek. *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962.

Bridges. Power to make improvements does not authorize a city to build a railway bridge over a street (*Bloomington v. Chicago*, etc. R. Co., 134 Ill. 451, 26 N. E. 366), nor to maintain a railway viaduct over a street (*Vandalia R. Co. v. State*, 166 Ind. 219, 76 N. E. 980), nor to bridge over a canal at a height greatly in excess of that necessary for

drains and the control thereof and the regulation of watercourses within, and sometimes without, the munici-

public travel but in accordance with a contract with the canal company (*Ranson v. Sault Ste. Marie*, 143 Mich. 661, 107 N. W. 439; *Morris v. Sault Ste. Marie*, 143 Mich. 672, 107 N. W. 443), nor to bridge over railway tracks at a street crossing. *Phelps v. Detroit*, 120 Mich. 447, 79 N. W. 640; *Schneider v. Detroit*, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54.

Power to build bridges in and culverts under the streets authorizes the construction of approaches in the streets to bridges built by the city. *Home Building and Conveyance Co. v. Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

Under express grant of power the city may require a railroad company to construct, at its own expense, a bridge over railroad tracks within its limits, for the safety and convenience of the public, and bind itself to pay a portion of the cost thereof. *Argentine v. Atchison, T. & S. F. R. R. Co.*, 55 Kan. 730, 41 Pac. 946, 30 L. R. A. 255.

Express authority to construct bridges with a view to the proper sewerage and drainage of the city does not authorize the bridging of railroad tracks for street crossing, nor the construction of an ascending grade to lead to the bridge. Hence a depreciation in the value of property fronting on the street because of the grade and bridge is such a taking of private property for public use as can be authorized only by con-

demnation. *Schneider v. Detroit*, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54.

Authority to construct and keep in repair public highways and bridges, held to apply to those which are to be constructed by the corporation through the exercise of the taxing power and not to bridges over mill races which by general state law it is made the duty of the mill proprietors to construct. *Merrill v. Kalamazoo*, 35 Mich. 211.

A statute may authorize two cities to construct a public bridge connecting them. This is a municipal purpose. *People v. Kelley*, 5 Abb. N. C. (N. Y.) 383.

Power to construct a bridge over a navigable river between states. *Haeussler v. St. Louis*, 205 Mo. 656, 103 S. W. 1034, explained in § 410 *ante*, vol. 1.

Toll bridge. General power to improve streets, etc., and to enact necessary and desirable by-laws for the good government of the corporation, does not confer power to erect a toll bridge within the corporate limits. *Clarke v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423.

Charter power "to enact ordinances necessary for government" will not sustain a grant to individuals of a franchise to build a toll bridge across a river passing through the place. *Williams v. Davidson*, 43 Tex. 1.

Preliminary proceedings. The power to construct bridges confers power to erect all necessary ap-

pal area;¹⁶ the lighting of public thoroughfares, squares, parks, places and (sometimes) public buildings and private residences;¹⁷ providing an adequate and wholesome

proaches, to render the bridge accessible, and where the construction of such approaches requires the grading of streets it is not necessary that such grading be done in accordance with charter or statutory provisions relating thereto. *Gray v. Brooklyn*, 7 Hun (N. Y.) 632.

16. Chapter 31, § 1421 *et seq.*, *ante*.

Sewers as improvements of the highway. *Cone v. Hartford*, 28 Conn. 363; *Kirland v. Board of Public Works*, 142 Ind. 123, 41 N. E. 374.

Sewer held to be a local improvement. *Maywood, County v. Maywood*, 140 Ill. 216, 29 N. E. 704.

Power to drain a specified area and assess the property for the expense therefor sustained, this being regarded a local improvement. *Davies v. New Orleans*, 40 La. Ann. 806, 6 So. 100.

An act authorizing a sewerage system providing that the municipal territory should be laid off into sewerage districts, and the improvements made at the cost of the property within the district, on petition of the owners of one-half of the value of the property, or, without a petition on a vote of two-thirds of the councilmen on a call of the yeas and nays, held valid. *Maddux v. Newport*, 12 Ky. L. Rep. 657, 14 S. W. 957.

Laws confer power to establish general sewerage system. *Philadelphia v. Tryon*, 35 Pa. 401.

The English statute providing for the appointment of commissioners of sewers, etc., held not to amend the common law so as to make it applicable to assessments for sewers in Rhode Island. *Bishop v. Tripp*, 16 R. I. 198, 14 Atl. 79.

"The discretionary power to construct sewers, drains and other improvements, and to select the plans is vested in the municipal authorities." *Barrett v. Minersville Borough*, 38 Pa. Super. Ct. 76.

17. Lighting. *Nelson v. La Porte*, 33 Ind. 258; *State v. Hiawatha*, 53 Kan. 477, 36 Pac. 1119; *Newport v. Newport Light Co.*, 84 Ky. 166; *Opinion of Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; *Detroit v. Wayne Co. Cir. Judges*, 79 Mich. 384, 44 N. W. 622; *Wade v. Oakmont*, 165 Pa. St. 479, 30 Atl. 959.

Inherent power to furnish light declared. *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14 L. R. A. 268; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885.

Gas works may be erected by city. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, *aff'g* 37 Fed. 832; *State v. Hamilton*, 47 Ohio St. 52, 23 N. E. 935; *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

See § 1783 *ante*.

Authority to grant the right to erect gas works, lay pipes, etc.,

water supply for public purposes and for private use where power to do so has been duly granted;¹⁸ opening,

held not to authorize an ordinance authorizing the erection of an electric light plant and the occupation of the streets with wires, etc. *Carthage v. Carthage Light Co.*, 97 Mo. App. 20, 70 S. W. 936.

Power to contract for supply of electricity under particular law. *Riverside & A. Ry. Co. v. Riverside*, 118 Fed. 736.

Charter power exists to contract with a lighting company to light the city, etc. *Newport v. Newport Light Co.*, 89 Ky. 454, 12 S. W. 1040, 11 Ky. L. Rep. 840.

May contract to light streets by gas, electricity or otherwise, and to cause annual expense thereof to be raised by taxation. *State (Scheffbauer) v. Kearney Tp.*, 57 N. J. L. (28 Vroom) 588, 31 Atl. 454.

Private places may be supplied. *Thompson-Houston Electric Co. v. Newton*, 42 Fed. 723.

Contra. *Ladd v. Jones*, 61 Ill. App. 584; *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397; *Christensen v. Fremont*, 45 Neb. 160, 63 N. W. 364; *Mauldin v. Greenville*, 33 S. C. 1, 11 S. W. 434, 8 L. R. A. 291.

Supplying light to residence, held a municipal purpose. *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, 18 So. 677, 51 Am. St. Rep. 24, 30 L. R. A. 540.

See chapter 34, § 1618 *ante*, also chapter 35, § 1783 *ante*.

18. Water supply. *Livingston v. Pippin*, 31 Ala. 542; *Illinois Trust & Savings Bank v. Arkan-*

sas City Water Co., 67 Fed. 196; *Centerville v. Fidelity Trust & Guaranty Co.*, 118 Fed. 332, 55 C. C. A. 348; *Fremont v. June*, 54 Ohio St. 663, 8 Ohio Cir. Ct. Rep. 124, 46 N. E. 1160; *Farnsworth v. Pawtucket*, 13 R. I. 82.

Acquiring lands for, §§ 1105, 1115 *ante*, vol. 3.

Charter authorized contract for a supply of water for public and private use. *Hackensack Water Co. v. Hoboken*, 51 N. J. L. (22 Vroom) 220, 17 Atl. 307.

Cities have power to supply water by granting the privilege of furnishing water to a person, natural or artificial. *Burlington Waterworks Co. v. Burlington*, 43 Kan. 725, 23 Pac. 1068.

Particular charter construed to authorize an ordinance granting to a water company the right to construct and operate waterworks to supply the city with water. *Mueller v. Egg Harbor City*, 55 N. J. L. (26 Vroom) 245, 26 Atl. 89.

When council may determine necessity of a new system. *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960; *Nalle v. Austin* (Tex. Civ. App., 1893), 21 S. W. 375.

Waterworks, general power to contract held to confer power to contract for in *Rome v. Cabot*, 28 Ga. 50. *Contra.* *Greenville Waterworks Co. v. Greenville* (Miss., 1890), 7 So. 409; *National Foundry & P. Works v. Oconto Water Co.*, 52 Fed. 29.

Legislative power to establish; construction of. *Murphy v. Way-*

establishing and maintaining public parks, squares and other pleasure resorts, as playgrounds for children, golf courses, and like places for diversion and recreation;¹⁹ constructing or authorizing the construction of safe harbors, landings, piers, wharves and docks;²⁰ the regula-

cross, 90 Ga. 36, 15 S. E. 817; *Dutton v. Aurora*, 114 Ill. 138, 23 N. E. 461; *Ysleta v. Babbitt*, 8 Tex. Civ. App. 432, 28 S. W. 702; *Springville v. Fullmer*, 7 Utah 450, 27 Pac. 577; *Attorney General v. Eau Claire*, 37 Wis. 400.

Inherent municipal power to build, asserted in *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885.

Legislative power to contract for supply. *Burlington Waterworks Co. v. Burlington*, 43 Kan. 725, 23 Pac. 1068; *Hackensack Water Co. v. Hoboken*, 51 N. J. L. 220, 17 Atl. 307; *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782, 10 C. C. A. 60; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. 586.

Waterworks held not "local improvement" authorizing levy of special assessments to pay therefor. § 1796 *ante*.

Delegation. Council cannot authorize committee to contract for hydrant. *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90. See § 383 *et seq.*, *ante*, vol. 1.

Charter power to furnish, held revoked by law conferring exclusive right upon a private corporation. *Gas & Water Co. v. Downingtown*, 175 Pa. St. 341, 34 Atl. 799.

See chapters 34 and 35 *ante*, this volume.

19. §§ 1115, 1153 to 1157 *ante*, vol. 3.

Park commissioners are frequently authorized to make expenditures for the improvement of parks, or the construction of park districts. *Re Adams*, 165 Mass. 497, 43 N. E. 682.

The right to vacate open spaces or parks is generally discretionary with the corporate authorities. *Riggs v. Board of Education of Detroit*, 27 Mich. 262.

20. Piers. City may enlarge slips in connection with their proprietors by extending piers. *Thompson v. New York*, 3 Sandf. (5 N. Y. Super. Ct.) 487.

The power to enlarge slips is a continuing one, applicable to slips in existence when law was passed as well as to such as may from time to time be constructed. *Marshal v. Vultee*, 1 E. D. Smith. (N. Y.) 294, *aff'd* *Marshall v. Guion*, 11 N. Y. 461.

Power to build piers and extend them exists. *Thompson v. New York*, 11 N. Y. 115.

Authority to enlarge the public slips by building piers, etc., does not authorize the making of a slip in the first instance. *Verplanck v. New York*, 2 Edward Ch. (N. Y.) 220.

Breakwater may be constructed by city, under general power, to protect public streets. *Miller v. Milwaukee*, 14 Wis. 642.

Levee. Such powers as are "essential to the declared objects

tion of the placing of poles, wires and electrical appliances, and of the construction and management of conduits subways, etc.²¹

and purposes of the corporation" do not include power to construct a levee. *Newport v. Batesville*, etc. R. Co., 58 Ark. 270, 24 S. W. 427.

Power to make local improvements authorizes steps to protect lands from overflow. *Daily v. Swope*, 47 Miss. 367.

Public landing place, held not a way, conferring power to discontinue it. *Com. v. Tucker*, 2 Pick. (19 Mass.) 44.

Harbor, power to establish denied in *Spengler v. Trowbridge*, 62 Miss. 46.

Wharves, landing, etc.

Alabama. *Webb v. Demopolis*, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62.

California. *San Pedro v. Southern Pac. R. Co.*, 101 Cal. 333, 35 Pac. 993.

Illinois. *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179.

Indiana. *Snyder v. Rockport*, 6 Ind. 237.

Louisiana. *Shepherd v. Municipality No. 3*, 6 Rob. (La.) 349, 41 Am. Dec. 269; *St. Martinsville v. The Mary Lewis*, 32 La. Ann. 1293.

Michigan. *Backus v. Detroit*, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447.

Missouri. *Hannibal v. Winchel*, 54 Mo. 172.

New York. *Bell v. New York*, 79 N. Y. S. 347, 77 App. Div. 437.

Texas. *Galveston v. Menard*, 23 Tex. 349.

Wharves may be constructed by contract or by the city directly. *Geiger v. Filor*, 8 Fla. 325.

The charter power to "erect, repair and regulate public wharves and docks" gives power to alter by extension or diminution. *Hannibal v. Winchel*, 54 Mo. 172.

Power to construct wharves, docks, piers, etc., does not give implied power to condemn for public use an existing private wharf. *Madison v. Daley*, 58 Fed. 751.

See chapter 32, *Eminent Domain*, *ante*, this volume.

In exercising the power to fill up slips a street may be continued or improved. *New York v. Whitney*, 7 Barb. (N. Y.) 485.

Power to make and maintain wharves will not authorize the granting of the exclusive right to maintain wharves for a term of years to an individual. Such grant constitutes a transferring of corporate powers and hence is void. *Oakland v. Carpentier*, 13 Cal. 540.

See § 382 *ante*, vol. 1.

21. See § 928 *ante*, vol. 3.

River tunnel. *Chicago* authorized to construct. *Chicago v. Rumsey*, 87 Ill. 348.

See chapter 25 *ante*, vol. 3, also chapter 34 *ante*, this volume.

Poles, wires and lamps in electric lighting system, held local improvements in *Illinois*, § 1797 *ante*.

§ 1817. Nature of power.

The powers to provide public improvements, like all municipal powers, are held in trust for the public. They cannot be abdicated or surrendered.²² The power is in its nature legislative, not judicial. Thus, unless expressly authorized by law, an action will not lie to change the location of a street which has been established.²³ The power is usually exercised under legislative discretion, and, as a rule, the courts cannot control it, but when the work has been determined upon, the construction thereof is merely ministerial.²⁴

Courts possess only such jurisdiction respecting municipal improvements as may be conferred by the legislature. Powers relative to the subject may be, and frequently are, conferred upon the courts.²⁵ But for

22. § 282 *ante*, vol. 1; §§ 1822, 1828 *post*.

23. *De Witt v. Duncan*, 46 Cal. 342.

24. *Georgia*. *Fuller v. Atlanta*, 66 Ga. 80.

Indiana. *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711; *Kokomo v. Mahan*, 100 Ind. 272.

Massachusetts. *Collins v. Walthem*, 151 Mass. 196, 24 N. E. 326.

Michigan. *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 526; *Lansing v. Toolan*, 37 Mich. 152, 38 Mich. 315; *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507.

Minnesota. *Pye v. Mankato*, 36 Minn. 373, 31 N. W. 863.

Missouri. *Donahoe v. Kansas City*, 136 Mo. 657, 666, 38 S. W. 571; *Thurston v. St. Joseph*, 51 Mo. 510, 519.

New Jersey. *Soule v. Passaic*, 47 N. J. Eq. 28, 20 Atl. 346.

New York. *Seifert v. Brooklyn*, 101 N. Y. 136, 4 N. E. 321.

United States. *Johnston v. Dis-*
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trict of Columbia, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440.

The power so to repair a highway that it shall be fit for travel is executive; but that of determining what shall be the lines of travel is legislative. *Attorney General v. Boston*, 142 Mass. 200, 7 N. E. 722.

"The ordinary repairs which are required to keep streets and highways in a safe condition for travel are plainly matters of an administrative nature." *Draper v. Fall River*, 185 Mass. 142, 69 N. E. 1068.

25. Surveyor of highway appointed by court. *Pancoast v. Troth*, 34 N. J. L. 377.

Power of county court over highways and bridges under legislative act. *Norwich v. Story*, 25 Conn. 44.

Powers of court of quarter session in Pennsylvania. *Re Widening Burnish St.*, 140 Pa. St. 531,

the most part these appertain to the condemnation of private property for public use, which is essentially a judicial proceeding.

§ 1818. Municipal power to make.

Ample power to make public improvements, as already indicated, is usually possessed by municipal corporations. Authority to provide for public improvements is generally granted in express terms or by necessary implication,²⁶ for it is well settled that it may be implied

21 Atl. 500; *Re Widening Howard St.*, 140 Pa. St. 531, 21 Atl. 500; *Re Osage Street*, 90 Pa. St. 114; *Re Road*, 14 Serg. & R. (Pa.) 447; *Re Callowhill St.*, 32 Pa. St. 361; *Re Twenty-eighth St.*, 102 Pa. St. 140; *Re Road Sterrett Tp.*, 123 Pa. St. 231, 16 Atl. 777; *Re Vacation of Henry St.*, 123 Pa. St. 346, 16 Atl. 785; *Re Vacation of Union St.*, 140 Pa. St. 525, 21 Atl. 406.

Examine Knowles v. Muscatine, 20 Iowa 248; *Brandt v. Milwaukee*, 69 Wis. 386, 34 N. W. 246.

Jurisdiction of county courts to narrow streets. *Re Greenough St.*, 169 Pa. 210, 32 Atl. 427; *Appeal of Donohue*, 169 Pa. 210, 32 Atl. 427.

26. State may confer right to make public improvements on municipal corporation. *Redersheimer v. Bruning*, 113 La. 343, 36 So. 990; *Rogers v. St. Paul*, 22 Minn. 494.

Authority to make improvements is required. An act giving the City of Boston power to distribute the waters of a named river and omitting all mention of authority to cross tide waters does not grant the latter power. *Quincy v. Boston*, 148 Mass. 389, 19 N. E. 519.

A turnpike road which has been surrendered under legislative authority to the municipal corporation may be reconstructed as a street. *Cassidy v. Covington Co.*, 12 Ky. L. Rep. 980, 16 S. W. 93.

A turnpike road which is one of the public recognized streets is subject to municipal jurisdiction as to grading, paving, etc. *Parker v. New Brunswick*, 32 N. J. L. (2 Vroom.) 548.

Law permitting city to grade and pave a turnpike road running through its limits and authorizing an indemnification to the turnpike company against liability, etc., held valid. *Providence & A. Turnpike Co. v. Scranton*, 175 Pa. St. 290, 34 Atl. 637.

The fact that a part of an act authorizing public improvements is unconstitutional does not invalidate the whole act, where that which remains contains a complete system in itself, capable of being carried out and not dependent upon the unconstitutional portions. This is the general rule of construction applicable to legislative acts. *Re Ruan St.*, 24 Wkly. N. Cas. 460.

Legislative authority to issue bonds for the purchase of lands

from powers expressly granted.²⁷ It is also said to exist by virtue of the creation of the local corporation²⁸ when it is characterized as an inherent power.²⁹ It has been held in Pennsylvania that a municipal corporation has authority to pass ordinances for the grading and paving of streets without express grant from the legislature.³⁰

Municipal corporations generally have power to condemn private property for public use. In the opening and widening of streets and alleys, the construction of drains, sewers and the regulation of watercourses, and the laying of water pipes, gas pipes, etc., condemnation proceedings are frequently required. They can only be sanctioned legally by express grant from the state,³¹ and in the exercise of the sovereign right of eminent domain in condemning property for such use, the constitutional rights of the property owners cannot be invaded. Just compensation must be paid for all property taken or "damaged" (according to some state constitution) for public use. The local corporation in such proceedings acts as the agent of the state under delegated authority, and the exercise of the power is subject to the inflexible rule that the power must be strictly pursued, and, ordinarily, must appear to be so on the face of the proceedings.³²

for the erection of a building, held merely permissive and not mandatory. *Staples v. Bridgeport*, 75 Conn. 509, 54 Atl. 194.

27. *Heilbron v. Cuthbert*, 96 Ga. 312, 23 S. E. 206; § 352 *ante*, vol. 1.

Sewers, § 1428 *ante*. Power to construct and maintain sewers may be derived from power to make local improvements. *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

28. *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79.

29. *Ellinwood v. Reedsburg*, 91

Wis. 131, 64 N. W. 885; § 357 *et seq.*, *ante*, vol. 1.

30. *Williamsport v. Com.*, 84 Pa. St. 487, 24 Am. Rep. 208.

See § 1827 *post*.

31. *Associates of Jersey Co. v. Jersey City*, 8 N. J. Eq. (4 Halst.) 715.

See chapter 31, *Sewers and Drains*, *ante*.

Law authorized the making, and the taking of private property therefor. *Dorgan v. Borton*, 12 Allen (94 Mass.) 223

32. *State (Durant) v. Jersey City*, 25 N. J. L. 309.

The right to provide for local improvements by the exercise of the extraordinary power of special assessment or taxation, like the right of eminent domain, is a power primarily vested in the state, and can only be invoked by the municipal corporation, under express grant, either delegated by the legislature of the state or conferred by the constitution. Constitutions frequently provide, in substance, that the legislature may vest the corporate authority of cities, towns and villages with power to make local improvements by special assessments or by special taxation of the property benefited.³³

§ 1819. Where power vested.

In deference to the idea of local self-government which, as explained in various parts of this work, is the fundamental conception of our constitutional and legal system,³⁴ in urban centers or in incorporated cities and towns the prevailing practice is to invest the municipal government with all the requisite powers, to provide all necessary and desirable public improvements,³⁵ while in

Lands for opening and widening street. *Dorgan v. Boston*, 12 Allen (94 Mass.) 223.

See chapter 32, Eminent Domain, *ante*, this volume.

33. *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *State v. Dodge County Court*, 8 Neb. 124, 30 Am. Rep. 819.

See chapter 38, Special Taxation and Local Assessments, *post*, vol. 5.

34. §§ 62 to 71 *ante*, vol. 1; chapter 4 *ante*, vol. 1.

35. *Illinois*. *People v. Chicago & N. W. Ry. Co.*, 118 Ill. 520, 8 N. E. 824; *Shields v. Ross*, 158 Ill. 214, 41 N. E. 985.

Indiana. *Sparling v. Dwenger*, 60 Ind. 72; *State v. Mainey*, 65

Ind. 404; *Anderson v. Endicutt*, 101 Ind. 539.

Iowa. *Gallagher v. Head*, 72 Iowa 173, 33 N. W. 620.

Kansas. *Ottawa v. Rohrbough*, 42 Kan. 253, 21 Pac. 1061.

Michigan. *Comrs. of Highways v. Willard*, 41 Mich. 627, 3 N. W. 164.

Mississippi. *Blocker v. State*, 72 Miss. 720, 18 So. 388.

New Jersey. *Campbell v. Hale*, 25 N. J. L. 324; *Cross v. Morristown*, 18 N. J. Eq. 305; *Keyport v. Cherry*, 51 N. J. L. 417, 18 Atl. 299; *Cherry v. Keyport*, 52 N. J. L. 544, 20 Atl. 970; *Re Public Road*, 54 N. J. L. 539, 24 Atl. 759.

Pennsylvania. *Re Road in Borough of Easton*, 3 Rawle (Pa.)

rural districts this power is possessed by county, township and other local authorities.³⁶ However, laws exist which confer power respecting public highways, parks, boulevards, etc., although within the limits of a municipal corporation, upon officers other than municipal, variously styled county commissioners, supervisors, highway surveyors, road boards, etc. Formerly these laws generally applied to small cities, towns and villages,³⁷ but at present in the larger cities, park, boulevard, water and other kinds of public improvements are common.³⁸

Whether power relating to given public improvements is to be exercised by the municipal or other authorities is sometimes a matter of the proper construction of the controlling law, to ascertain the legislative intent, in the light of the constitution, course of legislation and judicial decisions of the particular state.³⁹ As mentioned,

195; *Re Jackson Street*, 83 Pa. St. 328.

Texas. *State v. Jones*, 18 Tex. 874; *Norwood v. Gonzales County*, 79 Tex. 218, 14 S. W. 1057.

Vermont. *Bennington v. Smith*, 29 Vt. 254.

36. § 1312 *ante*, vol. 3.

37. *Re Hanson*, 51 Me. 193; *Washington v. Fisher*, 43 N. J. L. 377; *Carroll v. Irvington*, 50 N. J. L. 361, 12 Atl. 712; *People v. Queens County Supervisors*, 62 Hun (N. Y.) 619, 16 N. Y. S. 705; *Wells v. McLaughlin*, 17 Ohio 99; *Butman v. Fowler*, 17 Ohio 101.

See § 1312 *ante*, vol. 3.

38. § 67 *ante*, vol. 1.

Bridge and highway commission and district, § 189, p. 439 *ante*, vol. 1.

See §§ 227 to 229 *ante*, vol. 1; §§ 1310 to 1312 *ante*, vol. 3.

Bridges and ferries. May provide for establishment of bridge and ferry, and compel city to pay

without its consent. *Simon v. Northrup*, 27 Ore. 487, 40 Pac. 560, 30 L. R. A. 171; *Philadelphia v. Field*, 58 Pa. St. 320. Legislature may compel levy of taxes for bridges. *Talbot Co. v. Queen Anne Co.*, 50 Md. 245, 259.

39. § 170 *ante*, vol. 1.

Under some laws a township committee is empowered to order public streets to be lighted and make contracts therefor. *Scheffbauer v. Kearney Tp. Com.*, 57 N. J. L. (28 Vroom.) 588, 31 Atl. 454.

Held, under particular laws that city had power to let a contract for the construction of bridges against the contention that the power was vested in the county board. *New Albany v. Iron Substructure Co.*, 141 Ind. 500, 40 N. E. 44.

Railroad crossings over streets, held to be within the exclusive jurisdiction of the municipal corporation and not the county au-

sometimes state legislative acts provide for the creation of special commissioners or boards, to administer

thorities. *Cook County v. Great Western Ry. Co.*, 119 Ill. 218, 10 N. E. 564.

County commissioners, held to have jurisdiction over highways within the limits of a city notwithstanding the charter confers exclusive authority over the city streets to the council. *Deering v. County Commissioners*, 87 Me. 151, 32 Atl. 797.

Powers conferred in general terms upon highway commissioners to construct and maintain roads and bridges within their respective towns held, in Illinois, not to authorize the exercise of such powers within the corporate limits of cities and villages in such towns. *Meyer v. Thatcher*, 118 Ill. 520, 8 N. E. 824; *People v. Chicago and N. W. R. Co.*, 118 Ill. 520, 8 N. E. 824.

Quarter sessions, held in Pennsylvania not to possess jurisdiction to lay out and open streets and alleys on the site of streets and alleys laid out by the original proprietor of an incorporated borough in the plan of the town, which had not been opened. *Re Milford*, 4 Pa. (4 Bar.) 303; *Re Vacation of Street in Harrisburg*, 1 Pears. (Pa.) 87; *Re Alley in Kutztown*, 2 Woolw. Dec. (Pa.) 373; *Re South Chester Road*, 80 Pa. St. 374.

The appointment of viewers to widen a street, requires approval of town council. *Re Norwegian St.*, 81 Pa. St. 349.

Constitutions restrict the delegation of the right to make local

improvements to the corporate authorities. Legislative acts which contravene such provisions are void. *Gage v. Graham*, 57 Ill. 144.

State may by law create a board to contract for public work for the city, in which case no action on the part of the council is necessary to authorize such board to contract for the city. *Nelson v. New York*, 63 N. Y. 535.

A constitutional provision that municipal officers whose election or appointment are not provided for shall be elected by the electors of the municipality does not forbid the legislature from appointing commissioners for the purpose of widening a street by proceedings different from those which can be taken by commissioners of highways under the state laws. *People v. McDonald*, 69 N. Y. 362.

A legislative act, held valid relating to the improvement of a street which provided for the appointment of commissioners instead of conferring the power to do the work upon the municipal corporation. *Re Woolsey*, 95 N. Y. 135.

Court house. The legislature cannot compel a city at its sole expense to erect a court house in the county in which the city is situate, but may authorize the city to do so. *Callam v. Saginaw*, 50 Mich. 7, 14 N. W. 677.

Held, under particular law creating commissioners to locate and erect a court house for a city that the city never having assented to

certain functions belonging to the municipality,⁴⁰ as, for example, to devise a system of parks and boulevards,⁴¹ a plan of sewerage,⁴² to provide an adequate and wholesome water supply,⁴³ a merit or civil service system,⁴⁴ for the preservation of the public health,⁴⁵ or police protection.⁴⁶ In the absence of express constitutional inhibition laws of this character are generally sustained.⁴⁷

or accepted, the commissioners were not the agents of the city and could not bind it by contract entered into by them. *Von Valkenburgh v. New York*, 43 Barb. (N. Y.) 109.

40. § 67 *ante*, vol. 1; chapter 4 *ante*, vol. 1.

Power to assess city property for local improvements may be delegated by the legislature to a board of assessors, acting independently of city council. *Little Rock v. Board of Improvement*, 42 Ark. 152.

Commissioners, to perform municipal functions forbidden by constitutions of many states, as in California, Pennsylvania and Washington. Transferring duties of construction, maintenance and regulation of highways to commissioners is prohibited in Pennsylvania. *Porter v. Shields*, 200 Pa. St. 241, 49 Atl. 785.

But a legislative act creating a commission to investigate and report as to certain improvements, was decided in California not to violate the constitution forbidding the delegation of power to a special commission. Under the act the report was only effective and binding when approved by the council. *Davis v. Los Angeles*, 86 Cal. 37, 24 Pac. 771.

41. *West Chicago Park Comrs. v. Western Union Tel. Co.*, 103 Ill.

33; *Re Central Park Comrs.*, 51 Barb. (N. Y.) 277, 35 How. Pr. (N. Y.) 255.

See § 221 *ante*, vol. 1.

42. **Sewers.** Legislature may regulate the manner in which city sewers shall be constructed. *Re N. Y. P. E. Public Schools*, 46 N. Y. 178.

See chapter 31 *ante*.

Act creating board to provide sewerage and drainage, sustained. *Nelson v. New York*, 63 N. Y. 535.

43. *Re Zborowski*, 68 N. Y. 88; *Clark v. Lyon*, 68 N. Y. 609.

See § 220 *ante*, vol. 1.

Act creating water commissioners to which city consented, sustained, and commissioners held agents of the city in *Bailey v. New York*, 3 Hill (N. Y.) 531, *aff'd* 2 Denio (N. Y.) 433, 3 Am. Dec. 669.

44. § 189, p. 437 *ante*, vol. 1.

45. **Public health.** May make provision for disposition of sewage from a number of towns and cities, and compel cities and towns to pay expenses therefor—matter relates to public health—area contained 1-6 of state population. *Re Kingman*, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417; *S. P. King v. Reed*, 43 N. J. L. 186.

46. § 181 *ante*, vol. 1.

47. §§ 185 to 196 *ante*, vol. 1.

§ 1820. Same—legislative control.

Although, as considered in an earlier chapter of this work, purely municipal functions as distinguished from those of the state have not as yet been differentiated clearly in all cases,⁴⁸ it has been judicially affirmed in many jurisdictions that the following matters are of exclusive local control: street improvements,⁴⁹ condemnation proceedings to acquire lands for streets, parks, water works, sewers, etc.,⁵⁰ the establishment and maintenance of boulevards,⁵¹ the assessment of damages and benefits for grading and regrading streets,⁵² the establishment and control of parks,⁵³ fire departments,⁵⁴ waterworks,⁵⁵ gas works,⁵⁶ markets, hospitals, cemeteries, libraries,⁵⁷ and the assessment and collection of costs for street improvements.⁵⁸ On the other hand, in

48. 173 *ante*, vol. 1.

49. *Murnane v. St. Louis*, 123 Mo. 479, 27 S. W. 711; *State ex rel. v. Field*, 99 Mo. 352, 12 S. W. 802.

50. *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 472, 41 S. W. 943; *Harward v. St. Clair, etc. Co.*, 51 Ill. 130.

51. *St. Louis v. Dorr*, 145 Mo. 466, 480, 41 S. W. 1094, 46 S. W. 976.

52. *State ex rel. v. Field*, 99 Mo. 352, 356, 12 S. W. 802.

53. *State ex rel. v. Schweickhardt*, 109 Mo. 496, 19 S. W. 47; *Kansas City ex rel. v. Scarritt*, 127 Mo. 642, 29 S. W. 845, 30 S. W. 111; *People v. Chicago*, 51 Ill. 17; *People ex rel. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Oren v. Bolger*, 128 Mich. 355, 87 N. W. 366, 8 Det. Leg. News. 675.

Contra. State v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829.

Legislature may provide for construction of park system to be paid for by local assessments, *Re*

Adams, 165 Mass. 497, 43 N. E. 682.

Legislative mandatory act is valid which requires city to purchase lots or condemn land for a park. *Baltimore v. Reitz*, 50 Md. 574.

See § 221 *ante*, vol. 1.

54. *State ex rel. v. Denny*, 118 Ind. 382, 21 N. E. 252, 24 Am. & Eng. Corp. Cas. 165; *State v. Fox*, 158 Ind. 126, 63 N. E. 19; *Lexington v. Thompson*, 24 Ky. L. Rep. 384, 68 S. W. 477; *State v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, overruling *State v. Seavey*, 22 Neb. 454, 35 N. W. 228. Compare *Redell v. Moores*, 63 Neb. 219, 55 L. R. A. 740, 88 N. W. 243.

55. § 220 *ante*, vol. 1.

56. *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175, 183.

57. *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695, 35 Am. St. 515.

58. *Murnane v. St. Louis*, 123 Mo. 479, 27 S. W. 711.

the absence of express constitutional prohibition, legislative control in various ways of the several classes of public improvements of the municipality,⁵⁹ its corporate

59. **Legislative control of local improvements.** Legislature may authorize assessments for local improvements. *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Thomason v. Ruggles*, 69 Cal. 465, 11 Pac. 20; *People v. Bartlett*, 67 Cal. 156, 7 Pac. 417; *Oakland Pav. Co. v. Rier*, 52 Cal. 270. *Re House Bill No. 165*, 15 Colo. 593, 26 Pac 141; *Re Van Antwerp*, 56 N. Y. 261; *Seanor v. Whatcom County Comrs.*, 13 Wash. 48, 42 Pac. 552.

In Maryland mandatory legislative act was sustained which required the city to purchase lots or condemn land for a park. *Baltimore v. Reitz*, 50 Md. 574.

The legislature may provide for the drainage of swamp land within a city and make the expenses therefor chargeable upon the city. *O'Neill v. Hoboken*, 72 N. J. L. 67, 60 Atl. 50.

The legislature may enlarge a town and transfer the burden of maintaining a public bridge from the county to the town or city. And where a statute confers power upon a municipal corporation to be exercised for the public good, the exercise of such power is not discretionary but imperative, and the words "the city council shall have power to," mean duty and obligation. *Cavender v. Charleston*, 62 W. Va. 654, 59 S. E. 732.

In some states as to roads of all kinds, bridges and sewers the legislature may prescribe what shall be done, and require cities

and towns to bear the expense to such an extent and in such proportions as it may determine. This for the reason that the powers which have been given to cities and towns by the legislature by special or by general laws, are in no sense a contract, and do not become vested rights as against the legislature.

Indiana. *Sloan v. State*, 8 Blackf. (Ind.) 361.

Maryland. *Pumphrey v. Baltimore*, 47 Md. 145.

Massachusetts. *Prince v. Crocker*, 166 Mass. 347, 359, 44 N. E. 446, 32 L. R. A. 610; *Coolidge v. Brookline*, 114 Mass. 592, 596, 597; *Agawan v. Hampden*, 130 Mass. 528, 530; *Kingman*, petitioner, 153 Mass. 566, 573-576.

New York. *People v. Flagg*, 46 N. Y. 401; *People v. Morris*, 13 Wend. (N. Y.) 325.

Oregon. *Simon v. Northrup*, 27 Ore. 487, 40 Pac. 560, 30 L. R. A. 171.

Pennsylvania. *Philadelphia v. Field*, 58 Pa. St. 320.

Legislative control of highways in cities and towns. §§ 227-229 *ante*, vol. 1; § 310 *et seq.*, *ante*, vol. 3.

Subway. Statute may authorize construction of subway in city (Boston) where it is accepted by the qualified electors, and impose cost of same on city. Matter of construction may be taken out of hands of the regular city officers. *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

property,⁶⁰ its funds and revenues,⁶¹ its obligations, contracts and liabilities⁶² has been sanctioned by numerous judicial decisions.⁶³

§ 1821. Same—authorities to provide for improvements.

Public improvements can be legally provided for only by the officers, boards or departments duly empowered.⁶⁴

60. §§ 219-226 *ante*, vol. 1.

61. §§ 230-233 *ante*, vol. 1.

Funds and revenue. Act requiring council to levy special tax to create a fund for pensioning crippled and disabled firemen and families of deceased members held void. *McDonald v. Louisville*, 24 Ky. L. Rep. 271, 68 S. W. 413.

62. §§ 234-242 *ante*, vol. 1.

Legislature may compel city to pay damages in making improvements. *Re Reynolds*, 21 N. Y. S. 592; *Tocci v. New York*, 25 N. Y. S. 1089.

The legislature may relieve property improperly assessed for a local improvement and compel the city to pay the sum. *State v. Hoffman*, 35 Ohio St. 435.

The legislature cannot empower a municipal corporation to become indebted beyond the constitutional limitation even for public improvements the duty of making which improvements the legislature has imposed on the municipal corporation. *Re Opinion of the Justices* (Me., 1905), 60 Atl. 85, 87, 99 Me. 515.

Claims. May exercise power to tax to pay claims. *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 19 Supt. Ct. 513, 43 L. Ed. 796; *Guthrie v. Territory ex rel. Losey*, 1 Okla. 188, 31 Pac. 190; *Coast Co. v. Spring Lake Borough*, 56 N. J. Eq. 615, 36 Atl. 21.

63. Validating void act. Where an assessment for a local improvement has been adjudged void, the legislature cannot ratify or validate the same. Such an act was held unconstitutional in Maryland. *Baltimore v. Horn*, 26 Md. 194. See also, *Lennon v. New York*, 55 N. Y. 361; *Baltimore v. Porter*, 18 Md. 284.

A legislative act validating a local assessment, held void. The court saying: "The legislature cannot legalize a void assessment, nor can the legislature, by direct act, make an assessment within an incorporated city." *Schumacker v. Toberman*, 56 Cal. 508, following *People v. Lynch*, 51 Cal. 15.

A ratification by the legislature of an *ultra vires* contract for street improvement was upheld. *Brown v. New York*, 63 N. Y. 239. See also, *Duanesburgh v. Jenkins*, 57 N. Y. 177; *O'Hara v. New York*, 112 N. Y. 146.

Curative power of legislature as to void municipal action, §§ 707-709 *ante*, vol. 2.

64. *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132, reversing *Meserole v. Brooklyn*, 8 Paige (N. Y.) 198; *Van Doren v. New York*, 9 Paige (N. Y.) 388; *O'Rourke v. Hart*, 9 Bosw. (22 N. Y. Super. Ct.) 301; *King v. Brooklyn*, 42 Barb. (N. Y.) 627.

Municipal charters differ widely in the manner of vesting the several municipal functions;⁶⁵ changes in this respect are frequent;⁶⁶ and oftentimes laws are so drawn, amended and repealed, that judicial construction is necessary to inform those interested of their true meaning.⁶⁷

65. Ch. 9, The Municipal Charter, *ante*, vol. 1; § 432 *ante*, vol. 2.

66. Power of council to improve streets (changes in particular laws). Re Deering, 85 N. Y. 1.

Regulating grade of streets transferred from department of public works to council. Re Roberts, 89 N. Y. 618, *aff'g* 25 Hun (N. Y.) 371.

Power to contract for water works vested in mayor and council, changed to water commissioner. Wells v. Atlanta, 43 Ga. 67.

Held, particular law creating water commissioners and authorizing them to contract did not deprive the corporation of its power to contract for water under its general power. Hackensack Water Co. v. Hoboken, 51 N. J. L. (22 Vroom.) 220, 17 Atl. 307.

Under a law organizing board of public works in certain cities, and transferring to such boards power, which prior thereto, had been in the common council, to open and lay out streets, held to include the right to continue all unfinished proceedings that had been commenced by the council at the date of the enactment of the law. Wilson v. Trenton, 55 N. J. L. 220, 26 Atl. 83.

67. Authorities to provide and make improvements under various laws illustrated. Council and not commissioners had power

to lay out streets. Grant v. Newark, 28 N. J. L. (4 Dutch) 491.

Commissioners of public works, held authorized to let contracts for water meters, being exception, growing out of charter construction. People ex rel. v. Van Nort, 64 Barb. (N. Y.) 205.

Street commissioner had power to make contracts for street grading. Ede v. Cogswell, 79 Cal. 278, 21 Pac. 767.

The administrator of improvements has power to contract and repair bridges but after construction the management thereof may be given to the administrator of commerce. McCaffrey v. Cavanac, 30 La. Ann. 882.

Contract for water pumping machinery to be authorized by council. Chicago v. Fraser, 60 Ill. App. 404.

A law conferred upon the board of public works power "by and under the direction of the common council" to make certain contracts for specified work, as the construction of library and museum building. Held, the council should determine the kind of building to be constructed and procure plans therefor. Koch v. Milwaukee, 89 Wis. 220, 62 N. W. 918.

Under some charters executory contracts for public improvements are only binding when made by

A slight departure or an immaterial irregularity or failure to observe mere directory provisions will not in-

the council or an authorized committee of the council. *Starkey v. Minneapolis*, 19 Minn. 203.

Under some charters the board of public works has power to contract for paving streets or parts thereof. *State v. Ramsey County District Court*, 32 Minn. 181, 19 N. W. 732.

A committee of the council cannot accept a bid or award a contract to grade a street under a charter provision authorizing the council to cause the streets to be graded and to let contracts for this purpose. *Stockton v. Creanor*, 45 Cal. 643.

See § 615 *ante*, vol. 2.

Without express authority the street commissioner has no power to bind the city by contracts for public work. *Ellis v. New York*, 1 Daly (N. Y.) 102.

Borough officers and not county, have jurisdiction to lay out highways. *Monroe v. Danbury*, 24 Ky. 199.

A city of Maine, held to possess power to accept the report locating or altering a street against the contention that it should be done by the inhabitants at a town meeting. *Preble v. Portland*, 45 Me. 241.

Held, the quarter sessions were not authorized to change or alter the grade of streets. *Re Pine St.*, 5 Lanc. Law Review (Pa.) 18.

Law imposed duty upon board of commissioners to construct bridges in cities and towns in certain cases. Effect of law, held not to withdraw all power from

cities and towns. City may contract to build. *New Albany v. Iron Substructure Co.*, 141 Ind. 500, 40 N. E. 44.

Sewers. § 1428, p. 3028, n. 63 and § 1432 *ante*.

Sewers, belong to department of public work, and not to park department. *Re Wheelock*, 121 N. Y. 644, 24 N. E. 380, aff'g 51 Hun 640.

Township board has power to obtain light. *Scheffbauer v. Kearney Tp.*, 57 N. J. L. (28 Vroom) 588, 31 Atl. 454.

Board of public works and not highway commissioners. *Re Board of Public Works of Watertown*, 144 N. Y. 440, 39 N. E. 387, aff'g 67 Hun 190, 22 N. Y. S. 112.

Filling and leveling street by street commissioner; need not be ordered by council. *Brickwell v. Hamele*, 57 Wis. 490, 15 N. W. 190.

Trustees of village are commissioners of highways and have power to cut down street. *Graves v. Otis*, 2 Hill (N. Y.) 466.

Water system; waterworks committee, held to have no power, without being duly authorized. *Nashville v. Hogan*, 9 Baxt. (68 Tenn.) 495.

Commissioner to superintend construction and operation of waterworks. *Sewickley Waterworks Comrs. v. Sewickley*, 159 Pa. St. 194, 28 Atl. 169.

Improvement of parks by park commissioners. *Astor v. New York*, 62 N. Y. 567; *Re Central*

validate the proceedings, as the law has in view substance rather than form;⁶⁸ however, omission to follow mandatory requirements may render void the action,⁶⁹ as, for example, where the controlling law in express terms requires the concurrence of two or more officers, boards or departments, to do or authorize the doing of the particular thing which is often the case in providing for specified public improvements.⁷⁰

Park Comrs., 51 Barb. (N. Y.) 277, 35 How. Pr. 255.

Where the jurisdiction of county commissioners has attached a proceeding to order a change in the grade of a street at a railroad crossing the jurisdiction of the council is exclusive until the proceedings are ended. *Powers v. Springfield*, 116 Mass. 84.

Where department is independent, as department of docks, contracts to be entered into, are governed by law organizing that department, and exempt from restrictions contained in charter relating to other departments. *Bigler v. New York*, 5 Abb. N. C. (N. Y.) 51.

Law applicable to be followed. *Guidet v. New York*, 12 Hun (N. Y.) 566.

Authority for expenditures in making an improvement must originate with the council. *Grand Rapids v. Board of Public Works*, 87 Mich. 113, 49 N. W. 481.

Laws may commit to the council the final determination of the making of improvements, etc. *Rogers v. St. Paul*, 22 Minn. 494.

68. *Dorey v. Boston*, 146 Mass. 336, 15 N. E. 897.

Change of grade, held not altering street. *Callender v. Marsh*, 1 Pick. (18 Mass.) 418.

The charter gave power as to drains and sewers to the council, and a legislative act to the mayor and alderman; held that an order of the latter was not rendered void because the council concurred. *Woodbridge v. Cambridge*, 114 Mass. 483.

69. The mayor although authorized by ordinance to enter into a contract for paving a street can only bind the city according to the authority given him. *State v. Michigan City*, 138 Ind. 455, 37 N. E. 1041.

Under a charter requiring contract for street improvements to be presented to or approved by the council an agreement with the mayor alone is not binding on the city. *Murphy v. Louisville*, 9 Bush. (72 Ky.) 189; *Detroit v. Lighting Commission of Detroit*, 101 Mich. 362, 59 N. W. 654.

Where the charter provides that the board of public works cannot change plats which have been approved by it, unless authorized by the council, the board cannot vacate plats. *Campau v. Detroit Board of Public Works*, 86 Mich. 372, 49 N. W. 39.

70. § 383 *ante*, vol. 1; § 605 *ante*, vol. 2.

Where the council is authorized to direct the making of a contract

As an ordinance cannot change legally a provision of the charter,⁷¹ power conferred upon officers by this instrument cannot be limited or restricted by ordinance or resolution. Thus where the charter authorizes the board of street commissioners to provide for the lighting of the city, an ordinance directing that the board shall make provisional contracts, subject to the approval of the council, for the erection or lighting of street lamps, should be construed either as directory merely, or as an unauthorized limitation of the board's powers, and therefore void.⁷² So, where under the charter, the mayor and council have power to widen and extend the streets and open new ones, and authority to grade, repair and otherwise improve them, ordinances forbidding the removal of earth in the city during the summer months, without the permit of the board of health, which do not expressly name the mayor and council as subject thereto, are not operative upon them when acting as a municipal body in improving or repairing the streets.⁷³

and which council is composed of two bodies a resolution of one body alone directing the contract is insufficient. *Christopher v. New York*, 13 Barb. (N. Y.) 567.

Held, under particular charter that the board of street commissioners had power with the concurrence of the council to contract with a light company to supply electricity for a period of five years to street lamps, erected under authority of the council, after the council had determined that such lighting was necessary. *Hartford v. Hartford Electric Light Co.*, 65 Conn. 324, 32 Atl. 925.

Law required concurrence of board of finance and taxation with board of public works for making

any public improvements or the doing of any work or procuring any material. Hence, ratification by the latter board of an order for work done in repairing a public sewer by approval of the bill presented therefor is insufficient to bind the city. *State (Keeney) v. Jersey City*, 47 N. J. L. (18 Vroom.) 449, 1 Atl. 511.

71. § 646 *ante*, vol. 2.

72. *Hartford v. Hartford Electric Light Co.*, 65 Conn. 324, 32 Atl. 925.

Example *Minneapolis Gaslight Co. v. Minneapolis*, 36 Minn. 159, 30 N. W. 450.

73. *Brunswick v. King*, 91 Ga. 522, 17 S. E. 940.

§ 1822. Same—delegation of power forbidden.

The rule forbidding the delegation of legislative power and powers and duties imposed upon particular officers, boards or departments, stated and explained elsewhere,⁷⁴ is well illustrated and constantly applied by the courts in public improvements of every kind in the various steps required to be taken with reference thereto, whether by simple order or formal resolution or ordinance.⁷⁵ Thus where the council or legislative

74. §§ 383-387 *ante*, vol. 1.

75. *California*. Chase v. City Treasurer, 122 Cal. 540, 55 Pac. 414; Perine Contracting, etc. Co. v. Pasadena, 116 Cal. 6, 47 Pac. 777; Richardson v. Heydenfeldt, 46 Cal. 68.

Illinois. Foss v. Chicago, 56 Ill. 354; Jenks v. Chicago, 56 Ill. 397; Lake Shore & M. S. Ry. Co. v. Chicago, 56 Ill. 454; Moore v. Chicago, 60 Ill. 243; Wright v. Chicago, 60 Ill. 312; Bryan v. Chicago, 60 Ill. 507; Page v. Chicago, 60 Ill. 441; Rich v. Chicago, 152 Ill. 18, 38 N. E. 255.

Indiana. Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989.

Kentucky. Lowery v. Lexington, 116 Ky. 157, 25 Ky. L. Rep. 392, 75 S. W. 202; Hydes v. Joyes, 67 Ky. (4 Bush) 464, 96 Am. Dec. 311; Murray v. Tucker, 73 Ky. (10 Bush) 240.

Maryland. Baltimore v. John Hopkins Hospital, 56 Md. 1; Moale v. Baltimore, 61 Md. 224.

Massachusetts. Taber v. New Bedford, 135 Mass. 162.

Michigan. Scofield v. Lansing, 17 Mich. 437.

Missouri. Haag v. Ward, 186 Mo. 325, 85 S. W. 391; Schoenberg v. Field, 95 Mo. App. 241, 68 S. W. 945; Thomson v. Boonville, 61

Mo. 282; St. Joseph v. Wilshire, 47 Mo. App. 125; St. Louis v. Gleason, 15 Mo. App. 25. City cannot delegate to officers power to grade its streets. Koeppen v. Sedalia, 89 Mo. App. 648; Whitworth v. Webb City, 204 Mo. 579, 103 S. W. 86.

New Hampshire. Hall v. Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455.

New Jersey. Foster v. Cape May, 60 N. J. L. 78, 36 Atl. 1089; Bodine v. Trenton, 36 N. J. L. 198; State v. Newark, 54 N. J. L. 62, 23 Atl. 129.

New York. Merritt v. Portchester, 29 Hun (N. Y.) 619; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105, rev'g 7 Hun (N. Y.) 351; Phelps v. New York, 112 N. Y. 216, 19 N. E. 408, 2 L. R. A. 626; Van Nest v. New York, 113 N. Y. 652, 21 N. E. 414; People v. Haverstraw, 137 N. Y. 88, 32 N. E. 1111; Morey v. Buffalo, 59 N. Y. (Misc.) 603, 111 N. Y. S. 463.

Rhode Island. Rounds v. Mumford, 2 R. I. 154.

South Carolina. Charleston v. Pinckney, 3 Brev. (S. C.) 217.

Tennessee. Whyte v. Nashville, 2 Swan (32 Tenn.) 364.

Vermont. Blanchard v. Barre, 77 Vt. 420, 60 Atl. 970.

body is required by charter to determine the nature, character, location, material to be used and the manner in which the improvement should be made, such authority cannot be delegated by ordinance or resolution, either by recital or omission in specification, or otherwise, to any officer of the city or committee of the council.⁷⁶

Wisconsin. Lisbon Ave. Land Co. v. Lake, 134 Wis. 470, 113 N. W. 1099; Shelby v. Miller, 114 Wis. 660, 91 N. W. 86.

Authority to determine kind and character of street improvement and amount of same is legislative and cannot be delegated by the municipal council. Harton v. Avondale, 147 Ala. 458 (1906), 41 So. 934.

Usually the delegation of discretionary power to city officers to determine the manner in which public work is to be done is unauthorized. Re Presbytery, 57 How. Pr. (N. Y.) 500. Thus an ordinance conferring power on the commissioner of public works to determine whether any, and if any, what cross walks should be laid is void. Tappan v. Young, 9 Daly (N. Y.) 357.

Delegation of power to construct, maintain and operate a sewer system to a private individual is void. Weaver v. Cannon Sewer Co., 18 Colo. App. 242, 70 Pac. 953; § 1432 *ante*.

Leasing of city gas works is not an improper delegation of power. Supplying gas is not a municipal duty. Bailey v. Philadelphia, 184 Pa. St. 594, 39 Atl. 494, 39 L. R. A. 837, 63 Am. St. Rep. 812, 41 Wkly. Notes Cas. 529.

An ordinance setting apart a street for a pleasure drive, under

a state statute relating to boulevards between parks, and attempting to give park commissioners control over such thoroughfare, held as a license to protect them from prosecutions for interfering with such way, and not divesting the city of its power to improve the streets and to levy the assessment therefor. Kreigh v. Chicago, 86 Ill. 407.

76. *California.* Richardson v. Heydenfeldt, 46 Cal. 68.

Indiana. Smith v. Duncan, 77 Ind. 92.

Kentucky. Hydes v. Joyes, 4 Bush. (Ky.) 464, 96 Am. Dec. 311; Zabel v. Louisville Baptist Orphans Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668.

Mississippi. Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451.

Missouri. Thomson v. Boonville, 61 Mo. 282; Ruggles v. Collier, 43 Mo. 353; King-Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App. 120, 125; Galbreath v. Newton, 30 Mo. App. 380.

New York. Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385, 9 Barb. 152; Re New York Presb. Trustees, 57 How. Pr. (N. Y.) 500; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; Tappan v. Young, 9 Daly (N. Y.) 357.

Ohio. Lippelmañ v. Cincinnati, 4 Ohio Cir. Ct. R. 327.

Hence an ordinance providing for the construction of a sewer which omits to name the material for the receiving basins and manholes contravenes this rule, and as a result the taxbills issued to the contractor for the work will be held void as to such basins and manholes, but valid as to the rest.⁷⁷ So, an ordinance which leaves the determination of the dimensions of a sewer to an officer or the contractor, in violation of the charter requiring the ordinance to fix such dimensions, is clearly void.⁷⁸

Pennsylvania. Re *Pittsburg*, 138 Pa. 401.

Tennessee. *Whyte v. Nashville*, 2 Swan (Tenn.) 364.

Where city council has been given the power to construct sidewalks and determine their dimensions, prescribing the width of a sidewalk is a legislative function which cannot be delegated to ministerial officers. *Ramsey v. Field*, 115 Mo. App. 620, 92 S. W. 350.

"The trust is an important and delicate one. * * * In effect, it is a power of taxation which is the exercise of sovereign authority; and nothing short of the most positive and explicit language can justify the court in holding that the legislature intended to confer such power on a city officer or committee. The statute not only contains no such language, but on the contrary, clearly, to my mind, expresses the intention of confining the exercise of this power to the common council, the members of which are elected by and responsible to those whose property they are thus allowed to tax." *Thompson v. Schermerhorn*, 6 N. Y. 92, 96.

Authority to let contracts cannot be delegated to a clerk. *Meuser v. Risdon*, 36 Cal. 239.

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Reletting contract; same course usually as in first letting. *Ib.*

Delegation of certain authority to street committee sustained. *Hitchcock v. Galveston*, 96 U. S. 341; *Brewster v. Davenport*, 51 Iowa 427, 1 N. W. 737; *Dorman v. Lewiston*, 81 Me. 411, 17 Atl. 316; *Reuting v. Titusville*, 175 Pa. St. 512, 34 Atl. 916.

Compare *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Thompson v. Schermerhorn*, 9 Barb. (N. Y.) 152, aff'd 6 N. Y. 92, 55 Am. Dec. 385; *Gulf C. & S. F. Ry. v. Riordan* (Tex. Civ. App. 1893), 22 S. W. 519; *McCrowell v. Bristol*, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653.

Sidewalk, construction of may be given to an officer. *Bowers v. Barrett*, 85 Me. 382, 27 Atl. 260; *Attorney General v. Boston*, 142 Mass. 200, 7 N. E. 722.

Agents may be employed to supervise the work. *Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908.

77. *St. Joseph v. Wilshire*, 47 Mo. App. 125.

78. *St. Louis v. Clemens*, 52 Mo. 133; *St. Louis v. Clemens*, 43 Mo. 395; *Sheehan v. Gleeson*, 46 Mo. 100.

But where the charter merely provides that the size of the sewer to be constructed shall be prescribed by ordinance, and contains no such requirement as to inlets, manholes, etc., nor of the material to be used in their construction, the latter are mere appendages and may be regarded as matters of detail not necessary to be specified in the ordinance.⁷⁹

In one case an ordinance provided that a sidewalk might, at the option of the contractor, be constructed of pine, white or burr oak, of certain dimensions. Here it was held that the ordinance did not constitute a delegation of the authority as to material with which the sidewalk was to be constructed. The court observed that by allowing the walks to be constructed of one or the other material a larger competition in bidding would likely be opened up, and the work therefore done at a lower price.⁸⁰

The delegation of power concerning improvements may be authorized by charter or statute,⁸¹ and where such power is conferred upon a particular officer by charter it may be exercised by him without the order or direction of the council or other municipal body.⁸² Time for the completion of the contract is usually regarded as a legislative function, and hence, it cannot be delegated.⁸³ Nor can the authority to levy and assess

79. *St. Joseph to use, etc. v. Owen*, 110 Mo. 445, 19 S. W. 713.

80. *Gallagher v. Smith*, 55 Mo. App. 116, 121, 122, distinguishing *Galbreath v. Newton*, 30 Mo. App. 380; *Ruggles v. Collier*, 43 Mo. 353.

A designation that a sidewalk shall be constructed of stone or artificial stone is sufficient, and does not leave to others the selection of material for the walk. *Richardson v. Omaha*, 74 Neb. 297, 104 N. W. 172.

Culvert, ordinance may confer

power on city engineer to fix dimensions. *Young v. Kansas City*, 27 Mo. App. 101.

81. Regulation of grade and direction of the manner in which work shall be done may be delegated by the council to city paver when authorized by charter. *State v. New Brunswick*, 30 N. J. L. 395.

82. *Noyes v. Ward*, 19 Conn. 250.

83. *Ayers v. Schmohl*, 86 Mo. App. 349.

Cannot delegate to city engineer power to extend time of perform-

cost of street improvements be delegated to a clerk.⁸⁴

Ministerial duties may be delegated.⁸⁵ This rule applies to public improvements.⁸⁶ So *minor details* may be committed to the discretion of the appropriate officers and employees,⁸⁷ as, for example, permitting the

ance of municipal contract. *Childers v. Holmes*, 95 Mo. App. 154, 68 S. W. 1046.

A contract providing for commencement of work thereunder within one week after written notice from the engineer so to do, and completion thereof within three months thereafter, is not objectionable as delegation of power. *Halsey v. Richardson*, 139 Mo. App. 157, 122 S. W. 326.

84. *Sedalia v. Donohue*, 190 Mo. 407, 89 S. W. 386.

85. § 387 *ante*, vol. 1.

86. *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321.

87. *Swift v. St. Louis*, 180 Mo. 80, 79 S. W. 172. See also, *Sullivan v. Rome*, 86 N. Y. (App. Div.) 107, 83 N. Y. S. 554.

Where the council orders improvements to be made and prescribes the manner in which the work shall be done, leaving the execution of the work to others is not an undue delegation of power. *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523.

One may be employed by those upon whom the duty rests to make improvements as engineer to determine upon certain matters relative to the work. He is acting as their agent, and such is not an objectionable delegation of power. *Ampt. v. Cincinnati*, 17 Ohio Cir. Ct. 516, 9 Ohio Cir. Dec. 690.

Ordinance as to construction of railroad may designate officers, to execute its provisions. *Northern Central R. Co. v. Baltimore*, 21 Md. 93.

Direction in an ordinance to the city engineer to fix the grade of a sewer provided therein to be constructed, held not a delegation of the powers of the council. *Rich v. Woods*, 118 Ky. 865, 26 Ky. L. Rep. 799, 82 S. W. 578.

Ordinance specifying brick of a particular brand, or brick equally good, to be approved by board of local improvements, is not objectionable. *Oak Park v. Galt*, 231 Ill. 365, 83 N. E. 209.

An ordinance providing that work is to be done under the direction of the city engineer according to specified details, does not delegate authority. *Gilsonite Const. Co. v. Arkansas McAlester Coal Co.*, 205 Mo. 49, 103 S. W. 93.

Ordinance delegating power of locating foundation and walls of subway, sustained. *People v. Grand Trunk Western R. Co.*, 232 Ill. 292, 83 N. E. 839.

Ordinance held not an improper delegation of power. *Guyer v. Rock Island*, 215 Ill. 144, 74 N. E. 105.

The location of a sidewalk in a space wider than the walk is not a mere matter of detail. *Municipal Securities Corp. v. Gates*, 130 Mo. App. 552, 109 S. W. 85.

city engineer to determine what parts of the street in question are worn and defective,⁸⁸ or, in the construction of a sewer, allowing him to decide where sub-drains should be placed,⁸⁹ or, whether any part of the foundation of the sewer should be constructed of concrete,⁹⁰ or requiring certain municipal officers to pass upon the material called for,⁹¹ or imposing upon them the duty to say whether the work has been done in a workmanlike manner.⁹²

§ 1823. Law applicable.

Sometimes it is a matter of construction to determine the particular law to be followed in making public improvements, or doing certain kinds of public work,⁹³

88. *Barber Asphalt Paving Co. v. Tomlinson*, 141 Mo. App. 422, 125 S. W. 1175.

An ordinance for paving a street which provides for the relaying of the cross walks which, in the opinion of the commissioners of public works, should not be found to be in good repair, or not on a grade adapted to the new pavement, held not to be an unlawful delegation of authority as to invalidate an assessment made under it. *Burchell v. New York*, 56 Hun 640, 9 N. Y. S. 196.

89. Where, in providing for the construction of a sewer, a city specified the total length of sub-drains and material to be used, held proper to leave to the engineer to determine where subdrains should be placed. *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107.

90. Ordinance providing that if the city engineer should deem it necessary to construct any part of foundation of a sewer of concrete it should be paid for as

extra work, upheld. *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924.

91. It is not an improper delegation of power to require officers to see that brick used in construction of improvement are the kind required (*Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874), or the engineer to select material to fill depressions caused by settling in a street after it had been graded and rolled (*Guyer v. Rock Island*, 215 Ill. 144, 74 N. E. 105), or for the council to adopt the recommendation of the board of public works as to the material to be used. *Ex parte Paducah*, 28 Ky. L. Rep. 412, 89 S. W. 302.

92. It may be left to a board of local improvements to say whether work was done in a workmanlike manner. *Northwestern University v. Wilmette*, 230 Ill. 80, 82 N. E. 615.

93. Law to be followed in the exercise of power of eminent domain, § 1529 *ante*.

A city under a special charter

as where power is conferred to make specified improvement without providing the manner thereof.⁹⁴ Frequently general or state laws prevail over charter provisions, and often the contrary is true.⁹⁵ When changes

must proceed under it in the condemnation of private property for public use, where it appears that it has not availed itself of the general laws regulating municipal corporations and their classification. *Springfield v. Whitlock*, 34 Mo. App. 642.

The charter conferred the special franchise on the inhabitants to make their own laws with respect to the opening and laying out of streets, held to be a grant of sovereignty and therefore laws made in accordance with this grant of power will supersede the general laws of the state on the subject where the latter are repugnant. *State v. Clarke*, 25 N. J. L. 54.

Which of two statutes applicable. *Re Road in Lancaster City*, 68 Pa. St. 396.

Laws respecting to be construed together. *Indianapolis v. Mansur*, 15 Ind. 112.

The power to make is to be followed as prescribed. Rule applied to the power to extend streets under restrictions. *Matthiessen & Wilchers Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. (11 C. E. Greene) 247.

Effect by change in law after the institution of proceedings for improvement. *San Francisco v. Kiernan*, 98 Cal. 614, 33 Pac. 720; *Heffernan v. San Francisco Superior Court*, 98 Cal. XVII, 33 Pac. 725.

Proceedings to construct a sewer under a law which has ceased to exist may be continued under existing laws. *Van Vorst v. Jersey City*, 27 N. J. L. (3 Dutch.) 493.

94. The law authorized the laying out, etc., of streets and public sewers but did not provide the manner in which it should be done. Held, that the general state laws on the subject were applicable. *Barnes v. Springfield*, 4 Allen (86 Mass.) 488.

In raising the grade of streets, held that the proceedings might be under one of two acts. *Ryan v. Boston*, 118 Mass. 248.

Held, in particular case that the corporate authorities were not limited by the provisions of a charter relative to the condemning of property and making assessments therefor, but might proceed under a general law. *Trowbridge v. Detroit*, 99 Mich. 443, 58 N. W. 368.

95. See §§ 194, 216, 217 *ante*, vol. 1; § 829 *et seq.*, *ante*, § 841 *et seq.*, *ante*, vol. 2.

General laws as to the widening of streets sometimes prevail over charter provisions adopted by the people of the locality. *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 771; *San Francisco v. Kiernan*, 98 Cal. 614, 33 Pac. 720; *Heffernan v. Superior Court*, 98 Cal. XVII, 33 Pac. 725.

State laws are sometimes intended as a substitute for charter

or repeals of law occur often difficulty arises relating to the law applicable to the proposed improvement.⁹⁶

§ 1824. Improvements beyond corporate limits.

The general rule is that without legislative grant the authority of the municipal corporation is confined to its own area, hence its acts and ordinances have no force beyond its corporate limits.⁹⁷ Thus in the absence of such grant the municipality cannot open a street,⁹⁸ repair a highway,⁹⁹ grade an avenue,¹ or aid in the construction of a plank road or bridge beyond its boundaries.² Sometimes authority to act outside of the muni-

provisions authorizing the making of local improvements, *e. g.*, the establishment of a sewer system. *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825.

General laws, held not applicable to Boston, the streets of which from early time have been laid out, measured and kept in repairs by laws and usages specially adapted thereto. *Com. v. Goddard, Thatcher Cr. Cas.* (Mass.) 420.

96. § 829 *et seq.*, vol. 2.

Change and repeal of laws—mode to be followed. *Re East Grant St.*, 121 Pa. St. 596, 16 Atl. 366; *Re Frederick St.*, 150 Pa. St. 202, 24 Atl. 669; *Heidenheimer v. Galveston*, 2 Posey, Unrep. Cas. (Tex.) 153.

97. Acts beyond boundaries are void without legal authorization. § 259 *ante*, vol. 1.

Ordinances, § 657 *ante*, vol. 1; § 897 *ante*, vol. 3; power to license, § 995 *ante*, vol. 3; power to hold real estate for municipal purposes, § 1108 *ante*, vol. 3.

98. Power to open a street does not authorize the street to be opened where the jurisdiction of

the municipality extends to only one side of it. *Municipality No. 1 v. Young*, 5 La. Ann. 125.

Where city limits extend only to ordinary high tide and harbor lines being established in front of city limits, the city may extend streets over intervening space to harbor area. *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827.

99. *Georgetown v. United States*, 2 Hayw. & H. (U. S.) 302, 30 Fed. Cas. No. 18,281.

When highway beyond limits may be improved, see *Re East Syracuse*, 20 Abb. N. C. (N. Y.) 131.

A city authorized to improve streets and pay for same by local assessment cannot improve a street abutting on county property at the expense of the county. *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421.

1. One side of avenue in the county. *Baltimore v. Porter*, 18 Md. 284.

2. *Montgomery v. Montgomery & W. Plank Road Co.*, 31 Ala. 76.

Free bridge across a river may be constructed by city, when. *Dively v. Cedar Falls*, 27 Iowa 227.

icipal boundaries may be implied on the ground of necessity, as for example, to obtain outlets for sewers and drains, as considered in a former chapter.³ Likewise a municipality possessing power to supply its inhabitants with water may acquire for that purpose, a water supply without its territory.⁴ Certain municipalities have been held to be authorized to supply light and water to points beyond their limits.⁵

City held authorized to build a bridge across a river separating it from a different state. *Haeussler v. St. Louis*, 205 Mo. 656, 103 S. W. 1034; § 410 *ante*, vol. 1, explaining decision.

Under a legislative act authorizing Boston and Cambridge to construct a bridge and avenue across the Charles River, between certain points in each municipality, and prescribing that the location shall be determined by the respective councils of the corporations, "acting separately," and that they shall jointly construct the bridge, in accordance with plans concurrently approved by both councils, and that each city may condemn within its own limits lands for the avenue, and shall respectively defray the expenses of construction on each side of the river, it was held that neither corporation had any voice in the location or construction of that portion of the avenue lying within the limits of the other. *Cambridge v. Railroad Comrs.*, 153 Mass. 161, 26 N. E. 241. See *Re Butler Street*, 6 Kulp. (Pa.) 488.

3. Ch. 31, Sewers and Drains, § 1434 *ante*.

4. *South Pasadena v. Pasadena*

Land, etc. Co., 152 Cal. 579, 93 Pac. 490.

5. **Light.** A city authorized to furnish light for its own and its inhabitants' use, may extend such service to points outside its limits, where it can do so with very little expense to advantage to itself and inhabitants. *Henderson v. Young*, 119 Ky. 224, 26 Ky. L. Rep. 1152, 83 S. W. 583.

Water. A city may supply water from its own system to users outside its limits, if there is sufficient water remaining for the use of its own residents. *Rogers v. Wickliffe*, 29 Ky. L. Rep. 587, 94 S. W. 24.

While a city may sell its excess water to outsiders, it cannot contract to extend its system of waterworks to an adjoining city. *Dyer v. Newport*, 123 Ky. 203, 29 Ky. L. Rep. 656, 94 S. W. 25.

A borough cannot supply water to persons outside its limits. *Stauffer v. East Stroudsburg Borough*, 215 Pa. St. 143, 64 Atl. 411.

Power to a city to furnish such city, its inhabitants, and "any other persons" with water only applies to persons within its limits, and it can not supply water to another municipal corporation. *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217.

It is competent for the legislature to confer power upon a municipality to act beyond its boundaries, in making improvements and in other ways promoting municipal objects.⁶

It has been judicially declared that where the boundary lines of the municipal corporation are uncertain and indefinite at certain points, local improvements may be made legally with reference to any recognized corporate limits.⁷

§ 1825. Improvements by property owners.

Laws often confer power on property owners to lay out streets on their own lands,⁸ also authority to construct and maintain sewers and drains on their own premises,⁹ and to build sidewalks adjacent to their prop-

6. Lands for municipal objects, § 1108 *ante*, vol. 3.

The legislature may authorize a municipal corporation to expend money upon improvements on roads outside of its limits and to levy a tax therefor. *Hagood v. Hutton*, 33 Mo. 244.

Right to construct an elevated railroad may be granted which affords accommodation to go beyond the corporate limits. *Re East River Bridge Co.*, 75 Hun 119, 27 N. Y. S. 145.

Right of City of Detroit to improve and control as a public park Belle Island which is beyond the corporate limits. *Detroit v. Moran*, 44 Mich. 602, 7 N. W. 180.

Parks. The establishment of a park beyond the city limits, held not to be a municipal purpose within the meaning of a particular constitutional provision. *State ex rel. Choteau v. Leffingwell*, 54 Mo. 458.

Pesthouse. A statute providing that to acquire quarantine

grounds beyond its boundaries a city must secure the consent of the municipality or township in which the grounds are located, does not apply to a pesthouse, which may be located by virtue of another statute without such consent. *Lorain v. Rolling*, 24 Ohio Cir. Ct. Rep. 82. See § 1108 *ante*, vol. 3.

7. *Bloomington Cemetery Assn. v. People*, 139 Ill. 16, 28 N. E. 1076.

See chapter 7, *Corporate Boundaries*, §§ 259 and 260 *et seq.*, *ante*, vol. 1.

8. *Re Board of Street Opening and Improvement*, 12 Misc. Rep. 526, 33 N. Y. S. 594, 67 N. Y. St. Rep. 250; *Re Board of Street Opening and Improvement*, 91 Hun (N. Y.) 477, 36 N. Y. S. 311.

Right of property owners to take contract for the improvement. *Cochran v. Collins*, 29 Cal. 129.

9. § 1427 *ante*.

erty.¹⁰ Although the charter confers power to have improvements made at the expense of the property owners by contract duly authorized by ordinance, the municipal corporation ordinarily may by ordinance give the abutting property owners opportunity to do the work, before it is let by contract.¹¹

10. Where city has not declared what portion of a street shall be used for vehicles and what for sidewalk, it cannot restrain a property owner from laying a four-foot walk in front of his property where it is reasonable under the condition. *Georgetown v. Hambrick*, 127 Ky. 43, 31 Ky. L. Rep. 1276, 104 S. W. 997, 13 L. R. A. (N. S.) 1113.

11. *Frankfort v. Murray*, 99 Ky. 422, 18 Ky. L. Rep. 279, 36 S. W. 180.

If a city is not required to give a property owner the privilege of constructing a sidewalk in front of his property, he cannot complain that not sufficient opportunity was afforded him to construct the same. *Eversole v. Walsh*, 25 Ky. L. Rep. 784, 76 S. W. 358.

Where a city has been given power to provide for the construction of sidewalks and assess cost thereof against abutting property owners, it may, by ordinance authorize such owners to construct the walks according to given specifications. *Zalesky v. Cedar Rapids*, 118 Ia. 714, 92 N. W. 657.

Under some charters the ordinance may authorize a street to be paved by the contractor selected by the municipality or the owners of the adjacent premises. In such

case it must appear that such selection was made in order to sustain a lien for the cost of the work. *Reilly v. Philadelphia*, 6 Phila. (Pa.) 228, 60 Pa. St. 467; *Dickerson v. Peters*, 71 Pa. 53; *Richmond Granite Co. v. Dickinson*, 9 Phila. (Pa.) 144.

Revocation of consent of property owners that a particular contractor shall do the work. *Long v. O'Rourke*, 10 Phila. (Pa.) 129, 31 Leg. Int. 116, 6 Leg. Gaz. 118; *Philadelphia v. Philadelphia & R. R. Co.*, 12 Phila. (Pa.) 479, 88 Pa. St. 314.

Some laws take away from the property owners all choice in the selection of the contractor. *Ferree's Appeal*, 88 Pa. St. 440.

The selection of the contractor by the property owners must be approved by the municipal authorities. *Managhan v. Philadelphia*, 17 Leg. Int. (Pa.) 349.

In Missouri, an ordinance of St. Louis which provided that "the board of public improvements may, upon the application" of the abutting property owner, grant him permission "to construct the sidewalk in front of such property, but without such permission no sidewalk shall be constructed by any person other than the contractor having the annual contract for constructing new sidewalks," was construed as investing the

§ 1826. Same—compulsory regulations.

In the absence of legislative or municipal mandate an occupant or owner of property is under no legal obligations to keep the sidewalk in front of the premises owned or occupied by him in repair.¹² But municipal corporations are generally empowered to compel them to do so. However, all legal requirements must be followed in allowing or directing such improvements to be made.¹³

Under ample charter power, penal ordinances have been sustained compelling abutting property owners on streets to construct and maintain sidewalks and footways when necessary to the safety or convenience of pedestrians. This has been adjudged as a proper exercise of the police power,¹⁴ and not unconstitutional as

board with discretion to permit the abutting owner the right to construct a sidewalk in front of his property or deny to him that permission, hence *mandamus* to compel the board to issue a permit was denied. *State ex rel. v. St. Louis*, 158 Mo. 505, 59 S. W. 1101.

12. *Rupp v. Burgess*, 70 N. J. L. 7, 56 Atl. 166.

13. *Connecticut*. *State v. Richards*, 74 Conn. 57, 49 Atl. 858.

Illinois. *Storrs v. Chicago*, 208 Ill. 364, 70 N. E. 347; *Western Springs v. Hill*, 177 Ill. 634, 52 N. E. 959.

Iowa. *Burget v. Greenfield*, 120 Ia. 432, 94 N. W. 933.

Michigan. *Williams v. Detroit*, 2 Mich. 560.

Pennsylvania. *Black v. Roebuck*, 17 Pa. Super. Ct. 324; *Erie v. Carey*, 12 Pa. Super. Ct. 584.

14. § 924, p. 1989 *ante*, vol. 3; *Palmer v. Way*, 6 Col. 106; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Wilson v. Philippi*, 39 W. Va. 75, 19 S. E. 553.

May require abutting owners to build sidewalks. *Re O'Brien*, 119 Mich. 540, 79 N. W. 1070.

Word "may" held to mean "shall." *Pierson v. People*, 204 Ill. 456, 68 N. E. 383.

See §§ 380 and 381 *ante*, vol. 1.

Discretion vested in municipal authorities to compel adjoining lot owners to improve sidewalks is not subject to judicial control except for fraud. *Keith v. Wilson*, 145 Ind. 149, 44 N. E. 13.

Statutes providing for compulsory making of sidewalks by abutting property owners, under penalty are to be strictly construed. *Greendale v. Suit*, 163 Ind. 282, 71 N. E. 658.

Construction of such statutes, though strict, should not be narrow. *O'Haver v. Montgomery*, 120 Tenn. 448, 111 S. W. 441, 127 Am. St. Rep. 1014.

In Arkansas a penalty may be attached to failure of property owner to construct sidewalk, and each day's delay is a separate

an unwarranted delegation of the taxing power.¹⁵ On the other hand, such laws have been declared void.¹⁶

offense. *Brizzolara v. Ft. Smith*, 87 Ark. 85, 112 S. W. 181.

Power to compel owners of property to construct sidewalks. *Sanford v. Warwick*, 82 N. Y. S. 466, 83 App. Div. 120.

A law empowering municipal authorities "to lay out and ordain foot walks, pavements," etc., "upon lands abutting on and along the sides of turnpike roads," confers no power to require the building of a walk within the road way of a turnpike company, though outside of the artificial roadbed. *Milesburg v. Green* (Pa. 1888), 14 Atl. 256.

City held to have no power to require property owners to construct sidewalks in front of their property. *Owensboro v. Hope*, 33 Ky. L. Rep. 426, 110 S. W. 272.

Cities and towns cannot compel property owners to build gutters. *Brizzolara v. Ft. Smith*, 87 Ark. 85, 112 S. W. 181.

Drains, repairs. Compelling property owners to make. *Bangor v. Lansil*, 51 Me. 521; § 924, p. 1989 *ante*, vol. 3.

15. *Arkansas*. *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760.

California. *Hart v. Gaven*, 12 Cal. 476.

Kentucky. *Paris v. Berry*, 2 J. J. Marsh (25 Ky.) 483.

Pennsylvania. *Greenburg v. Young*, 53 Pa. St. 280.

Tennessee. *Franklin v. Maberry*, 6 Humph. (25 Tenn.) 368, 44 Am. Dec. 315; *Washington v. Nashville*, 1 Swan (31 Tenn.) 177.

Virginia. *Sands v. Richmond*,

31 Gratt. (Va.) 571, 31 Am. Rep. 742.

Particular provisions construed. *Arkansas*. *Little Rock v. Fitzgerald*, 59 Ark. 494, 28 S. W. 32, 28 L. R. A. 496.

Connecticut. *Norwich v. Hubbard*, 22 Conn. 587; *Yale College v. New Haven*, 57 Conn. 1, 17 Atl. 139; *Hillhouse v. New Haven*, 62 Conn. 344, 26 Atl. 393.

Indiana. *Wiles v. Hoss*, 114 Ind. 371, 16 N. E. 800; *Keith v. Wilson*, 145 Ind. 149, 44 N. E. 13.

Iowa. *Buell v. Ball*, 20 Iowa 282.

Kansas. *Emporia v. Gilchrist*, 37 Kan. 532, 15 Pac. 532.

Massachusetts. *Charlestown v. Stone*, 15 Gray (81 Mass.) 40; *Nute v. Boston, etc. Co.*, 149 Mass. 465, 21 N. E. 881.

Missouri. *McCormack v. Patchin*, 53 Mo. 33; *Estes v. Owen*, 90 Mo. 113, 2 S. W. 133, aff'g *Farrar v. St. Louis*, 80 Mo. 379.

New Jersey. *Paxson v. Sweet*, 13 N. J. L. 196; *Bergen v. Van Horne*, 32 N. J. L. 490.

Pennsylvania. *Findley v. Pittsburgh* (Pa. 1887), 11 Atl. 678; *Smith v. Kingston Borough*, 120 Pa. St. 357, 14 Atl. 170.

Rhode Island. *Swan v. Colville*, 19 R. I. 161, 32 Atl. 854.

16. *Port Huron v. Jenkinson*, 77 Mich. 414, 43 N. W. 923, 18 Am. St. Rep. 409, 6 L. R. A. 54.

Sidewalk repairs; city cannot compel abutting owner to make. *Chicago v. Crosby*, 111 Ill. 538; *Woodward v. Boscobel*, 84 Wis. 226, 54 N. W. 332.

It is usual for laws of this character to provide for due notice to the property owners that the construction or repairing is necessary,¹⁷ and thus give them an oppor-

Contra. Buell v. Ball, 20 Iowa 282; Warren v. Henly, 31 Iowa 31.

Tenant. City cannot compel mere tenants of property to repair and keep in good condition the sidewalk in front of the property they occupy. Ordinance and charter attempting it is unconstitutional. Ford v. Kansas City, 181 Mo. 137, 79 S. W. 923.

17. Notice generally necessary; sufficiency of service.

Colorado. Hallett v. United States Security, etc. Co., 40 Colo. 281, 90 Pac. 683.

Indiana. Shrum v. Salem, 13 Ind. App. 115, 39 N. E. 1050.

Massachusetts. Tufts v. Charlestown, 98 Mass. 583.

Missouri. Leach v. Cargill, 60 Mo. 316.

New Jersey. Carroll v. Irvington, 50 N. J. L. 361, 12 Atl. 712.

New York. Rathbun v. Acker, 18 Barb. (N. Y.) 393; Moore v. Fairport, 11 Misc. Rep. (N. Y.) 146, 32 N. Y. S. 633.

Pennsylvania. Philadelphia v. Edwards, 78 Pa. St. 62; Philadelphia v. Donath, 13 Phila. (Pa.) 4; Philadelphia v. Meighan, 159 Pa. St. 495, 28 Atl. 304; Re Shady Ave., 34 Pa. Super. Ct. 327.

Rhode Island. Simmons v. Gardiner, 6 R. I. 255.

Texas. Galveston v. Heard, 54 Tex. 420.

Wisconsin. Rogers v. Milwaukee, 13 Wis. 610; Myrick v. La Crosse, 17 Wis. 442; Johnston v. Oshkosh, 21 Wis. 184.

Notice to property owner rela-

live to construction of sidewalks, must be given if the ordinance so provides, in order to compel him to pay for sidewalk constructed by the city. Redersheimer v. Bruning, 113 La. 343, 36 So. 990; Bruning v. Barrett, 113 La. 349, 36 So. 991.

Failure of a property owner to build a sidewalk after notice by the city amounts to a refusal on his part. Bluefield v. McClaugherty, 64 W. Va. 536, 63 S. E. 363.

Where charter provides that property owners shall lay sidewalks in front of their property when ordered by *resolution* of the council to do so, an ordinance providing they shall do such work when so notified by the board of public works or the council, is in conflict with the charter and is invalid. Morey v. Buffalo, 111 N. Y. S. 463, 59 N. Y. Misc. 603.

Where notice has been served on a property owner and the sidewalk constructed by the city, the city may recover therefor from a subsequent purchaser. Kahn v. Cincinnati, 30 Ohio Cir. Ct. Rep. 809.

Although it is sometimes necessary in an ordinance to name the property owners therein required to build sidewalks, if the ordinance attempts to do so it must give them correctly or it will be invalid. Lebanon v. Avritt, 15 Ky. L. Rep. 494.

An order to put sidewalks in "good and sufficient repair, free from defects, and safe and con-

tunity to do the work, within a time named, and in event of default the municipal authorities may proceed to have the work done at the expense of the property.¹⁸ These conditions must be, in substance, observed, as they are jurisdictional.¹⁹ Sometimes it is necessary for the mu-

venient for travel," is invalid for failure to state manner of doing the work. *State v. Richards*, 74 Conn. 57, 49 Atl. 858.

Requiring sidewalks to be built in accordance with specifications on file with city engineer. *Bluefield v. McClaugherty*, 64 W. Va. 536, 63 S. E. 363.

Invalidity of ordinance does not affect liability of property owner for cost of walk constructed by him under such ordinance. *Blake v. Scott*, 92 Ark. 46, 121 S. W. 1054.

18. Time within which the work is to be done by property owner. Particular instances. *Loughridge v. Huntington*, 56 Ind. 253; *Nugent v. Jackson*, 72 Miss. 1040, 18 So. 493; *Springfield v. Mills*, 99 Mo. App. 141, 145, 72 S. W. 462; *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533.

Ordinance held void as unreasonable which required a lot owner to construct a walk within five days after notice, and on his default authorizing others to build it and taxing the owners for the costs thereof. *Auditor General v. Hoffman*, 129 Mich. 541, 89 N. W. 348, 8 Det. Leg. N. 1071.

Discretion in municipal authorities to say when repairs or replacing is required. *Heman v. Franklin*, 99 Mo. App. 346, 348, 73 S. W. 314.

Where the statute requires ten

days' notice to an owner to build a sidewalk and he is given twenty the city will not on that account be denied a recovery for building same after his failure. *Bluefield v. McClaugherty*, 64 W. Va. 536, 63 S. E. 363.

Where laws requiring sidewalks to be constructed by municipal authorities upon failure of lot owner to do so provided that the work shall be let to the lowest bidder the lot owner cannot be compelled to pay for work not so let. And the fact that lot owner did not object to the work will not estop him from contesting his liability. *Clay City v. Bryson*, 30 Ind. App. 490, 66 N. E. 498.

The fact that the contract for constructing a sidewalk is let prior to the expiration of the time in which it could be constructed by the property owner will not affect the validity of the taxbill where the property owner declines to do the work and the work is done after the time allowed him. *Springfield v. Mills*, 99 Mo. App. 141, 72 S. W. 462.

19. *Arkansas*. *Gregg v. Stuttgart*, 88 Ark. 597, 115 S. W. 394.

California. *Manning v. Den.*, 90 Cal. 610, 27 Pac. 435.

Colorado. *Denver v. Dunning*, 33 Colo. 487, 81 Pac. 259.

Illinois. *Carbondale v. Walker*, 240 Ill. 18, 88 N. E. 296; *Marshall v. People*, 219 Ill. 99, 76 N. E. 70;

municipal authorities to reduce the sidewalk space to established grade before compulsory regulations to construct the walk can be enforced against property owners.²⁰

Power to compel owners to construct sidewalks in front of their property has been held to include the power to require *reconstruction* when necessary.²¹ But under some laws, as construed, it is not contemplated that such owner should be called upon to make more than ordinary repairs to sidewalks in front of his property, and if the city lowers the grade of the street so that curbing is necessary to support and strengthen the sidewalk, the city, and not the owner, must supply it, and

Pierson v. People, 204 Ill. 456, 68 N. E. 383.

Iowa. *Converse v. Deep River* (Ia. 1908), 117 N. W. 1078; *Burget v. Greenfield*, 120 Ia. 432, 94 N. W. 933.

Kentucky. *Covington v. Bishop*, 10 Ky. L. Rep. 939, 11 S. W. 199.

Minnesota. *State v. Foster*, 94 Minn. 412, 103 N. W. 14; *Newberry v. Fox*, 37 Minn. 141, 33 N. W. 333, 5 Am. St. Rep. 830.

Missouri. *Springfield v. Mills*, 99 Mo. App. 141, 72 S. W. 462.

Nebraska. *State v. Several Parcels of Land*, 76 Neb. 320, 107 N. W. 566; *Lincoln v. Janesch*, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762, 93 Am. St. Rep. 478.

New York. *Walden v. Relyea*, 89 N. Y. App. Div. 241, 85 N. Y. S. 978; *Cowen v. West Troy*, 43 Barb. (N. Y.) 48.

Pennsylvania. *Angle v. Stroudsburg Borough*, 29 Pa. Super. Ct. 601; *Chester v. Lane*, 24 Pa. Super. Ct. 359; *Pittsburg v. Biggert*, 23 Pa. Super. Ct. 540.

Texas. *Galveston v. Heard*, 54 Tex. 420.

Wisconsin. *Waukesha v. Randles*, 120 Wis. 470, 98 N. W. 237. 20. *Smith v. Hofeldt*, 79 Neb. 276, 112 N. W. 605.

Property owner failing to construct sidewalk after notice, held not in default where municipal corporation fails to establish grade as required by law. *Burget v. Greenfield*, 120 Iowa 432, 94 N. W. 933.

Where a property owner's sidewalk is not on grade he may be compelled to connect same with walk that is on grade by an inclined walk, to avoid a step. *Converse v. Deep River*, 139 Ia. 732, 117 N. W. 1078.

Where the power is to cause all streets and sidewalks to be graded, and to compel abutting property owners to pay therefor, the municipality cannot compel the property owner to raise the grade of the sidewalk but only to pay therefor. *Arndt v. Cullman*, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

21. *Walker v. Detroit*, 143 Mich. 427, 106 N. W. 1123, 13 Det. Leg. N. 74.

the owner cannot be called upon to construct a new walk.²²

Under its police power, a municipal corporation cannot, it has been held, require property owners to lay a water pipe under a public street for distribution of water for the city and inhabitants.²³ However in Illinois, a regulation of a board of public works was sustained which required citizens desiring to use the water of the city flowing through the main pipes, to lay down, at their own expense, the necessary service pipes. The court expressed the opinion that the regulation was just and reasonable, and in harmony with the principle upon which special assessments are based.²⁴

§ 1827. Power to make street improvements.

As stated absolute dominion over the streets and public ways within the corporate limits is usually conferred upon the municipality by the state,²⁵ and under such

22. *Landry v. Lake Charles*, 125 La. 210, 51 So. 120.

23. *Doughten v. Camden*, 72 N. J. L. 451, 63 Atl. 170, 3 L. R. A. (N. S.) 817, 111 Am. St. Rep. 680, rev'g 71 N. J. L. 426, 59 Atl. 16.

24. *Prindiville v. Jackson*, 79 Ill. 337.

Piers. Marshall v. Gulon, 4 Denio (N. Y.) 581.

25. Municipal power to improve streets. Legislative authority to a town to lay out and construct streets within its limits is valid. *Keene v. Bristol*, 26 Pa. St. 46.

Laws authorizing the paving of a specified street as a public drive, held constitutional. *Bouvier v. Philadelphia*, 24 Leg. Int. (Pa.) 340.

Mere power of municipal regulation gives no authority to lay out or widen any street or take

for that purpose private property. *Associates of Jersey County v. Jersey City*, 4 Halst. (8 N. J. Eq.) 715.

Express power to improve streets and other ways. *Le Veine v. Kansas City*, 67 Kan. 239, 72 Pac. 774.

May maintain foundation in streets for the support of street car tracks, although such foundation must be heavier and stronger than that required for ordinary street traffic. *Detroit v. Detroit United Ry. Co.*, 133 Mich. 608, 95 N. W. 736.

City may bind itself to pave and repair streets used by street railway company. *Detroit v. Detroit United Railway Co.*, 133 Mich. 608, 95 N. W. 736.

Laws sometimes forbid the opening of a road or street

power they are held in trust for the public, and the local

through any burial ground. *Re Egypt St.*, 2 Grant Cas. (Pa.) 455.

Authority to take lands of owners for the use of streets embraces the power to remove buildings. *Patchin v. Brooklyn*, 2 Wend. (N. Y.) 377.

Special law relative to the laying out of streets and alleys, dedication of land therefor for public use construed. *Wisby v. Bonte*, 19 Ohio St. 238.

Particular act authorizing the corporate authorities to modify the grade of certain streets, held mandatory although the word "authorized" was used. *People v. San Francisco*, 36 Cal. 595.

Under particular charter, held city had power to incur debts for the necessary materials for laying out, grading and improving streets. *Bigelow v. Perth Amboy*, 25 N. J. L. 297.

New Hampshire towns, held to have power to make grants of land and lay out highways. *Wiley v. Portsmouth*, 35 N. H. 303.

Power to open streets is sometimes confined to such streets as are on the city plan. *Re Girard St.*, 44 Leg. Int. (Pa.) 166.

A law authorizing the improvement of certain streets laid down on a specified map "and" another named map does not mean that the street to be improved should be laid down on both maps, the conjunction "and" was construed as a disjunctive. *Diggins v. Harts-horne*, 108 Cal. 154, 41 Pac. 283.

Work on streets by property owner, held subject to such changes as the proper municipal

authorities might require. *South Highland Land and Improvement Co. v. Kansas City*, 100 Mo. App. 518, 75 S. W. 383.

New street may be paved to constitute an extension of an old one. *Rowe v. Commissioners of Assessments of East Orange*, 69 N. J. L. 600, 55 Atl. 649.

Power to lay out streets, etc., along a beach by towns located on or near the ocean was held to authorize the laying out of such drives whether the place is the breach of the ocean proper or an inlet. *State v. Wright*, 54 N. J. L. (25 Vroom) 130, 23 Atl. 116.

A legislative act authorizing the issuing of bonds for over due debts to improve streets by grading, etc., held not to be a restriction upon the existing powers of the municipal corporation relative to the subject but a new grant of power. *Roundtree v. Galveston*, 42 Tex. 612.

So a legislative act "relating to internal improvements in cities authorizing the issuance and collection of bonds on the property benefited," etc., held not to affect powers of cities as to improvements. *Germond v. Tacoma*, 6 Wash. 365, 33 Pac. 961.

The fact that a property owner on a street has voluntarily made improvements, suitable to his own convenience, will not prevent the city from thereafter improving such street as authorized by law and required for public convenience. *Parsons v. Columbus*, 50 Ohio St. 460, 34 N. E. 677.

corporation is charged with the duty of improving them in such manner as will respond to the necessity and convenience of the inhabitants in their use as ways of passage.²⁶

To promote these objects, the municipal corporation in the improvement of a street, has the right to make cuts in front of the property of some persons, and fills in front of that of others in producing a proper and common grade,²⁷ and to grade, macadamize, pave or do anything else necessary to make them answer the purpose which they are intended to serve.²⁸ In improving and regulating the use of streets there is both an obligation and power to keep them free from obstructions and unreasonable encroachments, and to remove summarily obstructions and nuisances.²⁹ The power of municipal corporations to make street improvements is subject to constitutional and statutory provisions against the taking or damaging of private property without compensation.³⁰ The authority to grade, pave,³¹ and otherwise improve streets for public use³² is sometimes held to be

26. *Connecticut*. Munson v Derby, 37 Conn. 298, 9 Am. Rep. 332.

Iowa. Nolan v. Reed, 139 Ia. 68, 117 N. W. 25.

Indiana. Valparaiso v. Spalth. 166 Ind. 14, 74 N. E. 518.

Maine. State v. Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750; Rogers v. Newport, 62 Me. 101.

Minnesota. Hutchinson Tp. v. Filk, 44 Minn. 536, 47 N. W. 255; Woodruff v. Gendale, 23 Minn. 537.

Pennsylvania. Chartiers Tp. v. Langdon, 114 Pa. St. 541, 7 Atl. 84.

South Carolina. Schoolbred v. Charleston, 2 Bay (S. C.) 63.

27. Valparaiso v. Spalth, 166 Ind. 14, 74 N. E. 518.

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28. Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

29. Perry v. Ball, 52 Tex. Civ. App. 134, 113 S. W. 588; §§ 924-926 *et seq.*, *ante*, vol. 3. See chapter 30, Streets and Alleys, *ante*, vol. 3.

30. Nicholson v. New York, etc. R. Co., 22 Conn. 74, 56 Am. Dec. 390; Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422.

See sub-division 5 of this chapter, § 1969 *et seq.*, *ante*; also, chapter 32, Eminent Domain, *ante*, this volume.

31. White v. McKeesport, 101 Pa. St. 394; Williamsport v. Com., 84 Pa. St. 487, 24 Am. Rep. 208.

32. Philadelphia v. Tryon, 35 Pa. St. 401; Barter v. Com., 3 Pen. & W. (Pa.) 253.

one of the implied powers of a municipal corporation.³³

Under power to control and maintain its streets, a municipal corporation has power to contract with a railway company to repair at its own expense streets and bridges thereon, used by the railway company and to release the company from further obligation to make such repairs.³⁴

§ 1828. Same—cannot be relinquished.

The fundamental principle elsewhere fully considered and illustrated, that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or relinquished to others,³⁵ has been enforced frequently with reference to street improvements. Thus in the absence of legislative authority therefor, the power of a city or town to control and improve its streets cannot be relinquished by the city or town to individuals or corporations, so as to prevent the future use or improvement of a street by the city or town.³⁶

33. § 1818 *ante*.

34. *Detroit v. Detroit Ry. Co.*, 133 Mich. 608, 95 N. W. 992, 10 Det. Leg. N. 389; *Hicks v. Chesapeake & O. Ry. Co.*, 102 Va. 197, 45 S. E. 888.

35. § 382 *ante*, vol. 1.

36. *Arkansas. Beebe v. Little Rock*, 68 Ark. 39, 56 S. W. 791.

Kentucky. Giltner v. Carrollton, 7 B. Mon. (Ky.) 680; *Newport Street Ry. Co. v. Newport*, 1 Ky. L. Rep. (abstract) 124.

Missouri. National Waterworks Co. v. Kansas City, 20 Mo. App. 237.

Ohio. Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89.

Pennsylvania. Olyphant Sewage Co. v. Borough, 4 Lack. Jur. (Pa.) 369.

Virginia. Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 S. E. 665.

Delegation of power is unlawful. § 1822 *ante*.

"Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity, that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants." *Wabash R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87.

"The authority to establish and open streets, and improve and keep them in repair, as the public necessities may require, is vital to the well being of municipal corporations; and it is never to be presumed that the legislature,

§ 1829. Same—sidewalks.

Power to grade and lay sidewalks is sometimes expressly conferred by charter.³⁷ But ordinarily the word "street" is held to include sidewalks as parts thereof,³⁸ and hence power to improve streets includes authority to improve sidewalks.³⁹ And power to order the original construction of street improvements at the cost of abutting owners is authority to order sidewalks constructed although the owner had already constructed walks.⁴⁰

Where the municipal corporation has exclusive control of the streets and sidewalks it is entirely discretionary with its proper authorities to say when and where sidewalks shall be constructed in front of abutting property and when and where they shall be repaired.⁴¹

having invested them with this power, has, at the same time, authorized them to surrender it to others over whose acts they can exercise no control." *Kreigh v. Chicago*, 86 Ill. 407.

37. *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523; *Detroit v. Chaffee*, 70 Mich. 80, 37 N. W. 882.

No obligation to construct sidewalks or to continue those already constructed. *Attorney General v. Boston*, 142 Mass. 200, 7 N. E. 722.

Held, under the law in 1886 that the city of Boston was not obliged to construct or maintain sidewalks upon any of its highways and that it might remove those already constructed. *Attorney General v. Boston*, 142 Mass. 200, 7 N. E. 722.

38. § 1286 *ante*, vol. 3.

See *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523.

39. *Re O'Brien*, 119 Mich. 540, 79 N. W. 1070; *Pittsburg v. Daly*, 5 Pa. Super. Ct. 528.

Contra, Re Shady Ave., 34 Pa. Super. Ct. 327.

Law authorizing the improvement of streets on petition of property owners along the line necessarily includes sidewalks. *Keith v. Wilson*, 145 Ind. 149, 44 N. E. 13.

A footway is neither a highway nor a townway. *Boston & A. R. Co. v. Boston*, 140 Mass. 87, 2 N. E. 943.

Power to accept a street including the sidewalk under particular law. *Bonnet v. San Francisco*, 65 Cal. 230, 3 Pac. 815.

40. *Guilfoyle v. Maysville*, 129 Ky. 532, 112 S. W. 666.

41. *Detroit v. Chaffee*, 70 Mich. 80, 37 N. W. 882; *Lentz v. Dallas*, 96 Tex. 258, 72 S. W. 59, *rev'd Tex. Civ. App.* (1902), 69 S. W. 166.

"The power to determine whether public convenience requires the construction of a sidewalk, and equally so its removal,

Under power to pave sidewalks any part thereof may be paved, as the municipal authorities may decide to be necessary and beneficial to the public.⁴² So authority to pave a sidewalk includes as a necessary incident power to grade, curb and drain.⁴³ Under general power to grade and pave sidewalks a municipal corporation may change the width of the paved portion.⁴⁴ While a municipal corporation may order a repavement of a sidewalk when necessary it cannot arbitrarily require a reconstruction of a pavement that is in good condition.⁴⁵

Power to construct sidewalks authorizes their removal by the city or town.⁴⁶

involves the exercise of judgment not administrative only, and the exercise of the power is judicial in its character, although expressed in a legislative form." *Attorney General v. Boston*, 142 Mass. 200, 7 N. E. 722.

Police power of a municipal corporation having entire control of its streets and sidewalks held sufficient to enable it to cause the repair of a hole in a sidewalk. *Dallas v. Lentz* (Tex. 1903), 72 S. W. 59, 69 S. W. 166.

Particular law construed and held that council had authority to order a sidewalk to be graded and paved or the whole width of the street to be graded and paved but had no authority to order a grading without paving. *Taylor v. Patton*, 160 Ind. 4, 66 N. E. 91.

An ordinance calling for a sidewalk to cover an area in front of an owner's building, is not invalid where there is nothing to show that the owner had any right as against the city to maintain the area. *Hyman v. Chicago*, 188 Ill. 462, 59 N. E. 10.

42. *Bozarth v. McGillicuddy*, 19

Ind. App. 26, 47 N. E. 397, 48 N. E. 1042.

43. *Redersheimer v. Bruning*, 113 La. 343, 36 So. 990; *Bruning v. Barrett*, 113 La. 349, 36 So. 991.

A curb to be set two feet from the edge of a sidewalk is in no sense a part of it, and cannot be constructed under power to construct sidewalks. *Boals v. Bachmann*, 201 Ill. 340, 66 N. E. 336.

Power to construct sidewalks with or without edgestones, includes laying curbing as a part of the walk. *Draper v. Grime*, 185 Mass. 142, 69 N. E. 1068.

44. *Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55.

45. *Reading City v. Heilman*, 19 Pa. Super. Ct. 422.

46. *Attorney General v. Boston*, 142 Mass. 200, 7 N. E. 722. But see *McGuire v. East Cleveland*, 25 Ohio Cir. Ct. Rep. (15 Cir. Dec.), 497.

Power to remove sidewalks laid. *Platt v. Oneonta*, 81 N. Y. S. 161, 40 Misc. Rep. 42, 12 N. Y. Ann. Cas. 378, 84 N. Y. S. 699.

§ 1830. Same—power to improve is continuing power.

The power of a municipal corporation to grade, pave and improve its streets and highways as the public interest may require, is unless restricted, a continuing power, and the municipality may, from time to time, re-grade and repave them as often as it may deem necessary for a proper use thereof.⁴⁷

General power conferred by charter "otherwise to improve" any street authorizes the municipality to order the condemnation of sidewalks and to remove same when so condemned. *Scott v. Marshall*, 110 Mo. App. 178, 85 S. W. 98.

47. *California*. *San Francisco Pav. Co. v. Egan*, 146 Cal. 635, 80 Pac. 1076; *Flickinger v. Fay*, 119 Cal. 590, 51 Pac. 855.

Indiana. *Kokomo v. Mahon*, 160 Ind. 242; *Macy v. Indianapolis*, 17 Ind. 267.

Kentucky. *Starling v. Hopkinsville*, 12 Ky. L. Rep. (abstract) 558.

Minnesota. *Karst v. St. Paul S. & T. F. R. Co.*, 22 Minn. 118; *State ex rel. v. District Court*, 80 Minn. 293, 83 N. W. 183.

Missouri. *Estes v. Owen*, 90 Mo. 113, 2 S. W. 133; *Farrar v. St. Louis*, 80 Mo. 379; *McCormick v. Patcher*, 53 Mo. 33.

Ohio. *Re Akron Street*, 7 Ohio N. P. 454.

Washington. *Seattle v. Columbia, etc. R. Co.*, 6 Wash. 379, 33 Pac. 1048.

United States. *Mead v. Portland*, 200 U. S. 148, 26 Sup. Ct. 171, 50 L. Ed. 413.

A general power to pave streets implies a power to repair and repave when necessary. *Wistar v. Philadelphia*, 80 Pa. St. 505, 21 Am. Rep. 112.

"There can be no doubt that the power of graduating and levelling the streets ought not to be capriciously exercised. Like all power, it is susceptible of abuse. But it is trusted to the inhabitants themselves who elect the corporate body, and who may therefore be expected to consult the interests of the town." *Goszler v. Georgetown*, 6 Wheat (U. S.) 593, 5 L. Ed. 339.

"Upon the exercise of this power the charter imposes no limitation and there is therefore, no reason why it should not be regarded as a continuing power—that is to say, a power which is not exhausted—with reference to a particular street or portion thereof, by its first exercise in establishing the grade of such street or portion, but notwithstanding such first exercise, may again, and as often as the public good requires, be exercised anew, though the result be to change a grade previously established." *Karst v. St. Paul, etc. R. Co.*, 22 Minn. 118, 121.

§ 1831. Same—changing width and course of streets.

Usually the municipal corporation possesses power to alter streets and public ways.⁴⁸ Thus power to open new streets sometimes gives power to straighten and widen them.⁴⁹ And power to lay out, widen, alter, extend and vacate streets gives authority to vacate part of a street so as to make it narrower when such action is for the benefit of abutting property owners.⁵⁰

The corporate authorities may change the width of the space paved and graded for sidewalks,⁵¹ and under power to lay out, widen or change streets a municipal corporation may determine the width of the traveled track in a street and extend its width in accordance with its determination.⁵² However, without express power a municipal corporation cannot appropriate public streets to a different purpose nor narrow or widen them except when necessary to give effect to a charter power expressly granted.⁵³ So power to "widen and straighten," it has been held, confers no power to extend a street or alter its course.⁵⁴ And power to alter streets

48. *Preble v. Portland*, 45 Me. 241.

49. *Lofland v. Orten*, 4 Houst. (Del.) 622.

50. *Mt. Carmel v. Shaw*, 155 Ill. 37, 39 N. E. 584, 46 Am. St. Rep. 311, 27 L. R. A. 580, reversing 52 Ill. App. 429.

51. *Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55.

52. *Bekkedahl v. Westby*, 140 Wis. 230, 122 N. W. 727.

53. *State v. Mobile*, 5 Port (Ala.) 279, 30 Am. Dec. 564.

54. *Re 34th St.*, 10 Phila. (N. Y.) 197, 31 Leg. Int. (Pa.) 13.

Right to widen particular street under particular law denied. *Philadelphia County Com'rs v.*

Spring Garden Com'rs, 6 Serg. & R. (Pa.) 522.

Act authorizing the widening of a certain street from "Union Square," to etc. construed. *Brock v. Dore*, 166 Mass. 161, 44 N. E. 142.

A highway duly located for more than twenty years cannot be shortened where the inhabitants have built according to such location. *Com. v. Miltenberger*, 7 Watts. (Pa.) 450.

A street established for ten years cannot be shifted without express authority. *Pratt v. Lewis*, 39 Mich. 7.

Construction of statute authorizing alteration of street lines. *Erie R. Co. v. Passaic*, 79 N. J. L. 19, 74 Atl. 338.

was construed as not authorizing the raising or lowering of the grade but it was held to apply only to changing the location.⁵⁵

§ 1832. Same—paving, repaving and repairing distinguished.

Power to “open and extend” streets includes construction as well as laying out.⁵⁶ And power to make new highways necessarily includes the lesser power to regulate, alter or repair them.⁵⁷ Usually municipal corporations have power to determine what street repairs shall be made and the nature thereof.⁵⁸

The question as to whether work done on a street constitutes repairs or repaving is frequently material to determine whether or not the improvement may be paid for by special taxation or local assessment. In some jurisdictions the cost of repaving may be assessed against property owners, while repairs must be paid for by the city, or town.⁵⁹ Power to repair streets only does not authorize original improvement work nor repair work different in character from that previously done,⁶⁰

Power to authorize the abutters to enclose part of a street on each side for court yards, denied. *Lawrence v. New York*, 2 Barb. (N. Y.) 577.

55. *Manufacturers Land and Improvement Co. v. Camden*, 71 N. J. L. 490, 59 Atl. 1.

Power to change the grade and width of a turnpike already established. *Re Plan of Kensington*, 2 Rawle (Pa.) 445.

56. *Matthiesson & Wiechers Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. (11 C. E. Green.) 247.

See chapter 30, Streets and Alleys, *ante*, vol. 3.

57. *Nicholson v. New York &*

N. H. R. Co., 22 Conn. 74, 56 Am. Dec. 390.

58. *Scammon v. Chicago*, 42 Ill. 192.

59. See *McCaffrey v. Omaha*, 72 Neb. 583, 101 N. W. 251; *Robertson v. Omaha*, 55 Neb. 718, 76 N. W. 442.

See chapter 38, Special Taxation and Local Assessments, *post*, vol. 5.

60. *Santa Cruz Rock-Pavement Co. v. Broderick*, 113 Cal. 628, 45 Pac. 863.

A statute providing that “repairing” of sidewalks shall be done by the city, does not include the reconstruction of a walk. *Walker v. Detroit*, 143 Mich. 427, 106 N. W. 1123, 13 Det. Leg. N. 74.

nor repaving.⁶¹ Regraveling a street, it has been held, is repairing it,⁶² and that resurfacing a street on the same concrete base is repaving it as distinguished from repairing.⁶³

Changing the surface of a street from macadam to granite blocks or from cobble stones to brick is held to be *specific repairs* within the meaning of a charter vesting authority in regard to specific repairs in the board of aldermen and leaving ordinary repairs in the hands of those charged with the duty of keeping the streets in a suitable condition for travel.⁶⁴

Power to grade and pave, does not authorize grading without paving.⁶⁵ The fact that the contract for grading a street is invalid because the petition for the improvement had not been signed by a sufficient number of property owners, does not affect the power to contract for macadamizing such street, as the contract for macadamizing may be let before the grading.⁶⁶

Under power to repave its streets it necessarily follows that the municipality has the right to remove any material in the street that may be in the way of a proper execution of the work.⁶⁷

§ 1833. Power to establish boulevards.

Express power is often conferred upon the municipal

61. Hurley v. Trenton, 66 N. J. L. 538, 49 Atl. 518, aff'd in 67 N. J. L. 350, 51 Atl. 1109.

62. Scammon v. Chicago, 42 Ill. 192.

63. McCaffrey v. Omaha, 72 Neb. 583, 101 N. W. 251.

64. Draper v. Fall River, 185 Mass. 142, 69 N. E. 1068.

65. Taylor v. Patton, 160 Ind. 4, 66 N. E. 91.

Authority conferred upon park commissioners to contract for the paving of park roads gives power to provide for outside work to be done on streets leading into the

roads necessary to render the approaches free and safe for travel. Kittinger v. Buffalo, 148 N. Y. 332, 42 N. E. 803.

Charter power to "regulate, clean and keep in repair," streets out of a fund raised by taxes each year held not to give authority by resolution to expend money for graveling or macadamizing certain streets. Watson v. Passaic, 46 N. J. L. (17 Vroom.) 124.

66. Gafney v. San Francisco, 72 Cal. 146, 13 Pac. 467.

67. Burckhardt v. Atlanta, 103 Ga. 302, 30 S. E. 32.

authorities to establish and open boulevards, or change existing streets into boulevards, and fix the width thereof, and the manner of laying out and improving the same; to regulate the traffic thereon by excluding heavy driving thereon or any kind of vehicle therefrom; to forbid the erection, establishment or maintenance of any business house, or the carrying on of any business vocation on the property fronting on such boulevard; to establish a building line to which all buildings, fences or other structures thereon shall conform; and to provide for grading, improving, constructing, reconstructing, maintaining, cleaning, sprinkling, the planting of trees, shrubbery, and other things of that description and nature thereon. Usually, the entire cost connected with all such work is levied, assessed and collected, as a special tax or assessment on the property fronting or bordering on such boulevard, according to some just method of apportionment, specified in the charter or legislative act applicable. The restriction is common that no franchise for the occupancy or use of such boulevard, or any part thereof, shall be granted, except with the consent, in writing, of the owners of a certain proportion (generally two-thirds) in frontage of the property fronting or bordering thereon.⁶⁸

68. Charter of St. Louis, art. XVI, § 1, The Revised Code of St. Louis (Woerner, 1907), pp. 380, 381; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 51 N. E. 758.

Boulevard defined. § 1280 *ante*, vol. 3.

Under a law providing for the establishment or designation by ordinance of the whole or any part of not to exceed two streets or highways as pleasure driveways, and to improve and maintain the same, but only on petition of the owners of more than two-thirds of the frontage of land abutting on the proposed drive-

way, it was held that the law only referred to a proposal to change the character of an existing street from an ordinary street to a pleasure driveway, or to establish a street for that purpose, and hence it did not necessitate a petition by property owners as a condition precedent to the right of municipal authorities to widen a street already designated as a pleasure driveway. *Chicago v. Larned*, 203 Ill. 290, 67 N. E. 789.

Regulation of board of park commissioners forbidding the driving of a wagon or other vehicle for conveying merchan-

In view of the prevailing constitutional provision that private property shall not be taken (or damaged) for public use, without just compensation, to be ascertained in a manner specified, it is essential that such laws should make adequate provision for the ascertainment and allowance of just compensation to the owners of property fronting or bordering thereon for damages occasioned by the establishment of a building line on such boulevard and by the use to which such property may be put by the owners thereof.⁶⁹ All laws relating to the use of boulevards and streets set aside for pleasure drives must operate generally and impartially, and provide a permanent and uniform rule. Thus an ordinance forbidding the use of such ways for 'heavy hauling, or for any of the purposes above mentioned, except on the special permission of certain municipal officers, as for example, the board of trustees, is unreasonable, since it invests in such board an unregulated official discretion.⁷⁰

Charter provisions also exist for the discontinuance of boulevards legally established, under specific conditions, having in view the public interest and the constitutional rights of the property owners.⁷¹ Where the boulevard is to become an ordinary street, to be treated in all respects as this class of public thoroughfares, it would seem that special legal authority is necessary, to give the change due sanction. If the boulevard is to be vacated and cease to exist as a public way for any purpose, the paramount public control of highways, or the special provisions (if any) relative to the vacation of streets, would doubtless support such action.

dise or other articles along boulevards sustained. *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607.

69. *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; *St. Louis v. Dorr*, 145 Mo. 466, 485, 41 S. W. 1094, 46 S. W. 976;

Philadelphia v. Linnard, 97 Pa. St. 242; *Re Chestnut Street*, 118 Pa. St. 593, 12 Atl. 585.

70. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758.

71. Charter of St. Louis, art. VI, § 1, *The Revised Code of St. Louis* (Woerner, 1907), p. 381.

2. MUNICIPAL DISCRETION.

§ 1834. General consideration.

It is a fundamental rule that discretionary powers vested in public officers are not subject to judicial control.⁷² Steps to provide for and the manner of obtaining necessary or desirable public improvements give frequent occasion for the application of this rule, as explained in an earlier chapter.⁷³

Unless legal limitations exist, power to open, improve, pave and maintain streets, establish sewers and drains, and secure public improvements of all kinds, is discretionary with the proper municipal authorities, and if the governing law has been observed substantially their action therein is not subject to judicial review,⁷⁴ except in cases expressly provided by law.⁷⁵ In other words, where a power touching local improvements is expressly granted to municipal authorities, as a rule, they are in

72. §§ 376, 377 *ante*, vol. 1.

Mandatory and discretionary powers distinguished. §§ 380, 381 *ante*, vol. 1.

Mandatory law requiring the modification of grade of certain street. *People v. San Francisco*, 36 Cal. 595.

73. § 377 *ante*, vol. 1.

74. *California*. *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687.

Illinois. *Curry v. Mount Sterling*, 15 Ill. 320; *English v. Danville*, 150 Ill. 92, 36 N. E. 994; *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181; *Church v. People*, 179 Ill. 205, 52 N. E. 554; *Davis v. Litchfield*, 145 Ill. 313, 33 N. E. 888.

Kentucky. *Worthington v. Corington*, 6 Ky. L. Rep. 237.

Massachusetts. *Draper v. Grime*, 185 Mass. 142, 69 N. E. 1068.

Missouri. *Barber Asphalt P. Co. v. French*, 158 Mo. 534, 58 S. W. 934; *Skinker v. Heman*, 64 Mo. App. 441; *Estes v. Owen*, 90 Mo. 113, 2 S. W. 133; *Farrar v. St. Louis*, 80 Mo. 379; *McCormack v. Patchin*, 53 Mo. 33.

New Jersey. *Taintor v. Morristown*, 33 N. J. L. 57.

Courts will not interfere except in cases of fraud or improper motives on the part of the municipal authorities in causing the improvement to be made. *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448.

"It is to be presumed that the city in constructing a street made it conform to the grade as then established." *Thompson v. Keokuk*, 61 Ia. 187, 16 N. W. 82.

Establishing and opening streets, §§ 1294-1304 *ante*, vol. 3.

75. § 2004 *et seq.*, *post*.

the reasonable exercise of it, beyond the control of the courts.⁷⁶

As *the necessity or utility of an improvement is a matter within municipal discretion*,⁷⁷ and this discretion is generally vested in the legislative body whose decision is usually final,⁷⁸ ordinarily, courts will not interfere

76. Usually the question whether an improvement is injudicious and injurious to private property is a question exclusively for the consideration of the municipal authorities with which equity will not interfere. *Pope v. Union*, 18 N. J. Eq. 282.

Charter prevails over state law, when. *Hill v. St. Louis*, 159 Mo. 159, 60 S. W. 116.

Where the municipal authorities act within the scope of their powers in public improvements as in repairing streets and sidewalks the courts in the absence of fraud will not interfere. *Emporia v. Gilchrist*, 37 Kan. 532, 15 Pac. 532.

Rule applied to the regulation and the dimensions of squares and the width of streets, in the absence of showing of a flagrant abuse of municipal discretion. *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217, 9 So. 21.

Discretionary power as to sewers. § 1435 *ante*.

Location and construction of sewers. *Stoudinger v. Newark*, 28 N. J. Eq. 187, *aff'd* in 28 N. J. Eq. 446.

Plan of sewerage. *Johnson v. Avondale*, 1 Ohio Cir. Ct. 229, 1 O. C. D. 24.

Municipal discretion as to the place of building a sewer and as to its connection with existing

drains, held not subject to judicial review. *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271.

Rule applied to a proceeding to set aside as unreasonable an ordinance establishing a sewer district. *Topeka v. Huntoon*, 46 Kan. 634, 26 Pac. 488.

Rule applied to providing a water supply. *Atlantic City Water Works Co. v. Atlantic City*, 48 N. J. L. (9 Vroom.) 378, 6 Atl. 24.

Discretion as to source of water supply, held not subject to judicial review. *Lawrence v. Freeland*, 55 Hun (N. Y.) 610, 8 N. Y. S. 807, 29 N. Y. St. Rep. 284.

77. *Brewster v. Davenport*, 51 Iowa 427, 1 N. W. 737; *State v. Neodesha*, 3 Kan. App. 319, 45 Pac. 122.

Final discretion as to necessity of doing public work, held conclusive in absence of fraud or collusion. *Brady v. New York*, 112 N. Y. 480, 2 L. R. A. 751, 20 N. E. 390.

78. *Illinois*. *Ton v. Chicago*, 216 Ill. 331, 74 N. E. 1044; *Givins v. Chicago*, 188 Ill. 348, 58 N. E. 912.

Indiana. *Holden v. Crawfordsville*, 143 Ind. 558, 41 N. E. 370.

Kentucky. *Mudge v. Walker*, 122 Ky. 29, 28 Ky. L. Rep. 996, 90 S. W. 1046. See, *Holt v. Somerville*, 127 Mass. 408.

on the ground that a given improvement is unnecessary, and that the ordinance providing for it is therefore oppressive and unreasonable.⁷⁹

Michigan. See, *Borgman v. Detroit*, 102 Mich. 261, 60 N. W. 696.

Minnesota. *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448.

Nebraska. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

Oregon. *Applegate v. Portland*, 53 Ore. 552 (1909), 99 Pac. 890.

Pennsylvania. *Fyfe v. Turtle Creek Borough*, 22 Pa. Super. Ct. 292.

The rule has been declared that the city council in determining the sufficiency of a public improvement acts in a *quasi* judicial character and its judgment in the absence of allegations of fraud will not be looked into by the courts upon application of a private person. *Kirchman v. West and South Towns St. Ry. Co.*, 58 Ill. App. 515; *Shima v. West and South Towns St. Ry. Co.*, 58 Ill. App. 515.

79. *Georgia.* *Bacon v. Savannah*, 105 Ga. 62, 31 S. E. 127.

Iowa. *Miller v. Wester City*, 94 Iowa 162, 62 N. W. 648; *In re Cedar Rapids*, 85 Iowa 39, 51 N. W. 1142.

Illinois. *Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359; *Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574; *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

Indiana. *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

Missouri. *Saxton v. St. Joseph*, 60 Mo. 153; *Morse v. Westport*, 110 Mo. 502, 19 S. W. 831, 136 Mo.

276, 33 S. W. 182; *Marionville v. Henson*, 65 Mo. App. 397.

New York. *Kelsey v. King*, 32 Barb. (N. Y.) 410, 11 Abb. Pr. (N. Y.) 180.

Pennsylvania. *Oil City v. Oil City Boiler Works*, 152 Pa. St. 348, 25 Atl. 549.

Rule applied in case where proceedings held for levying an assessment to pay therefor. *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772.

Municipal discretion in establishing a cemetery will not be reviewed by the courts. *Greencastle v. Hazelett*, 23 Ind. 186.

Municipal discretion respecting the necessity of erecting a water plant by the corporation by virtue of express charter power will not be disturbed by the courts, although the city has already an adequate supply, furnished by a plant owned by a private corporation. *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 241.

Street improvement. The necessity and advisability of street improvements, held to be discretionary with the municipal authorities. *Wabash Ry. Co. v. Defiance*, 52 Ohio St. 262, 40 N. E. 89; *Goff v. Nolan*, 62 How. Pr. (N. Y.) 323.

Council is usually the judge of the necessity or expediency of making street improvements and the manner in which the work shall be done. *Alberger v. Baltimore*, 64 Md. 1, 20 Atl. 988.

The power to grade and the manner of doing such work when

It is well settled and it has been affirmed repeatedly by numerous judicial decisions of the several jurisdictions that in the absence of constitutional or charter restrictions municipal discretion includes the nature and extent of the improvement,⁸⁰ the location of the im-

discretionary with the municipal authorities is not subject to judicial control. *McHale v. Easton & B. Transit Co.*, 169 Pa. St. 416, 32 Atl. 461.

Municipal discretion, held to be conclusive as to necessity of changing the street grade. *Waddell v. New York*, 8 Barb. (N. Y.) 95.

Sidewalks. Rule applied to construction of sidewalk. *Seward v. Rheiner*, 2 Kan. App. 95, 43 Pac. 423.

The local authorities are the sole judges as to whether the construction of a sidewalk is demanded by the public needs. Judicial interference may be invoked in case of fraud. *Brewster v. Davenport*, 51 Iowa 427, 1 N. W. 737.

The discretion of the council in establishing the grade of a sidewalk will not be interfered with by the courts. *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523.

Sewers and drains, necessity. *Carr v. Doley*, 122 Mass. 255; *Paulson v. Portland*, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673.

The necessity for a sewer is a matter of judicial discretion. A mere judgment will not justify judicial interference. *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281.

Condemnation—public use. In re Condemnation of Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773.

Municipal officers, how far agents of the property owners in authorizing improvements. *Schum v. Seymour*, 24 N. J. Eq. 143, 147; *Barber Asphalt P. Co. v. Hezel*, 76 Mo. App. 135, 152.

80. Nature and extent, streets and public ways.

Colorado. *Hallett v. United States Security, etc. Co.*, 40 Colo. 281, 90 Pac. 683.

Georgia. *Burckhardt v. Atlanta*, 103 Ga. 302, 30 S. E. 32.

Illinois. *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962.

Iowa. *Brown v. Barstow*, 87 Iowa 344, 54 N. W. 241.

Kentucky. *Meyer v. Covington*, 103 Ky. 546, 45 S. W. 767; *Bullitt v. Selva*, 20 Ky. L. Rep. 599, 47 S. W. 255; *Guilfoyle v. Maysville*, 129 Ky. 532, 112 S. W. 666.

Louisiana. *Schmidt v. New Orleans*, 48 La. Ann. 1440, 21 So. 24.

Massachusetts. *Boston & M. R. Co. v. Lawrence*, 2 Allen (84 Mass.) 107.

Missouri. *Dunker v. Stiefel*, 57 Mo. App. 379.

New York. *Re Folt Street*, 46 N. Y. S. 43, 18 App. Div. 568.

Wisconsin. *State v. Portage*, 12 Wis. 562.

"In the absence of statutory regulations, the municipal authorities are vested with discretion in laying out a district within

provement, the plans and manner of construction,⁸¹ the nature and kind of materials to be used,⁸² the cost thereof,⁸³ and the opening and vacation of streets, alleys and public ways.⁸⁴ The expediency of vacating streets,

which local public improvements shall be made." *Hallett v. United States Security, etc. Co.*, 40 Colo. 281, 90 Pac. 683. Citing *Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142.

The improvement of a street need not extend to the sidewalk. *Moran v. Lindell*, 52 Mo. 229, 232, where only a carriage way on each side of the street was macadamized, and the material did not cover the whole street, and the sidewalk, distinguishing *Philadelphia v. Eastwick*, 35 Pa. St. 75.

Sewers. *Hoboken v. Chamberlain*, 37 N. J. L. 51.

One sewer district may be planned; whole city need not be laid out into sewerage districts. *Re Protestant Episcopal Public School*, 40 How. Pr. (N. Y.) 198, 47 N. Y. 556. Compare, 46 N. Y. 178; *rev'g* 58 Barb. (N. Y.) 161, 40 How. Pr. (N. Y.) 139.

Sometimes the power to determine whether or not the widening of any particular street is required by the public welfare and convenience is vested by statute in the municipal authorities. *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 48 Am. Dec. 540.

81. The corporate authorities have discretion as to plans for or locating streets, sewers, or other improvements. *Fyfe v. Turtle Creek Borough*, 22 Pa. Super. Ct. 292.

Municipal discretion applied to the necessity for sewers, the kind and manner of construction. *Piard v. Jersey City*, 30 N. J. L. (1 Vroom.) 148.

Injunction, to control the discretion as to when and where sidewalk shall be laid, will not lie. *Irving v. Ford*, 65 Mich. 241, 32 N. W. 601.

Having prescribed the plan for sidewalks and material for their construction, a city may enjoin a property owner from building in front of his property in a different way and of a different material. *Drew v. Geneva*, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814.

§ 2004 *post*.

82. § 1874 *post*.

83. Council to determine, in erecting lighting plant, kind and cost of material, and when and where to buy and how much at a time. *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

The determination of the cost of a municipal building is discretionary with the corporate authorities. *Parker v. Concord*, 71 N. H. 468, 52 Atl. 1095.

§ 1866 *post*.

84. §§ 1294-1304 *ante*, vol. 3; § 1402 *et seq.*, *ante*, vol. 3; § 2007 *post*.

Opening street, necessity. *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; *Re Folts*

and alleys, as heretofore stated, rests primarily in the discretion of the municipality and its determination relative thereto is, in the absence of fraud or collusion, conclusive, and not subject to review by the courts.⁸⁵

Street, 46 N. Y. S. 43, 18 App. Div. 651; *Marshalltown v. Forney*, 61 (N. Y.) 568. Iowa, 578, 16 N. W. 740.

Usually municipal authorities have full control over the opening and vacation of streets and highways within the corporate limits. Their decision is usually conclusive. *Platt v. Chicago, B. Q. R. Co.* (Iowa 1887), 31 N. W. 883.

Ordinance directing the opening of a street will not be set aside where it appears that such street will subserve the convenience of the public although the claim is made that it is for private purpose. *State v. Orange*, 54 N. J. L. (25 Vroom.) 111, 14 L. R. A. 62, 22 Atl. 1004.

85. §§ 1403, 1404 *ante*, vol. 3.

Iowa. *Williams v. Carey*, 73 Ia. 194, 34 N. W. 813; *Gray v. Iowa Land Co.*, 26 Ia. 387.

Kansas. *Eudora v. Darling*, 54 Kan. 654, 39 Pac. 184.

Missouri. *Glasgow v. St. Louis*, 107 Mo. App. 198, 17 S. W. 743; *Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102.

Nebraska. *Lindsay v. Omaha*, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415.

Pennsylvania. *Re Swanson Street*, 163 Pa. 323, 30 Atl. 207.

Washington. *Mottman v. Olympia*, 45 Wash. 361, 88 Pac. 579.

Wisconsin. *Kimball v. Kenosha*, 4 Wis. 321.

Vacation of street for benefit of private individual or corporation, held not illegal. *Meyer v. Teutopolis*, 131 Ill. 552, 23 N. E.

A street may be vacated legally notwithstanding one reason therefor was to accommodate a private individual over whose lands a vacated portion of the street ran. *State v. Elizabeth*, 54 N. J. L. (25 Vroom.) 462, 24 Atl. 495.

Street can be vacated when no longer required for public use. *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393.

Vacating an alley in consideration of a division with the city of the property after the erection of a building thereon by the owner of the fee, held void. *Horton v. Williams*, 99 Mich. 423, 58 N. W. 809.

Reducing the width of a street one half and giving an abutting owner permission to inclose the excess, held illegal, as attempting to give for private purposes a portion of a public street. *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286.

In vacating streets, etc. an ordinance which authorizes the taking of the easement of certain abutters for private use is void. *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403.

Particular facts held not to show that the discontinuance of the street was the result of a bargain with a railroad company and was not done for the benefit of the public. *Pillsbury v. Augusta*, 79 Me. 71, 8 Atl. 150.

Final municipal discretion evidenced by formal order or resolution or a legislative act by ordinance, exercised in good faith, in the public interest, with due recognition of private property and rights therein, is usually regarded as conclusive relating to the necessity for the particular improvement,⁸⁶ but, as pointed out in

A law authorizing the municipal authorities to grant a railroad company an encroachment on a public street in front of two of its lots confers no power to grant the right to close up an alley running between the lots, especially where the act provides for compensation for the damages by the use of the street, and makes no mention of damages for closing the alley. *Georgia, S. & F. R. Co. v. Harvey*, 84 Ga. 372, 10 S. E. 971.

No implied power exists to close a public alley for a money consideration against the will of those owning lots in the square through which the alley runs, and who have the right of passage over it. *Louisville v. Bannon*, 99 Ky. 74, 35 S. W. 120.

The power to vacate streets cannot be exercised arbitrarily; it must be in the interest of the public. *Whitsett v. Union Depot & R. Co.*, 10 Colo. 243, 15 Pac. 339.

86. Ordinarily the passage of an ordinance providing for the contemplated street is conclusive of the necessity. *State ex rel. Cape Girardeau v. Engelmann*, 106 Mo. 628, 17 S. W. 759; *Cape Girardeau v. Houck*, 129 Mo. 607, 31 S. W. 933; *Seibert v. Tiffany*, 8 Mo. App. 33; *Bohle v. Stannard*, 7 Mo. App. 51.

Municipal discretion may determine the question whether the

public interests require the improvement of streets in an uninhabited and sparsely settled portion of the city; its determination in this respect, held final. *Henderson v. Sandefur*, 11 Bush. (74 Ky.) 550.

An objection to the making of an improvement is for the council to determine exclusively. *Applegate v. Portland*, 53 Ore. 552, 99 Pac. 890.

Council is the final judge of the necessity of sidewalk. *Mudge v. Walker*, 122 Ky. 29, 28 Ky. L. Rep. 996, 90 S. W. 1046.

Determination of council that sidewalk is necessary and that the property will be benefited by it, is conclusive, unless arbitrary and unreasonable. *Pierson v. People*, 204 Ill. 456, 68 N. E. 383.

Where the council has not determined the necessity of an improvement, when the power of doing so belongs to it, a court of equity will not compel a property owner to pay an assessment for such improvement. *Lisbon Ave. Land Co. v. Lake*, 134 Wis. 470, 113 N. W. 1099.

In determining the necessity of opening a street it is not necessary that the benefits be found to exceed the cost of opening and grading same. *Grand Rapids v.*

various parts of this work, courts will sometimes investigate the reasonableness of municipal action in the premises.⁸⁷

§ 1835. Discretionary power relating to public improvements illustrated,

Concerning their necessity or utility the following have been held to be questions for the municipal legislative body or authorities to determine, and courts will not interfere in the absence of a showing of abuse of discretion or fraud: In proceedings to condemn land to widen a street the size of the strip of ground taken;⁸⁸

Widdicomb, 92 Mich. 92, 52 N. W. 635.

Nor need the members of the council have actual knowledge of the facts creating a necessity for an improvement, they may depend upon the report of a committee for the facts. *Brewster v. Davenport*, 51 Ia. 427, 1 N. W. 737.

87. Unreasonable discretion. An ordinance requiring practically new and unworn macadam to be torn up and replaced with asphalt, the expense to be borne by the property owners, is void for unreasonableness. *Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65.

In *Corrigan v. Gage*, 68 Mo. 541, it was held that an ordinance for a sidewalk in an uninhabited portion of a city, and disconnected with any other street or sidewalk, was unnecessary and oppressive; and such facts might be shown in an action on the special taxbill.

The rule was declared in a Minnesota case that where the municipal authorities claim the right to lay out a street in a certain locality not by virtue of any express grant of power but by virtue of

the existence of an alleged necessity from which such power is implied their decision respecting the existence of such necessity is not conclusive upon the courts. *Milwaukee and St. Paul Ry. Co. v. Faribault*, 23 Minn. 167.

Rules to test reasonableness of ordinances. § 724 *et seq.*, *ante*, vol. 2.

Injunction granted to restrain the construction of a drain which would discharge water on the property of an individual in the manner contemplated by the town where it appeared that such drain could be constructed at a reasonable expense in a manner that would not damage the property. *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109.

An injunction was granted in order to restrain a city from proceeding to lay out sewers in such manner that their contents would be emptied on plaintiffs land to the probable injury of his family's health. *Butler v. Thomasville*, 74 Ga. 570.

88. *Re Independence Ave.*, 128 Mo. 272, 30 S. W. 773.

plan of improvement, as where engineers of experience deem another plan to be a better one;⁸⁹ the size, kind or location of a building for a library or memorial edifice;⁹⁰ the manner in which sewers should be connected with premises;⁹¹ whether to construct a sewer,⁹² or to lay out a street at a given point,⁹³ or to improve streets,⁹⁴ and whether a street should be improved throughout its entire length or width;⁹⁵ or whether to pave or repave.

89. *People v. Grand Trunk R. Co.*, 232 Ill. 292, 83 N. E. 839.

"Municipal authorities when adopting plans for or locating streets, sewers or other improvements, are vested with a discretion which the courts are without power to review, and in passing upon questions of benefits or damages arising from the execution of the plan, evidence tending to show that some other plan might have been more beneficial or less injurious is not admissible." *Fyfe v. Turtle Creek Borough*, 22 Pa. Super. Ct. 292.

90. *Curtis v. Portsmouth*, 67 N. H. 506, 39 Atl. 439.

91. *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531.

§ 1448 *ante*, this volume.

92. *Akers v. Kolkmeier*, 97 Mo. App. 520, 71 S. W. 536; *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281.

93. *Poulan v. Atlantic Coas Line R. Co.*, 123 Ga. 605, 51 S. E. 657; *State v. Engelmann*, 106 Mo. 628, 17 S. W. 759; *Cape Girardeau v. Houck*, 129 Mo. 607, 31 S. W. 933.

94. *Worthington v. Covington*, 82 Ky. 265, 6 Ky. L. Rep. 237; *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 48 Am. Dec. 540; *Wabash R. Co. v.*

Defiance, 52 Ohio St. 262, 40 N. E. 89; *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772.

95. Under general power to improve streets the municipality need not improve a street throughout its entire length or width but may limit the improvements to such portions as it may deem necessary and expedient. *Indianapolis R. Co. v. Capitol Pav., etc. Co.*, 24 Ind. App. 114, 54 N. E. 1076; *Neff v. Covington, etc. Stone Co.*, 108 Ky. 457, 55 S. W. 697, 56 S. W. 723, 21 Ky. L. Rep. 1454, 22 Ky. L. Rep. 139; *Springfield v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

Unless restricted, the determination as to what portion of a street shall be paved is within the discretion of the municipality. *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69.

Authority to improve the whole, or any portion of the streets is sometimes expressly conferred by statute. *Alameda Macadamizing Co. v. Williams*, 70 Cal. 534, 12 Pa. 530.

Power to macadamize and improve parts of a street where other parts are improved and macadamized. *Alameda Macadamizing Co. v. Williams*, 70 Cal. 534, 12 Pac. 530,

a street;⁹⁶ or whether to substitute an asphalt pavement for a macadam road on the remote outskirts of the town,⁹⁷ or whether to widen a street,⁹⁸ or extend its

Power to macadamize and order any other work necessary to complete the street gives power to provide for like gutter ways. *Burk v. Altschul*, 66 Cal. 533, 6 Pac. 393.

Street improvement; statute construed as to extent of improvement of street to be made. *Daly v. Gubbins*, 170 Ind. 105, 82 N. E. 659.

A statute providing that a city may improve all or part of a street but not less than one block of it, has been held not to apply to reconstruction. *Nickels v. Frankfort*, 33 Ky. L. Rep. 918, 111 S. W. 706.

Under a provision that street improvements shall not be made in extent less than a block, a city may make improvements of a street where the land is not laid off into blocks to an extent of not less than an ordinary block. *Frankfort v. Brislan*, 31 Ky. L. Rep. 867, 104 S. W. 311, rehearing denied 32 Ky. L. Rep. 377, 104 S. W. 1199. And where the statute fails to define what constitutes a block, its length is a question of fact to be determined from the evidence. *Frankfort v. Brislan*, *supra*.

The fact that only one-half of a street is within the city limits, the rest being in the township, will not affect the power of the city to improve the same, where the other part is improved by the township. *Backman v. Oskaloosa*, 130 Ia. 600, 104 N. W. 347.

See § 1824 *ante*.

96. *Burckhardt v. Atlanta*, 103 Ga. 302, 30 S. E. 32; *Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428; *Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165.

Mandamus will not lie to compel a city to construct a public street in a certain specified manner not required by law. *Parrott v. Bridgeport*, 44 Conn. 180, 26 Am. Rep. 439.

97. *Duker v. Barber Asphalt Pav. Co.*, 25 Ky. L. Rep. 135, 74 S. W. 744.

98. *Goff v. Nolan*, 62 How. Pr. (N. Y.) 323.

The width of streets and sidewalks is usually discretionary with the municipal authorities. They also generally have the power to apportion the space for each. *Taintor v. Morristown*, 36 N. J. L. (4 Vroom.) 57.

Authority to make and establish ordinances and regulations for streets and sidewalks confers the right to apportion the width of the street between that part used for vehicles and that part for a sidewalk. *Taintor v. Morristown*, 33 N. J. L. 57.

The charter provision forbidding the adoption, laying out, opening, working or grading of any street less than sixty feet wide, held to mean streets and highways, strictly so called, and not bridges. *Langlois v. Cohoes*, 58 Hun (N. Y.) 226, 11 N. Y. S. 908.

The law forbidding the establishment of any street less than

length,⁹⁹ or whether to change the grade of a street,¹ or to vacate a street;² or to construct sidewalks;³ or whether a waterworks would be a necessary and an economical enterprise,⁴ or whether to purchase public utilities,⁵ or where to locate a cemetery under proper authority.⁶

§ 1836. Compelling municipality to make improvements.

Since municipal authorities are vested with a *quasi* judicial discretion as to street improvement, courts have no power to order them to make all alike, or to keep all in the same state of repair.⁷ Likewise, a court cannot require a municipal corporation to construct a sewer, irrespective of the exercise of discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and like matters.⁸

twenty-five feet, held the laying out of a street less than this width was illegal. *Re Drum St.*, 6 Phila. (Pa.) 84.

99. Right to extend over tide land under particular law. *Columbia & P. S. R. Co. v. Seattle*, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725; *Seattle & M. Ry. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; *State v. Forrest*, 12 Wash. 483, 41 Pac. 194.

1. *Waddell v. New York*, 8 Barb. (N. Y.) 95.

Mandamus denied to compel the grade of a street to be made in a particular manner. *Metcalf v. Boston*, 158 Mass. 284, 33 N. E. 586.

2. *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743.

See § 1402 *et seq.*, *ante*, vol. 3; § 1834 *ante*; § 2007 *post*.

3. *Keith v. Wilson*, 145 Ind.

149, 44 N. E. 13; *Brewster v. Davenport*, 51 Ia. 427, 1 N. W. 737; *Seward v. Rheiner*, 2 Kan. App. 95, 43 Pac. 423; *State v. Neodesho*, 3 Kan. App. 319, 45 Pac. 122.

4. *Phoenix Water Co. v. Phoenix*, 9 Ariz. 430, 84 Pac. 1095; *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 24.

5. *Connor v. Marshfield*, 128 Wis. 280, 107 N. W. 639.

See chapter 35, *Municipal Ownership of Public Utilities*, *ante*, this volume.

6. *Greencastle v. Hazelett*, 23 Ind. 186.

7. *Hohmann v. Chicago*, 41 Ill. App. 41.

8. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102.

A court of equity cannot compel a city to construct a sewer. *Horton v. Nashville*, 4 Lea. (72 Tenn.) 39, 40 Am. Rep. 1.

On the other hand, it has been held that, although the power to improve and repair public streets is in its nature legislative, yet it is conferred on the municipal authorities for the benefit of the public; and whenever the necessity for its exercise is so apparent and obvious as to justify the inference that the refusal of the legislative body to act is the result of a determination not to discharge a plain duty, rather than of mistaken judgment as to the existence of the necessity, then the exercise of the power may be coerced through appropriate proceedings in the courts under stress of great necessity for the repair of a street, not only to save the street, but to save valuable business property abutting thereon, the duty of the authorities to repair must be deemed ministerial rather than legislative, and they may be compelled to discharge it by *mandamus*, upon the prayer of the property holders directly and specially interested therein.⁹ If the clear legal duty is imposed, *mandamus* will lie to compel a municipal corporation to open a

9. Catlettsburg v. Kinner, 73 Ky. (13 Bush.) 334.

See also, Hammar v. Covington, 3 Met. (Ky.) 494, holding that where the charter imperatively requires the authorities to keep the street clean and in repair when once improved, their action in providing for such work is ministerial.

Mandamus will lie to compel the execution of express power to keep in repair the streets, prohibit obstructions, etc. People v. Bloomington, 63 Ill. 207; Uniontown v. Commonwealth, 34 Pa. St. 293.

Refusal of municipal authorities to lay out town way. Construction of statute. Worcester v. County Com'rs, 167 Mass. 565, 46 N. E. 383.

Right of court to review decl-

sion of council refusing to cause an improvement of a street to be made, etc., on *mandamus*. Michigan City v. Roberts, 34 Ind. 471.

Mandamus to compel the issuance of bonds for park purposes, denied. Boston Water Power Co. v. Boston, 143 Mass. 546, 10 N. E. 318.

Mandamus denied to compel loans for park purposes. Com. v. Park Com'rs, 10 Phila. (Pa.) 444.

Right of court to compel construction of works to abate a canal or drain which was a nuisance, denied. Melpomene St. v. New Orleans, 14 La. Ann. 452.

Mandamus awarded parties. Ashton v. Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619, aff'g 60 Hun (N. Y.) 372, 14 N. Y. 855,

street,¹⁰ or to take proceedings under a legislative act to improve a street,¹¹ or to complete an improvement begun¹² in accordance with the ordinance, where the work is being done in a different manner.¹³

Notwithstanding as stated, in the absence of restrictions, power to determine the necessity or utility and character of street paving is generally discretionary with the municipality,^{13a} yet where the council, or other body, in which such discretionary power is lodged, has exercised its discretion, and given its conclusions upon the facts before it, what remains to be done to make its conclusions effective is purely ministerial, and *mandamus* will lie to compel its performance.¹⁴

10. *Webster v. Chicago*, 83 Ill. 458; *People v. Syracuse*, 20 How. Pr. (N. Y.) 491.

Mandamus to compel the enforcement of an ordinance ordering the opening of the street, denied where the street exists only on a plat as recorded and has been in the actual adverse occupancy of the abutting owner for more than fifty years. *Terrill v. Bloomfield* (Ky., 1892), 21 S. W. 1041, aff'g 20 S. W. 289, 14 Ky. L. Rep. 614.

11. Where an act of the legislature provides that a certain street is "hereby widened," held *mandamus* was proper to compel the municipal authorities to take proceedings under the act for the improvement of such street. An unauthorized order by the court directing the authorities to designate the proceedings will not defeat *mandamus*. *People v. Brooklyn*, 22 Barb. (N. Y.) 404.

See *People v. San Francisco*, 36 Cal. 595.

12. *Mandamus* awarded to require the completion of a street. *O'Brian v. Baltimore County Com'rs*, 51 Md. 15.

Mandamus denied to compel the discontinuance of a particular street under an indefinite legislative authority. *Morse v. Williamson*, 35 Barb. (N. Y.) 472.

13. *Wells v. Raymond*, 201 Ill. 435, 66 N. E. 210.

13a. *Georgia*. *Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428.

Illinois. *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69.

Iowa. *Dewey v. Des Moines*, 101 Ia. 416, 70 N. W. 605.

Maryland. *Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165.

Missouri. *Morse v. Westport*, 136 Mo. 276, 37 S. W. 932.

Pennsylvania. *Re Wabash Ave.*, 26 Pa. Super. Ct. 305.

14. *Rhodes v. Board of Public Works*, 10 Colo. App. 99, 49 Pac. 430.

§ 1837. Discretion as to plans in general.

Unless restricted by statutory or charter provisions,¹⁵ a municipal corporation proceeding under general power and acting in good faith may exercise reasonable discretion as to the plans of making improvements.¹⁶ In such case the character of the improvement

15. *Georgia*. Burget v. Greenfield, 120 Ga. 432, 94 N. W. 933.

New Jersey. Hoboken v. Chamberlain, 37 N. J. L. 51.

New York. Re New York, etc. Public School, 46 N. Y. 178, rev'g 58 Barb. 161, 40 How. Pr. 139.

Ohio. Mills v. Norwood, 6 Ohio Cir. Ct. Rep. 305, 3 Ohio Cir. Dec. 465.

Pennsylvania. Commissioners v. Wood, 10 Pa. St. 93, 49 Am. Dec. 582; Matter of Fairmount Place, 12 Phila. (Pa.) 536.

16. *Illinois*. Lightner v. Peoria, 150 Ill. 80, 37 N. E. 69; Louisville, etc. R. Co. v. East St. Louis, 134 Ill. 656, 25 N. E. 962; Murphy v. Peoria, 119 Ill. 509, 9 N. E. 895.

Iowa. Brown v. Barstow, 87 Ia. 344, 54 N. W. 241.

Maine. Franklin Wharf Co. v. Portland, 67 Me. 46, 24 Am. Rep. 1.

New York. Walter v. McClellan, 96 N. Y. S. 479, 48 N. Y. Misc. Rep. 215.

Ohio. Toledo v. Grasser, 7 Ohio N. P. 396.

Wisconsin. State v. Portage, 12 Wis. 562.

Discretion of corporate authorities in the compilation of plans and specifications for a public work, exercised in good faith will not be reviewed by the court. Kunding v. Saginaw, 132 Mich. 395, 93 N. W. 914, 9 Detroit Leg. N. 650.

Under power to improve streets a city may sod and park a part of the center not needed for travel. Murphy v. Peoria, 119 Ill. 509, 9 N. E. 895.

A city is not precluded from following its plans in making an improvement because an improvement made by an individual property owner to suit his own convenience will be destroyed. Parsons v. Columbus, 50 Ohio St. 460, 34 N. E. 677.

Power to plan parkways in streets. Downing v. Des Moines, 124 Ia. 289, 99 N. W. 1066.

A street each side of a street railway track may be paved at the expense of abutting property owners, and space between the car track rails left unpaved. Springfield v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

Holding village to have power to compel construction of sidewalk on grade. Blanke v. Genoa Junction, 140 Wis. 211, 121 N. W. 132.

Holding that municipal corporations have authority to fix the grade of sidewalks, and to determine character of walks and material to be used therein. Illinois Cent. R. Co. v. Stewart, 230 Ill. 204, 82 N. E. 590.

Place of sewer outlet, held to be in discretion of council. Cleney v. Norwood, 137 Fed. 962.

may be determined by the proper municipal authorities regardless of the desire of the property owners or a majority thereof, or the inhabitants.¹⁷ Thus a level side-

The fact that a sewer provided for by ordinance is too large does not affect the validity of the ordinance. *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.

Nor does the fact that the outlet of the sewer will be too small, affect the ordinance. *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.

A provision for "house-connection slants" every twenty feet each side of the sewer, does not invalidate the ordinance in the absence of proof that it is unreasonable. (*Vandersyde v. People*, 195 Ill. 200, 62 N. E. 806), but a provision in an ordinance that such slants should be built opposite each twenty feet of lot frontage was held void where some of the lots had more than twenty feet frontage. *Gage v. Chicago*, 191 Ill. 210, 60 N. E. 896. See *Chicago v. Corcoran*, 196 Ill. 146, 63 N. E. 690.

The fact that only one such slant is provided for each lot or parcel of land, so that a large tract will have no more connection than a small lot, is not objectionable. *Gage v. Chicago*, 195 Ill. 490, 63 N. E. 184.

An ordinance is not unreasonable for providing for a house slant (which is only a four inch extension extending from the side of the sewer) opposite each lot or parcel of land. *Smythe v. Chicago*, 197 Ill. 311, 64 N. E. 361.

Nor for providing for two house

slants for each corner lot, one on each street. *Duane v. Chicago*, 198 Ill. 471, 64 N. E. 1033.

An ordinance requiring that house slants to sewers be constructed every twenty-five feet, although lots were larger than twenty-five feet, held not invalid on that account. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

Nor does such an ordinance make an unreasonable or arbitrary subdivision of the property owner's land. *Washington Park Club v. Chicago*, 219 Ill. 323, 76 N. E. 383.

"Local Drainage." *Avondale v. Scudder*, 12 Ohio Cir. Ct. Rep. 770, 4 Ohio Cir. Dec. 476.

Plans that did not provide for a foundation under a sewer at places it was impossible to predetermine such a question, are not defective on that account. *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

Cases relating to plans of sewers and discretion of authorities relative thereto. *Northwestern University v. Wilmette*, 230 Ill. 80, 82 N. E. 615; *Soden v. Emporia*, 7 Kan. App. 583, 52 Pac. 461; *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

Right of city to remove soil from a street. *Haas v. Evansville*, 20 Ind. App. 482, 50 N. E. 46, 51 N. E. 105; *Aurora v. Fox*, 78 Ind. 1; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12.

17. *Irish v. Mt. Clements*, 156 Mich. 588, 121 N. W. 316, 16 Det. Leg. N. 202.

walk may be laid although it necessitates property owners taking precautions to prevent a nuisance.¹⁸ So provision may be made for reconstruction of sidewalks in a block, excepting lots which have sufficient walks, as the authorities may decide.¹⁹ And a municipal corporation may make improvements in its public thoroughfares so that a long used course of travel may be diverted to a less convenient way.²⁰

§ 1838. Discretion in selecting materials.

In the absence of restrictions power to pave streets carries authority to select whatever material is necessary and reasonable,²¹ even alternative materials, although competitive bidding is required.²² Thus under power to build and repair sidewalks, a municipal corporation may designate the material to be used and their width and manner of construction.²³ So where a city is empowered to procure streets to be "paved, graded, or macadamized," it has authority to lay a sidewalk of plank or other material.²⁴

18. *Holyoke v. Hadley Water Power Co.*, 174 Mass. 424, 54 N. E. 889.

19. *Barret v. Falls City Artificial Stone Co.*, 21 Ky. L. Rep. 669, 52 S. W. 947.

20. *Hohmann v. Chicago*, 41 Ill. App. 41.

Plans and specifications. §§ 1872, 1873 *post*.

21. *Schenley v. Com.*, 36 Pa. St. 29, 78 Am. Dec. 359. See also *Oxford Borough v. Alexander*, 2 Chest Co. Rep. (Pa.) 265.

It has been held that the act of selecting the kind of pavement to be laid is ministerial. *Loughry v. Pittsburgh*, 29 Pittsb. Leg. J. (N. S.) (Pa.) 426. See also, *Berg v. Grace*, 1 N. Y. St. Rep. 418, 40 Hun 639,

Under an ordinance requiring the order published to "specify briefly but plainly, the kind of improvement ordered," the material need not be described. *Main v. Ft. Smith*, 49 Ark. 480, 5 S. W. 801.

Ordinance need not name material. *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580

Sidewalk, material to be prescribed. *Lowell v. Wheelock*, 11 Cush. (65 Mass.) 391.

22. § 1210 *ante*, vol. 3; § 1872 *post*.

23. *Benson v. Waukesha*, 74 Wis. 31, 41 N. W. 1017.

24. *Burlington, etc. R. Co. v. Spearman*, 12 Ia. 112.

Unless forbidden, municipal authorities may make *restrictions as to the kind and quality of the material to be used* and may require a certificate that there will be an uninterrupted supply during the time named for the completion of the contract without violating the law requiring competitive bidding.²⁵ And although competitive bidding is necessary under certain conditions, *patented articles or materials may be specified*; however, the proposition is denied in some jurisdictions.²⁶

The extent to which municipal authorities may exercise discretion touching the selection of materials depends, of course, on the proper construction of the governing law,²⁷ but their decision in this respect when they possess the power, is generally speaking regarded as

25. § 1199 *ante*, vol. 3.

26. §§ 1197, 1198 *ante*, vol. 3.

27. *California*. San Francisco Paving Co. v. Egan, 146 Cal. 635, 80 Pac. 1076.

Illinois. Cunningham v. Peoria, 157 Ill. 499, 41 N. E. 1014; Cram v. Chicago, 138 Ill. 506, 28 N. E. 757; Shannon v. Hinsdale, 180 Ill. 202, 54 N. E. 181; Louisville & Nashville R. R. v. East St. Louis, 134 Ill. 656, 25 N. E. 962; Illinois Central R. R. Co. v. Chicago, 141 Ill. 586, 30 N. E. 1044.

Kentucky. Anderson v. Bitzer, 20 Ky. L. Rep. 1450, 49 S. W. 442; Barber Asphalt Pav. Co. v. Gaar, 115 Ky. 334, 24 Ky. L. Rep. 2227, 73 S. W. 1106; Nell v. Power, 32 Ky. L. Rep. 952, 107 S. W. 694.

Louisiana. Gunning Gravel & P. Co. v. New Orleans, 45 La. Ann. 911, 13 So. 182.

Massachusetts. Carr v. Dooley, 122 Mass. 255.

Michigan. Re O'Brien, 119 Mich. 540, 79 N. W. 1070, 5 Det. Leg. N.

335; Grand Rapids v. Board of Public Works, 87 Mich. 113, 49 N. W. 481, 99 Mich. 392, 58 N. W. 335; Shimmons v. Saginaw, 104 Mich. 511, 62 N. W. 725.

Missouri. Gallagher v. Smith, 55 Mo. App. 116; Barber Asphalt Paving Co. v. Field, 188 Mo. 182, 86 S. W. 860.

Nebraska. Eddy v. Omaha, 72 Neb. 550, 101 N. W. 25, modified on rehearing, 72 Neb. 550, 102 N. W. 70, 103 N. W. 692.

New York. Berg v. Grace, 1 N. Y. St. Rep. 418; Schenectady v. Union College, 66 Hun (N. Y.) 179, 21 N. Y. S. 147, rev'd 144 N. Y. 241, 39 N. E. 67, 26 L. R. A. 614.

Council's discretion in selection of material will not be questioned because the material selected is more costly than other material, or more costly than the property owners thought should be used. Swan v. Indianola, 142 Ia. 731, 121 N. W. 547.

final.²⁸ And unless restricted *changes may be made in the materials.*²⁹

§ 1839. Same—selecting by property owners.

Some laws give to the property owners interested the privilege of designating the materials with which certain kinds of improvements shall be construed.³⁰ In such case, if there is no mode prescribed to ascertain their wishes, it has been held, they must take the initiative and make their decision known, otherwise the municipal authorities may assume that they have waived their right.³¹

A charter which provided that the majority of the property owners should have the right to select the material from not less than two kinds of materials designated by the board of works, was construed to mean that their choice should be made from two wholly different kinds of material, and where they were given an opportunity to select from asphalt, vitrified brick, or macadam, the charter is complied with and they have no

28. *Kentucky*. O'Brien v. Markland, 9 Ky. L. Rep. 773, 6 S. W. 713; Hood v. Lebanon, 12 Ky. L. Rep. 813, 15 S. W. 516.

Louisiana. Gunning Gravel, etc. Co. v. New Orleans, 45 La. Ann. 911, 13 So. 182.

Michigan. Grand Rapids v. Grand Rapids Public Works, 99 Mich. 392, 58 N. W. 335.

Missouri. Huling v. Bandara Flag Stone Co., 87 Mo. App. 349; Kansas City v. Askew, 105 Mo. App. 84, 79 S. W. 483.

Pennsylvania. Philadelphia v. Evans, 139 Pa. St. 483, 21 Atl. 200; Schenley v. Com., 36 Pa. St. 29, 78 Am. Dec. 359.

Wisconsin. Benson v. Waukesha, 74 Wis. 31, 41 N. W. 1017.

29. Change of material, held not fatal. Barber Asphalt P. Co. v. Gaar, 24 Ky. L. Rep. 2227, 73 S. W. 1106.

The necessity for substituting an asphalt pavement for a macadam turnpike road on the remote outskirts of a city, held to be discretionary with the proper municipal authorities. Unless in case of spoliation courts will not interfere. Duker v. Barber Asphalt Paving Co., 25 Ky. L. Rep. 135, 74 S. W. 744. See Gage v. People, 193 Ill. 316, 61 N. E. 1045, 56 L. R. A. 916.

30. § 1185 *ante*, vol. 3.

31. Moale v. Baltimore, 61 Md. 224.

right to select from two or more kinds or makers of each material.³²

If two petitions of property owners, one calling for asphalt and the other for brick pavement, are presented the municipal authorities may act upon the one containing the larger number of signers and ignore the other.³³

§ 1840. Discretion as to contracting for the work.

In the absence of restrictions the municipal corporation may itself do the work or have it done under its supervision, or let out the work by contract.³⁴ But unless required by charter or statute a municipal corporation is not bound to let out the work to be done on improvements to contractors.³⁵ However, some laws exact that the work be done by contract, except when ordered otherwise by a specified vote of the legislative body, as two-thirds or three-fourths vote.³⁶

32. *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107.

33. *Cunningham v. Peoria*, 157 Ill. 499, 41 N. E. 1014.

34. Where a city is given the power, when contracting for lighting, to erect necessary poles and fixtures in its streets, it can do so itself or contract for the same. *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651.

Under grant of power to provide for the construction of sewers at the city's expense, the council may do the same by employing laborers or let it out to contractor. *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511.

Power to provide sewer system by contract denied. § 1431 *ante*.

35. *Florida*. *Geiger v. Filor*, 8 Fla. 325.

Illinois. *People v. Payton*, 214 Ill. 376, 73 N. E. 768.

Indiana. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

Louisiana. *Monroe v. Johnson*, 106 La. 350, 30 So. 840.

Virginia. *Home Building, etc. Co. v. Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

Power to make certain street improvements by day's work denied. *Re Emigrant Industrial Sav. Bank*, 75 N. Y. 388; *Re Presbytery*, 9 Daly (N. Y.) 116.

Where a city and a street railway company are interested in an improvement the city may contract to do the work and the street railway company to pay its part. *Worcester v. Worcester, etc. Consol. St. R. Co.*, 194 Mass. 228, 80 N. E. 232.

36. *Re Newton*, 19 Hun (N. Y.) 470.

Work to be by contract. *Re Robbins*, 82 N. Y. 131, *rev'g* 20 Hun (N. Y.) 530.

Work by contract; change in law; work "in progress." *Re Weil*, 83 N. Y. 543; *Re Blodgett*,

Where work is to be let in large volume it is frequently required that municipal corporations award the same to the contractor under competitive bids.³⁷ And in such case, the requirement must be followed, otherwise the contract will be void and a valid assessment cannot be made to pay for the same.³⁸ Sometimes a municipal corporation is required first to submit the work to bidders and if there are no bidders to do the work itself.³⁹ When work is to be let by competitive bidding and the method of doing so are treated elsewhere in this work.⁴⁰

§ 1841. Discretion as to mode and time of doing the work.

If the mode of doing the work is prescribed by charter or statute applicable, manifestly such mode must in all essentials be followed.⁴¹ But in the absence of such regulation the time, place and manner of erecting structures for corporate purpose,⁴² or the time and mode of doing work in making improvements of the several kinds is within municipal discretion,⁴³ although it extends be-

91 N. Y. 117; *Smith v. New York*, 82 Hun (N. Y.) 570, 31 N. Y. S. 783, *aff'd* in 145 N. Y. 641, 41 N. E. 90; *Boas v. New York*, 32 N. Y. S. 967, 85 Hun 311.

37. *Matthews v. Livermore*, 156 Cal. 294, 104 Pac. 303; *Re Emigrant Industrial Sav. Bank*, 75 N. Y. 388; *Boas v. New York*, 32 N. Y. S. 967, 85 Hun (N. Y.) 311; *Re Newton*, 19 Hun (N. Y.) 470.

38. *Re Blodgett*, 91 N. Y. 117; *Re Presbytery*, 9 Daly (N. Y.) 116.

39. *Fayette v. Rich*, 122 Mo. App. 145, 99 S. W. 8.

40. § 1183 *et seq.*, *ante*, vol 3.

A charter provision requiring all contracts for public improvements to be let to the lowest bidder after notice, etc., held not to forbid the construction of ap-

proaches to a bridge under direction of the municipal engineer. *Home Building and Conveyance Co. v. Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

41. *Thomson v. Boonville*, 61 Mo. 282.

42. *Richmond v. Davis*, 103 Ind. 449, 3 N. E. 130; *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715.

43. *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531; *Downing v. Des Moines*, 124 Ia. 289, 99 N. W. 1066; *Barber Asphalt Paving Co. v. Gaar*, 115 Ky. 334, 24 Ky. L. Rep. 2227, 73 S. W. 1106.

Property owner is not concerned with manner of doing the work. The only thing he can require is that he be charged no more than the actual cost of the

yond the corporate area or upon private property.⁴⁴ If, however, the municipal corporation fixes in its general ordinance the mode of procedure to obtain certain improvements, *e. g.* permanent sidewalks authorized by state statute, such mode must be observed.⁴⁵ Moreover, ministerial officers must follow the mode prescribed by ordinance except as to inconsequential details.⁴⁶

3. EXERCISE OF POWER.

a. *General consideration including preliminary proceedings.*

§ 1842. Street to be established.

The street must be established before it can be improved.⁴⁷ Sometimes laws provide that it shall not be

work. *Edwards House Co. v. Jackson*, 91 Miss. 429, 45 So. 14.

Held, discretionary with town authorities to determine the manner in which the work should be done. *Hood v. Lebanon*, 12 Ky. L. Rep. 813, 15 S. W. 516.

City may move sidewalk to establish line where it was built by owner on different line. *Moore v. Fairport*, 32 N. Y. S. 633, 11 N. Y. Misc. 146.

The time of doing work, as paving streets, etc., is generally discretionary with municipal authorities. The courts will not interfere with such discretion where they ordered street paving to be done in winter months which results in increasing the cost of the improvement over what it would be at a more appropriate season. *Philadelphia v. Evans*, 139 Pa. St. 483, 21 Atl. 200.

44. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601. See § 1108 *ante*, vol. 3; § 1434 *ante*.

A city has no right to lay a pipe across private property to conduct water from a catch basin in the street which was being laid out. *Smith v. Gloucester*, 201 Mass. 329, 87 N. E. 626.

45. *Burget v. Greenfield*, 120 Iowa 432, 94 N. W. 933.

46. *Martin v. Oskaloosa*, 126 Ia. 680, 102 N. W. 529; *Hedge v. Oskaloosa*, 126 Ia. 680, 102 N. W. 529; *Barber Asphalt Paving Co. v. Gaar*, 115 Ky. 334, 24 Ky. L. Rep. 2227, 73 S. W. 1106.

See § 1904 *post*.

Power to prescribe the details of the work vested in the board of public works. *Louisville v. Barber Asphalt Paving Co.*, 24 Ky. L. Rep. 2227, 73 S. W. 1106.

47. *McGinnis v. St. Louis*, 157 Mo. 191, 57 S. W. 755; *Moran v. Lindell*, 52 Mo. 229.

Power to improve streets does not authorize the municipality to improve streets which have not been lawfully established. *Spaul-*

lawful to grade, pave or macadamize streets, etc., not established and opened according to law and ordinance.⁴⁸ The method of establishing streets is fully treated in a former chapter.⁴⁹ The acquisition of land

ding v. Wesson, 115 Cal. 441, 47 Pac. 249.

Sufficiency of establishment of street to authorize improvement. See *Wisby v. Bonte*, 19 Ohio St. 238.

Sewer may be constructed therein before street is opened. *Re Fowler*, 53 N. Y. 60; *Edwards v. Cooper*, 168 Ind. 24, 79 N. E. 1047.

48. Absence of proceedings to open street, held not to invalidate preliminary proceedings for improvement. *Jersey City v. National Docks R. R. Co.*, 55 N. J. L. (26 Vroom.) 194, 26 Atl. 145.

A contractor for the city need not see that a street he contracts to grade has been legally opened. *Brundage v. Portchester*, 31 Hun (N. Y.) 129, *aff'd* in 102 N. Y. 494, 7 N. E. 398.

Where a city, at the time of ordering the grading a street had no power to do so, by reason of the fact that a portion of the street was private property, a subsequent dedication of such portion to the city, it was held, could not confer power to make the improvement. *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258.

49. §§ 1294-1304 *ante*, vol. 3.

Opening streets. Preliminary proceedings "are important, to enable the council properly to decide whether the improvement is proper to be made, as well as to inform the owners of the land to be assessed how it will affect their

interests." Preliminary assessment made by the commissioners must be filed within the time prescribed by charter, or the street cannot be opened. *State (Ackerman) v. Bergen*, 33 N. J. L. 39, 41.

Condemnation. When public property to be condemned for sewer. *Kelsey v. King*, 32 Barb. (N. Y.) 410, 11 Abb. Pr. (N. Y.) 180.

An alley which is public need not be condemned when it is to form part of a street, as there is no one to complain. *Scotten v. Detroit*, 106 Mich. 564, 64 N. W. 579.

Right to open a street laid down on the general plan of the town sustained, notwithstanding that by doing so it necessarily closed up another highway. *Appeal of Commonwealth (Pa., 1887)*, 9 Atl. 524.

Local authorities were only authorized to proceed to open streets when satisfied that the benefits to lands affected thereby and to be assessed therefor would exceed the damages to private property necessarily occasioned and the expenses of the proceedings and work. *Jacobus v. Oakland*, 42 Cal. 21.

Unless land has been dedicated for a public street it cannot be taken as such. *Demartini v. San Francisco*, 107 Cal. 402, 40 Pac. 496.

Laws sometimes authorize the opening of a street when the state

for a street is to be distinguished from opening up the street for use.⁵⁰

§ 1843. Establishment of street grade.

Charters frequently require the council or legislative body to establish by ordinance the location and gradation of streets within the corporate limits.⁵¹ This requirement does not always extend to alleys.⁵²

Some charters provide that a designated board, as the board of public works or improvements, shall recommend to the legislative department all ordinances for the establishment or change of grade of streets, public ways, alleys, etc.,⁵³ which requirement is usually regarded as jurisdictional, and hence an ordinance without such

of improvements in the neighborhood requires it. Under such law there is no authority to open a street for part of the distance only. *Re Washington St.*, 12 Pa. Co. Ct. Rep. 288, 2 Pa. Dist. Rep. 604.

As to whether a proceeding was opening a new street or extending an old one, under a particular local law, see *Re Locust St.* in *McKeesport*, 153 Pa. 276, 25 Atl. 816.

50. See chapter 32, *Eminent Domain*, *ante*.

Sometimes the question as to the breadth of land which may be acquired for road and levee purposes is within legal restrictions, an administrative question, largely discretionary with the municipal authorities. *Thibodeaux v. Maggioli*, 4 La. Ann. 73.

51. Power to open streets implies power to fix grade. *Himmelman v. Hoadley*, 44 Cal. 213.

Power to grade located streets is usually given. *Houston v. McKenna*, 22 Cal. 550.

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Power to alter a street refers to change of location and not to change of grade. *Manufacturers Land, etc. Co. v. Camden*, 71 N. J. L. 490, 59 Atl. 1.

The establishment or change of street grades has no reference whatever to condemnation proceedings to open streets, etc. The former may be done at any time before such condemnation, or after it, before the work of grading or paving is actually completed. *Kelly v. Baltimore*, 65 Md. 171, 3 Atl. 594.

52. *Weber v. Johnson*, 37 Mo. App. 601.

Compare *Joyes v. Shadburn*, 11 Ky. L. Rep. 892, 13 S. W. 361.

Construction of word "may" as used in connection with authority to establish alley grades. *Kelly v. Cedar Falls*, 123 Ia. 660, 99 N. W. 556.

53. Charter of St. Louis, art. VI, § 17. The Revised Code of St. Louis (Woerner, 1907), p. 403.

recommendation is void.⁵⁴ Under such provision, until the grade of a street or alley is fixed by ordinance the street or alley is not fully established and cannot be ordered to be improved. Moreover, charters generally require the grade to be established before proceedings for the permanent improvement of streets at the expense of property owners shall be commenced.⁵⁵

Where the grade must be established by ordinance which is often required,⁵⁶ the act is legislative,⁵⁷ and

54. *St. Louis v. Gleason*, 93 Mo. 33, 37, 8 S. W. 348; *St. Louis v. Franke*, 78 Mo. 41; § 676 *ante*, vol. 2; § 1881 *post*.

55. *Napa v. Easterly*, 61 Cal. 509; *State v. Judges of District Court*, 51 Minn. 539, 53 N. W. 800; 55 N. W. 122; *Re Delaware & H. Canal Co.*, 60 Hun (N. Y.) 204, 14 N. Y. S. 585, reversing 8 N. Y. S. 352.

Grade to be established before improvement proceeds. Contract for macadamizing may be let after the contract for the grading has been made and before the grading has been done. *Dyer v. Hudson*, 65 Cal. 374, 4 Pac. 231.

If the grade and width of a street have been officially established, it may be ordered planked, though it has not been graded. *Knowles v. Seale*, 64 Cal. 377, 1 Pac. 159.

Although the charter requires the grade to be established before the street is paved, the city may order paving and make a contract therefor before the grade is established, where the contract is made with reference to a proposed grade which is established before the work is done. *Allen v. Danvenport*, 107 Iowa 90, 77 N. W. 532.

So, a contract for grading may

be let, although the gradient lines for the street prior to the passage of an order directing the street to be graded have not been fixed. *Keough v. St. Paul*, 66 Minn. 114, 68 N. W. 843; reviewing and distinguishing *Fitzhugh v. Duluth*, 58 Minn. 427, 59 N. W. 1041; *Sang v. Duluth*, 38 Minn. 81; 59 N. W. 878; *State v. District Court Judges*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122; and *State v. District Court*, 44 Minn. 244, 46 N. W. 349.

Sidewalks, construction of, to conform to established grade. *Burr v. Newcastle*, 49 Ind. 322.

Some charters permit sidewalks to be constructed before the street has been graded or macadamized. *Challiss v. Parker*, 11 Kan. 394.

56. *Chicago & N. P. R. R. v. Chicago*, 174 Ill. 439, 51 N. E. 596; approved in *London Mills v. White*, 208 Ill. 289, 301, 302, 70 N. E. 313; *Chicago & N. Pac. R. Co. v. Chicago*, 174 Ill. 439, 51 N. E. 596; *Clay v. Mexico*, 92 Mo. App. 611; *State v. Bayonne*, 35 N. J. L. 335; *Koeppen v. Sedalia*, 89 Mo. App. 648.

Official grade of all streets may be established by one general ordinance. *Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253.

cannot be delegated to executive or administrative officers,⁵⁸ or to private corporations.⁵⁹

As considered in a prior volume the doctrine that the legislative body must act as a legal entity, duly convened,⁶⁰ has been applied to the establishment and change of grade of streets. Thus individual members of the council cannot consent to the placing of dirt on a street and thereby change its grade.⁶¹ So the rule, elsewhere explained that, a municipal corporation may ratify the unauthorized acts of its officers and agents which are within the corporate powers,⁶² was applied in Pennsylvania to a change of a grade of a street made by officers without ordinance authority by ratification by the council.⁶³

In improvement proceedings the question is sometimes presented, What constitutes the establishment of a grade? It has been held in California that the fixing of a definite height of a street at two points does not establish the official grade between such points on an

Grade established by resolution. *State (Meday) v. Rutherford*, 52 N. J. L. 499, 19 Atl. 972.

Change of grade to be by ordinance. *Kraffe v. Springfield*, 86 Mo. App. 530; *Powell v. Excelsior Springs*, 138 Mo. App. 121, 120 S. W. 106; *Maudlin v. Trenton*, 67 Mo. App. 452.

See §§ 633-636 *ante*, vol. 2.

57. § 643 *ante*, vol. 2.

58. §§ 384-386 *ante*, vol. 1; §§ 1822, 1828 *ante*; *Chilson v. Wilson*, 38 Mich. 267; *Themanson v. Kearney*, 35 Neb. 881, 53 N. W. 1009; *Ware v. Rutherford*, 55 N. J. L. 450, 26 Atl. 933.

Cannot be delegated to a city engineer. *Lippelman v. Cincinnati*, 10 Ohio Dec. 825, 21 Wkly. Law Bul. 216.

Council must fix the grade of the curb of the street. *Lippelman*

v. Cincinnati, 4 Ohio Cir. Ct. Rep. 327.

59. *Egbert v. Lake Shore & M. S. Ry. Co.*, 6 Ind. App. 350, 33 N. E. 659.

60. § 574 *ante*, vol. 2.

61. *Denison & Pac. Sub. Ry. Co. v. James*, 20 Tex. Civ. App. 358, 49 S. W. 660.

To recover damages for change of grade the change must have been authorized and directed by ordinance. *Hall v. Trenton*, 86 Mo. App. 326, 328.

62. § 611 *ante*, vol. 2.

63. *McCormick's Appeal*, In re *Shiloh Street*, 165 Pa. St. 386, 30 Atl. 986, 44 Am. St. Rep. 671.

Contra. Ratification can only be by ordinance. *Kroffe v. Springfield*, 86 Mo. App. 530, 535; *Maudlin v. Trenton*, 67 Mo. App. 452.

arbitrary straight line drawn between them.⁶⁴ The word "grade" means the difference between grade line and a level or horizontal line, and to grade a street is to bring the surface to the grade line.⁶⁵

If an ordinance establishes the grade of a street or alley at certain elevations between designated points a level cross grade would seem to be intended. If one side of such street or alley should be constructed above the established elevation and the other side below it, then, in such case, the question is presented, whether legislative power has been exercised. In many cases natural conditions require that one side of a street be considerably higher than the opposite side, and the elevation of the side lines determines the relation of the street

64. *Dorland v. Bergson*, 78 Cal. 637, 21 Pac. 537.

65. § 1290 *ante*, vol. 3; *Hyland v. Ossining*, 107 N. Y. S. 225, 57 Misc. 212.

Establishing grade. Particular cases. *Burr v. Newcastle*, 49 Ind. 322; *Kearney v. Andrews*, 10 N. J. Eq. 70; *Parker v. New Brunswick*, 30 N. J. L. 395.

Particular laws establishing grades, construed. *Gafney v. San Francisco*, 72 Cal. 146, 13 Pac. 467; *Lake v. Decatur*, 91 Ill. 596; *State v. Ramsey County District Court*, 33 Minn. 295, 23 N. W. 222; *Yanish v. St. Paul*, 50 Minn. 518, 52 N. W. 925.

An ordinance required that street grade should be estimated from a certain datum line, and "calculated for the middle of the several streets for which they are established." Taking the outer line of the streets as the grade line is a violation of such ordinance. *Given v. Des Moines*, 70 Iowa 637, 27 N. W. 803.

Recital that the street shall be

filled up to the "highest grade," insufficiently indicates the grade. *Stretch v. Hoboken*, 47 N. J. L. 268.

A vote to place the grade as reported by a committee, held not sufficient to establish grade. *Gardner v. Johnson*, 16 R. I. 94, 12 Atl. 888.

Change of grade. *Niver v. Bathon-the-Hudson*, 27 Misc. Rep. (N. Y.) 605.

Establishment of grade by reference to an ordinance, monument, etc. *Chicago & N. Pac. R. Co. v. Chicago*, 172 Ill. 66, 49 N. E. 1006; *Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169; *Washington Ice Co. v. Chicago*, 147 Ill. 327, 35 N. E. 378; *Bloomington v. Pollock*, 14 Ill. 346, 31 N. E. 146.

Grade of street held not established by reference to "datum plan" fixed by ordinance. *De Soto v. Showman*, 100 Mo. App. 323, 73 S. W. 257.

Description of improvements by reference. § 1886 *post*.

grades to adjacent property. This is in consequence of the fact that streets have width as well as length and their grade is that of a plane or surface and not of a line. The width of roadway is the distance between curb lines. Therefore, where the fixing of the grade is a legislative act, the elevation of the curb lines should be established by ordinance, either by establishing their elevation at controlling points, or by the adoption, by ordinance, of a general uniform rule fixing the relation of curb grades to center line grades.⁶⁶

An ordinance establishing grades of streets is not void for uncertainty if the grades so established can be ascertained without difficulty.⁶⁷

§ 1844. Same—change of grade.

As indicated sometimes municipal authorities are restricted in the exercise of their discretion by statute or charter,⁶⁸ but when not so restricted, they may, under a general grant of power over the city streets, within their discretion, change the grade or width thereof without

66. Annotated Amended Charter of St. Louis by the author (1902), pp. 48, 49, contribution of Robert E. McMath, President St. Louis Board of Public Improvements, 1893 to 1901, and member of said board for sixteen years.

Under general power, when the circumstances warrant, the grade on one side of a street may be different from the other, and, if need be, the city has authority to erect a retaining wall in the center thereof. *Yamish v. St. Paul*, 50 Minn. 518, 52 N. W. 925.

67. *Burr v. Newcastle*, 49 Ind. 322.

Establishing grade. *Chicago Terminal R. R. Co. v. Chicago*, 184 Ill. 154, 56 N. E. 410.

Grade lines; sufficient indica-

tion of. *Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169.

Ordinances, held to sufficiently establish grade. *Guyer v. Rock Island*, 215 Ill. 144, 74 N. E. 105; *Pierson v. People*, 204 Ill. 456, 68 N. E. 383; *Chicago Union Traction Co. v. Chicago*, 215 Ill. 410, 74 N. E. 449; *Connecticut Mut. Life Ins. Co. v. Chicago*, 217 Ill. 352, 75 N. E. 365.

Ordinance held insufficient in failing to show grade with sufficient certainty. *McDowall v. People*, 204 Ill. 499, 68 N. E. 379. Sufficiency of specification as to grade of streets at intersection. *Ogden, etc. Co. v. Chicago*, 224 Ill. 294, 79 N. E. 699.

68. *Napa v. Easterby*, 61 Cal. 509; *Re Drum St.*, 6 Phila. (Pa.) 84.

further authority.⁶⁹ So, power to lay out, survey and open new streets and straighten, widen and otherwise alter those already laid out confers power to change the grade of the street.⁷⁰ Power to change the grade of streets is sometimes expressly conferred upon the municipality by charter or statute.⁷¹

Power to grade and improve streets is ordinarily construed to be a continuing power, and not exhausted by a single exercise, and hence, the local corporation may alter the grade established from time to time as its welfare requires.⁷² Moreover such power cannot be

69. *California*. *Himmelman v. Hoadley*, 44 Cal. 213; *Shaw v. Crocker*, 42 Cal. 435.

Louisiana. *Thibodeaux v. Maggioli*, 4 La. Ann. 73.

Minnesota. *Yamish v. St. Paul*, 50 Minn. 518, 52 N. W. 925; *Rakowsky v. Duluth*, 44 Minn. 188, 46 N. W. 338.

North Carolina. *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 264.

New Jersey. *Taintor v. Morristown*, 33 N. J. L. 57; *Mann v. Jersey City*, 24 N. J. L. 662; *Latta v. Hoboken*, 48 N. J. L. (19 Vroom.) 63, 4 Atl. 655.

Pennsylvania. *Darlington v. Com.*, 41 Pa. St. 68.

"The right to establish a grade, in the sense of determining what the grade shall be, is clearly implied and included in the general authority to make, grade, repair and improve streets." *Karst v. St. Paul, etc. R. Co.*, 22 Minn. 118, 121.

70. *Macy v. Indianapolis*, 17 Ind. 267; *People v. Asten*, 49 How. Pr. (N. Y.) 405.

Power to regulate the grade of streets includes the power to re-grade. *Creal v. Keokuk*, 4 G. Greene (Iowa) 47.

Power "to open and keep in repair streets and avenues, etc., agreeably to the plan of the city" is ample to authorize the alteration of grade or changing the level of the land on which the streets are laid out by the plan of the city. *Smith v. Washington*, 20 How. (61 U. S.), 135, 15 L. Ed. 858.

71. *Illinois*. *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146. *Indiana*. *Macy v. Indianapolis*, 17 Ind. 267.

Maryland. *Kelly v. Baltimore*, 65 Md. 171, 3 Atl. 594.

Minnesota. *Rakowsky v. Duluth*, 44 Minn. 188, 46 N. W. 338.

New Jersey. *State v. Bayonne*, 54 N. J. L. 293, 23 Atl. 648.

New York. *Archer v. Mount Vernon*, 71 N. Y. S. 571, 63 App. Div. 286.

72. *Illinois*. *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146.

Indiana. *Macy v. Indianapolis*, 17 Ind. 267.

Minnesota. *Karst v. St. Paul, S. & T. F. R. Co.*, 22 Minn. 118.

New Jersey. *Trenton v. McQuade*, 52 N. J. Eq. 669, 29 Atl. 354.

New York. *Waddell v. New York*, 3 Barb. (N. Y.) 95.

abridged, therefore the council cannot bind its successors in this respect.⁷³

Occasionally restrictions relating to the power to change the grade of streets exist.⁷⁴ Thus it is some-

United States, *Goszler v. Georgetown*, 6 Wheat (19 U. S.) 593, 5 L. Ed. 339; *Smoot v. Washington*, 2 Hayw. & H. 122, Fed. Cas. No. 13,133a.

The fact that a street has been left at its natural grade for many years and that sewers and sidewalks have been constructed thereon will not estop the city from thereafter establishing a different grade. *Neubert v. Toledo*, 2 Ohio Dec. 148, 9 Ohio Cir. Ct. Rep. 64.

The fact that a previous change of grade had been made in an informal manner not in conformity to law will not prevent a subsequent change in grade. *Mattingly v. Plymouth*, 100 Ind. 545.

Held, under a particular act giving the abutting owners the right to have a permanent grade and prescribing as a prerequisite to its value and vesting a right in him that it be filed for record, where a permanent street grade had been fixed but not recorded as prescribed, an abutting owner cannot enjoin the municipal authorities from grading the streets in front of his residence on the ground that the grade had been fixed previously. *Moore v. Atlanta*, 70 Ga. 611.

73. *Columbus Gaslight & Coke Co. v. Columbus*, 50 Ohio St. 65, 33 N. E. 292, 40 Am. St. Rep. 648, 19 L. R. A. 510.

Where power to grade and improve streets, conferred by statute, is exercised by ordinance such

ordinance held not to constitute a contract between the city and abutting property owners, which would forbid the city from subsequently modifying it and changing the grade established by it. *Goszler v. Georgetown*, 6 Wheat. (19 U. S.) 593, 5 L. Ed. 339.

The city cannot bind itself by agreement not to change an established grade. *Corry v. Cincinnati*, 22 Wkly. Law Bul. (Ohio) 194.

Public power cannot be surrendered or delegated. § 382 *et seq.*, *ante*, vol. 1.

Delegation of powers relating to public improvements forbidden. § 1822 *ante*.

Relinquishment of power touching street improvements denied. § 1828 *ante*.

74. Restricted to streets the grades of which had not been lawfully established. *Re Mutual Life Ins. Co.*, 89 N. Y. 530, aff'g 27 Hun (N. Y.) 22.

The law conferring the power to change grades whereby railroad companies entering the city might relocate, change or elevate their railroads. Held, the change must be confined to such limits as are necessary for the accomplishment of the purposes of the law; therefore an ordinance which extends the lines of such change clearly beyond what is required by the alteration of grade at the point of railroad crossing is void. *State v. Bayonne*, 54 N. J. L. (25 Vroom.) 293, 23 Atl. 648.

times held that authority to alter the grade of a street implies the power to make only such changes in the grade of intersecting streets as are necessary to adjust it to the changed grade of the principal street.⁷⁵ And under some statutes and charters the municipality may change the grade of a street only upon a petition of a majority of abutting property owners.⁷⁶

If the law prescribes a method for changing street grades, it should in substance be followed.⁷⁷ Moreover power to change street grades is subject to statutory or constitutional provisions requiring compensation to be made for the taking or damaging of private property.⁷⁸

§ 1845. Water and gas pipes in advance of improvement.

Charters sometimes prescribe that water and gas pipes shall be laid before the street shall be paved. The Detroit charter requiring water and gas pipes to be laid at least one year before a street could be ordered paved was adjudged void because inconsistent with the general power of the city to pave streets.⁷⁹

State law is not limited to railroads in existence at the time of the passage of the act. *State v. Bayonne*, 54 N. J. L. (25 Vroom.) 293, 23 Atl. 648.

Power to change grade denied under particular law. *Oakley v. Williamsburg*, 6 Paige (N. Y.) 262.

75. *State v. Bayonne*, 54 N. J. L. (25 Vroom.) 293, 23 Atl. 648.

76. Before a street has been actually worked to grade, the grade may be altered by the council upon the application in writing of the owners of a majority of foot frontage along the line of the proposed change. *State v. Bayonne*, 54 N. J. L. (25 Vroom.) 293, 23 Atl. 648.

77. *People v. San Francisco*, 43 Cal. 91.

Particular action of council, held to constitute change of grade of street. *Karst v. St. Paul, S. & T. R. R. Co.*, 22 Minn. 118.

Held, under particular law that the board of street commissioners of the city of Boston had no power to change the grade of an existing street. *Murphy v. Boston*, 120 Mass. 419.

78. *Mattingly v. Plymouth*, 100 Ind. 545.

See subdivision 5, "Damages" of this chapter, *post*.

79. It appeared that the laying of gas pipes was done by private corporations and the laying of water pipes was in control of the water board. *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526.

Water mains need not be laid prior to order to pave street. Eng-

Manifestly it is not practicable to comply with such requirement in all cases; however, it should be observed when convenient, since the purpose is to preserve the pavement when laid.

§ 1846. Improvements interfering with franchise rights.

Ordinances granting to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, as for railroad tracks, poles, wires, gas and water pipes, when accepted and acted on by the grantees thereof become, as stated elsewhere, contracts, the obligations of which cannot be impaired constitutionally by act of the municipality.⁸⁰ However, such rights are held in subordination to the superior rights of the public. As explained in a prior chapter, all necessary and desirable police ordinances, which are reasonable, may be enacted and enforced, to protect the public health, safety and convenience, notwithstanding the enforcement of such regulations may interfere with legal franchise rights.⁸¹ And as mentioned elsewhere in this work the grantee of a franchise to use the street takes it subject to the right of the municipality to make public improvements whenever and wherever the public interests demand and if the improvement causes injury to the grantee usually he cannot recover damages from the municipality because thereof.⁸² Thus a water company, placing its pipes in the streets under a franchise contract with the local corporation, does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets, whenever and wherever the public inter-

lsh v. Danville, 150 Ill. 92, 36 N. E. 994.

The requirement held valid, where cost was borne by abutter. *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249.

80. §§ 759-763, 823, 826, 827 *ante*, vol. 2.

81. Chapter 25, Municipal Police Powers and Ordinances Relating Thereto, *ante*, vol. 3.

82. § 1675 *ante*.

Interference with franchise as "taking" property, etc., see § 1474 *ante*; also, chapter 34 *ante*, this volume.

est demands; and if, in consequence of the exercise of this right, the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account thereof.⁸³

But the *location of sewers must be reasonable*, with respect to franchise rights. Thus where other parts of the street are equally suitable, the location of a sewer in a part of the street occupied with tracks by a railway company, under valid ordinance, which compels the company to suspend operations, greatly to its damage, will be held unreasonable.⁸⁴ So, in the exercise of the undoubted right in constructing sewers, a municipal corporation cannot compel a street railway company to tear up its tracks laid in the center of a street, pursuant to ordinance authority, to permit the placing of a sewer under it, where it appears that the company has expended large sums in constructing its roadbed, and the contemplated action would impair the value of the property, and cause inconvenience to the public, and it would be just as suitable to lay the sewer on one side of the track.⁸⁵

The municipality cannot, by any franchise it may grant, relinquish any of its rightful authority over its

83. In such action, a mere allegation that the sewer might have been placed properly in another part of the street, is not equivalent to an averment that the corporation acted unreasonably or maliciously. *National Waterworks Co. v. Kansas City*, 28 Fed. 921.

Interference with operations of a railroad by constructing and repairing sewers is authorized. *Dry Dock, E. B. & B. R. Co. v. New York*, 55 Barb. (N. Y.) 298.

84. *Clapp v. Spokane*, 53 Fed. 515.

85. *Des Moines City Ry. Co. v. Des Moines*, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767.

A sewer may be constructed in the center of the street, notwithstanding the presence of tracks by legal authority, though there was space on either side of the tracks, to allow its construction without disturbing the railway. *Spokane Street Ry. Co. v. Spokane*, 5 Wash. 634, 32 Pac. 456. The consequences of the removal of the tracks therefore are *damnum absque injuria*. *Kirby v. Citizens' Ry. Co.*, 48 Md. 168.

streets,⁸⁶ or indeed, any municipal function whatever.⁸⁷ Every franchise conferred by it is subject to this limitation, whether expressed therein or not. Cases involving the grading, constructing, repairing and otherwise improving streets fully illustrate and explain the rule.⁸⁸ Thus the legal right of a water company to lay its pipes through the streets, "in such a manner as not to obstruct or impede travel thereon," does not impair the obligation of the municipal corporation to repair its streets. This may be done in the ordinary and proper manner, although in so doing the pipes of the water company become exposed, necessitating their being sunk deeper at considerable expense to the company, to protect them from frost and other dangers.⁸⁹ But the power to improve streets, like that in locating and constructing sewers, must be reasonably exercised. It is not an arbi-

86. § 924 *et seq.*, §§ 953-955 *ante*, vol. 3; chapter 34 *ante*, this volume.

87. § 382 *ante*, vol. 1.

88. *Illinois*. Chicago, B. & Q. R. Co. v. Quincy, 136 Ill. 563, 27 N. E. 192.

Missouri. National Waterworks Co. v. Kansas City, 20 Mo. App. 237.

New Jersey. Townsend v. Jersey City, 26 N. J. L. 444.

Ohio. Columbus Gaslight & Coke Co. v. Columbus, 50 Ohio St. 65, 33 N. E. 292, 40 Am. St. Rep. 648, 19 L. R. A. 510; Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89.

Pennsylvania. North Pennsylvania R. Co. v. Stone, 3 Phila. (Pa.) 421, 8 Am. Law Reg. 112; Monongahela v. Monongahela Electric Light Co., 3 Pa. Dist. Rep. 63.

Virginia. Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 N. E. 665.

The fact that a railroad company agreed to so improve the streets upon which its tracks are laid that it may be safely used for vehicles, does not destroy the right of the local corporation to improve the streets. Chicago, B. & Q. R. Co. v. Quincy, 139 Ill. 355, 28 N. E. 1069.

A city does not yield its control of streets or the right to repair them and improve them by reason of a street railway having been laid thereon, and where the city assumes the burden of improving, it is just and equitable that the company shall be required to contribute. Newport St. R. Co. v. Newport, 1 Ky. L. Rep. 124.

89. Rockland Water Co. v. Rockland, 83 Me. 267, 22 Atl. 166.

May remove pipes of abutter, to construct sewer. City not liable. Elster v. Springfield, 49 Ohio St. 82, 30 N. E. 274.

trary power. Vested rights must be protected.⁹⁰ Therefore, if the municipal authorities in making the improvement unnecessarily interfere with the rights of the grantee of the franchise there may be a recovery. So if the law permits it (which is sometimes true), recovery of damages may be had resulting from the grading or change of grade of a street if it should appear that the franchise rights are unnecessarily injured thereby.⁹¹

§ 1847. Discontinuance of proceedings and abandonment of improvement.

Unless restricted, public improvements proposed or begun may be discontinued or abandoned by the municipal corporation.⁹² As mentioned elsewhere usually the

90. The right of a municipal corporation to grade and regrade its streets is, however, not an absolute one to be exercised at its option regardless of the effect upon others, and it cannot be exercised to the extent of working a destruction of the franchise of a railway company previously granted (*Seattle v. Columbia*, etc. R. Co., 6 Wash. 379, 33 Pac. 1048), or so as to impose upon the company new and additional obligations and burdens. *State ex rel. v. St. Paul*, etc. R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313.

A city, although authorized to construct a wharf, will be enjoined from constructing it so as to materially interfere with the operation of a ferry. *Vallejo Ferry Co. v. Vallejo*, 146 Cal. 392, 80 Pac. 514.

Possible injury to vested franchise rights will not invalidate a street improvement ordinance. *Chicago, B. & Q. R. Co. v. Quincy*, 139 Ill. 355, 28 N. E. 1069.

Outlet of sewer system may

pass over private property. *Burhans v. Norwood Park*, 138 Ill. 147, 27 N. E. 1088.

See chapter 31 *ante*, this volume.

91. § 1675 *ante*. See also subdivision "Damages," this chapter, *post*.

92. *Illinois*. *Gage v. Chicago*, 193 Ill. 108, 61 N. E. 850.

Indiana. *Sowers v. Cincinnati*, etc. R. Co., 162 Ind. 676, 71 N. E. 134; *Barber Asphalt Pav. Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436.

Louisiana. *Re Roffignac St.*, 4 Rob. (La.) 357.

Maryland. *Baltimore v. Musgrave*, 48 Md. 272, 30 Am. Rep. 458.

New York. *Re Military Parade Grounds*, 60 N. Y. 319; *Martin v. Brooklyn*, 1 Hill (N. Y.) 545; *Re Dover Street*, 18 Johns. (N. Y.) 506.

Ohio. *Toledo v. Jacobson*, 11 Ohio Cir. Ct. 220, 5 Ohio Cir. Dec. 137.

Pennsylvania. *Re Sandusky St.*, 165 Pa. St. 367, 30 Atl. 983.

municipal corporation is the sole judge as to whether certain improvements should be made,⁹³ and if it orders such improvements to be made it may lawfully abandon them and all proceedings relating thereto,⁹⁴ provided such step is seasonably taken.⁹⁵

Laws providing for the discontinuance of highways on land condemned for park purposes, held not to authorize their discontinuance without compensation to property owners injured thereby. *Baker v. Rochester*, 48 N. Y. S. 764, 24 App. Div. 383.

"The dedication of private property to public use is not complete until the proprietor is paid or tendered the value of his property as ascertained by the inquest or assessment. No preliminary step prior to actual payment, so fixes the corporation as to prevent an abandonment of the enterprise." *State v. Graves*, 19 Md. 351; *Graff v. Baltimore*, 10 Md. 544.

A municipal corporation has the right to abandon any proposed improvement, and repeal the ordinance authorizing it to be made, and after the abandonment property owners cannot compel the corporation to take and pay for property condemned for such purpose, nor recover the amount of the assessment. *Baltimore v. Musgrave*, 48 Md. 272, 30 Am. Rep. 458; *Black v. Baltimore*, 50 Md. 235, 33 Am. Rep. 320.

Park. Owners of land around a public park, the fee of which is in the city, held to have no such rights as will entitle them to compensation for a legal discontinuance of the park on the part of the city. *Clarke v. Providence*, 16

R. I. 337, 15 Atl. 763, 1 L. R. A. 725.

See § 1930 *post*, as to right to annul or abandonment.

93. § 1834 *ante*.

94. *Chicago v. Weber*, 94 Ill. App. 561, holding that property owners assessed for an improvement cannot prevent the city from abandoning the improvement.

95. But where the owner of property has suffered loss or damage by the wrongful acts or delay of the corporation in any such case, he is entitled to recover damages for the same. *Baltimore v. Musgrave*, 48 Md. 272, 30 Am. Rep. 458; *Black v. Baltimore*, 50 Md. 235, 33 Am. Rep. 320; *Baltimore v. Black*, 56 Md. 333.

Failure to comply with legal provisions, held to be an abandonment of proposed improvement on the part of the city. *Toledo v. Jacobson*, 11 Ohio Cir. Ct. Rep. 220, 5 Ohio Cir. Dec. 137.

A council resolution directing an attorney to apply in behalf of the city for a discontinuance of condemnation proceedings is binding only on the city when granted by the court. *Brady v. Atlantic City*, 53 N. J. Eq. 440, 32 Atl. 271.

Where a city drops all proceedings it may be assumed that it has abandoned the proposed improvement and when it abandons the same it cannot be prosecuted further by an individual. *Re*

§ 1848. Preliminary proceedings.

Prior to the formal ordering of the improvements (which is usually a legislative act, executed by ordinance or resolution) what preliminary proceedings, if any, are required, depends upon the local laws applicable and the nature of the proposed improvement. If the improvement involves the condemnation of private property, or the levying of special assessments or taxes against the property assumed to be benefited, strict adherence to all mandatory and jurisdictional provisions are rigidly enforced by the courts, and properly so.⁹⁶

Seventeenth St., 189 Mo. 245, 88 S. W. 45.

Where a municipal corporation desires to discontinue proceedings in court to open a highway, the court may impose other terms on such dismissal than the mere taxing of costs and disbursements. *Re White Plains*, 72 N. Y. S. 1026, 65 App. Div. 417.

Request to discontinue condemnation proceedings, denied. *Re Beekman St.*, 20 Johns. (N. Y.) 269.

When court authorized to quash street opening proceedings. *Appeal of Reyrner*, 91 Pa. St. 354; *Re Sandusky St.*, 165 Pa. 367, 30 Atl. 983.

Proceedings in laying out, opening and extending streets may be discontinued by court order subsequent to commissioner's report and prior to confirmation. *Re Canal St.*, 11 Wend. (N. Y.) 154.

Discontinuance of proceedings may be had at any time before the final confirmation of the report of the commissioners. *Re Anthony*, 20 Wend. (N. Y.) 618, 32 Am. Dec. 608.

On application of the city to discontinue the proceedings for laying out and widening streets, affidavits tending to show the injustice and impropriety of granting such application, held inadmissible. *Re Anthony*, 20 Wend. (N. Y.) 618, 32 Am. Dec. 608.

Order to discontinue street opening proceedings, held void in particular case. *People v. Brooklyn*, 22 Barb. (N. Y.) 404.

Where the law authorizing the opening and extension of a street and providing for the assessment of damages is repealed before the street is opened, all proceedings under it are thereby rendered void, and owners of land on the proposed extension are not entitled to recover compensation reported in their favor. *Hampton v. Commonwealth*, 19 Pa. (7 Harris) 329.

96. *Arkansas*. Improvement Dist. v. Cotter, 71 Ark. 556, 76 S. W. 552.

California. *Dougherty v. Hitchcock*, 35 Cal. 512; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435; *Burke v. Turney*, 54 Cal. 486; *Daly v. San Francisco*, 72 Cal. 154, 13 Pac. 321.

It is a general rule that when measures are authorized by statute or charter "in derogation of the common law, which may result in divesting the title of one person to land, and transferring it to another, that every requisite having the semblance of benefit to the owner must be strictly complied with."⁹⁷

Illinois. Chicago Union Tr. Co. v. Chicago, 209 Ill. 44, 70 N. E. 659; Walker v. Chicago, 202 Ill. 531, 67 N. E. 369.

Indiana. Case v. Johnson, 91 Ind. 477.

Kentucky. Owensboro v. Hope, 128 Ky. 524, 110 S. W. 272.

Massachusetts. Northampton v. Abell, 127 Mass. 507.

Missouri. Trenton v. Coyle, 107 Mo. 193, 17 S. W. 643; Saxton v. St. Joseph, 60 Mo. 153; Stewart v. Clinton, 79 Mo. 603; Werth v. Springfield, 78 Mo. 107; State ex rel. v. Barlow, 48 Mo. 17; State ex rel. v. St. Louis, 56 Mo. 277; Perkinson v. Partridge, 3 Mo. App. 60.

New Jersey. State v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052; State (Arnett) v. Lambertville (N. J. L., 1886), 6 Atl. 432.

New York. Pooley v. Buffalo, 122 N. Y. 592, 26 N. E. 16.

Oregon. Hawthorne v. East Portland, 13 Ore. 271, 10 Pac. 342.

97. Kneeland v. Milwaukee, 18 Wis. 411, 418. Per Dixon, C. J., Atkins v. Kinnan, 20 Wend. (N. Y.) 241.

Preliminary proceedings not required. Kelsey v. King, 32 Barb. (N. Y.) 410, 11 Abb. Pr. (N. Y.) 180; Pooley v. Buffalo, 122 N. Y. 592, 26 N. E. 16.

Directory provisions. McKune v. Weller, 11 Cal. 49, 54; Stein-

lein v. Halstead, 52 Wis. 289, 293, 8 N. W. 881.

A provision that the council "may, by ordinance," prescribe general rules "as to the material to be used and the mode of executing the work," held not mandatory. The council may obtain jurisdiction without observing the condition. Santa Cruz Rock Pavement Co. v. Heaton, 105 Cal. 162, 38 Pac. 693.

Maps and surveys of streets, etc., to be laid out, provisions as to, held directory in Coles v. Williamsburg, 10 Wend. (N. Y.) 659.

Plans. Failure to make proper plans, etc., and failure to let the contract to the lowest bidder are fatal. Wells v. Burnham, 20 Wis. 112.

Plans. § 1872 *post*.

Competitive bidding. § 1183 *et seq.*, *ante*, vol. 3.

Irregularities. Minor irregularities will not invalidate the special tax. Warner v. Knox, 50 Wis. 429, 7 N. W. 372.

Omissions which do not prejudice the tax payer. Houghton v. Burnham, 22 Wis. 301, 306.

Departure from ordinance in constructing sidewalk, held not material. Steffen v. Fox, 124 Mo. 630, 28 S. W. 70, 56 Mo. App. 9.

Statute providing that errors in the proceedings in the council shall not exempt from payment

The manner in which the proceedings shall be instituted and conducted is generally specifically provided by charter or statute. Laws sometimes provide a complete scheme for the construction of specified public improvements.⁹⁸ Where there are two acts prescribing modes of procedure they will be construed as allowing more than one way, unless repugnant to each other.⁹⁹

Some charters require certain preliminary steps, as for example, *notice* (usually by advertisement) to the property owners interested in the contemplated improvement;¹ petition or consent of property owners to be affected;² establishment of benefit, assessment or taxing

after the work has been done. *Broadway Baptist Church v. McAttee*, 8 Bush. (Ky.) 508.

"Informality, irregularity or defect," enabling it to recover for improvement for sidewalk, means error or omission to do something which in no manner affects the jurisdiction of the city to build the walk. Where a resolution providing therefor is repealed, city has no jurisdiction. *Chariton v. Holliday*, 60 Iowa 391, 14 N. W. 775.

Irregularities in council proceedings in ordering improvement may be corrected by the court, so that no one's property may be improved at the general expense of the city when in equity he should himself pay for the same. *Covington v. Dressman*, 6 Bush. (Ky.) 210.

Estoppel. *Argenti v. San Francisco*, 16 Cal. 255. Too late to object to preliminary proceedings where the land owners with notice of such proceedings have failed to object until after the work is completed and paid for by the city.

State (Youngster) v. Paterson, 40 N. J. L. 244.

See § 2011 *post*.

Presumption that law was observed. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

98. *Gage v. Chicago*, 203 Ill. 26, 67 N. E. 477.

99. *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Ryan v. Boston*, 118 Mass. 248; *Roth v. Forsee*, 107 Mo. App. 471, 81 S. W. 913; *Re Brooklyn*, 73 N. Y. 179.

Statutes are not to be unreasonably extended by construction. *Taber v. New Bedford*, 135 Mass. 162; *Re Forty-second St.*, 11 Phila. (Pa.) 437.

An act relating to public buildings, etc., "making public improvements," does not relate to establishing streets. *Baldwin v. Bangor*, 36 Me. 518.

Nor does one relating to paving streets include construction of sewers. *Atchison v. Price*, 45 Kan. 296, 25 Pac. 605.

1. § 1849 *et seq.*, *post*.

2. § 1856 *post*.

districts;³ preliminary order, resolution or ordinance;⁴ deciding the mode of paying for the work;⁵ estimating the cost;⁶ *public hearing* before certain municipal officers, committees or boards, as the board of public works or improvements;⁷ receiving and determining protests or remonstrances;⁸ recommendation of proposed ordinance by a designated officer, board or department.⁹ These and like requirements are regarded as *conditions precedent* to final action touching the improvement, since they are jurisdictional in their nature and non-compliance with them precludes the municipal authorities from proceeding,¹⁰ as will abundantly appear from the sections which follow.

§ 1849. Notice of proposed improvement.

It is frequently required by statutory or constitutional provision that notice shall be given the property owners to be affected of the proposed improvement so that they may have an opportunity to appear before the proper authorities and make known their views, and if desired, to protest against making such improvement. It is generally held that unless such requirements are observed the future proceedings relative thereto are invalid at least so far as assessing such property is concerned.¹¹

3. See chapter 38 *post*.
4. § 1870 *post*.
5. § 1863 *post*.
6. § 1866 *post*.
7. § 1859 *post*.
8. § 1860 *post*.
9. § 1881 *post*.
10. § 676 *ante*, vol. 2.
11. *California*. Charter San Francisco, art. VI, ch. 2, §§ 3 and 4; statutes and amendments to Codes of California (1898), pp. 293, 294; *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266; *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023; *City Street Imp. Co. v. Taylor*, 138 Cal. 364, 71 Pac. 446.
- Colorado*. *Brown v. Denver*, 7 Col. 305, 3 Pac. 455; *Dunars v. Denver*, 16 Colo. App. 375, 65 Pac. 580.
- Connecticut*. *Peck v. Bridgeport*, 75 Conn. 417, 53 Atl. 893.
- Illinois*. *Field v. Chicago*, 198 Ill. 224, 64 N. E. 840; *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217; *Gage v. Chicago*, 201 Ill. 93, 66 N. E. 374.
- Indiana*. *Barber A. P. Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436; *Swain v. Fulmer*, 135 Ind. 8, 34 N. E. 639; *Kiphart v. Pittsburgh C. C. & St. L. Ry. Co.*, 7 Ind. App. 122, 34 N. E. 375.

Sometimes notice is not required as where the law does not so provide, or where the expense of the proposed

Iowa. Roche v. Dubuque, 42 Ia. 250.

Kentucky. Chesapeake, etc. R. Co. v. Mullins, 94 Ky. 355, 22 S. W. 558.

Louisiana. Second Municipality v. Botts, 8 Rob. (La.) 198; Fays-soux v. De Chourand, 36 La. Ann. 547.

Maryland. Baltimore v. Scharf, 54 Md. 499; Baltimore v. Grand Lodge, 44 Md. 436.

Massachusetts. Stone v. Boston, 43 Mass. (2 Met.) 220.

Michigan. Kunderling v. Sagi-naw, 59 Mich. 355, 26 N. W. 634; Osborne v. Detroit, 32 Mich. 282; Mills v. Detroit, 95 Mich. 422, 54 N. W. 897; Appeal of Powers, 29 Mich. 504.

Mississippi. Jackson v. Wil-liams, 92 Miss. 301, 46 So. 551.

Nebraska. Portsmouth Savings Bank v. Omaha, 67 Neb. 50, 93 N. W. 231.

New Jersey. State (Vanatta) v. Morristown, 34 N. J. L. 445, 452; Beam v. Paterson, 47 N. J. L. 15; State v. Jersey City, 27 N. J. L. 536; State v. Jersey City, 35 N. J. L. 404, 408; State v. Newark, 31 N. J. L. 360; Cook v. Chambers-burg Borough, 39 N. J. L. 257; Stretch v. Hoboken, 47 N. J. L. 268; Brinkley v. Perth Amboy, 29 N. J. L. 259; State v. Long Branch Com'rs, 54 N. J. L. 434, 24 Atl. 368; Ackerman v. Nutley, 70 N. J. L. 438, 57 Atl. 150; Sears v. Atlantic City, 72 N. J. L. 435, 60 Atl. 1093, aff'd 73 N. J. L. 710, 64 Atl. 1062; Bye v. Atlantic City, 73 N. J. L. 402, 64 Atl. 1056.

New York. People ex rel. v. Rochester, 5 Lans. (N. Y.) 11; In re Central Park Com'rs, 51 Barb. (N. Y.) 277; In re Anderson, 60 N. Y. 457; People v. Whitney's Point, 32 Hun (N. Y.) 508; Re Little, 60 N. Y. 343, rev'g 3 Hun 215; Re Douglass, 9 Abb. Pr. (N. S.) (N. Y.) 84; Hyland v. Ossin-ing, 107 N. Y. S. 225, 57 Misc. 212.

Pennsylvania. Re Wilbur St., 8 Pa. Co. Ct. 477; Large v. Philadel-phia, 3 Phila. (Pa.) 382; Tyler v. Brown, 1 Pittsb. R. 225; Re Alley, 42 Leg. Int. (Pa.) 6; Hammel v. Morrisville, 3 Pa. Co. Ct. 185.

Wisconsin. State v. Fon du Lac, 42 Wis. 287.

Notice is jurisdictional. Joyce v. Barron, 67 Ohio St. 264, 65 N. E. 1001.

There can be no assessment without the required notice. Weeks v. Middletown, 107 N. Y. App. Div. 587, 95 N. Y. S. 352.

Property owner cannot be as-sessed if he has not had notice, unless he has waived his right to a hearing. Walsh v. Newark, 78 N. J. L. 168, 71 Atl. 39.

An omission to give personal notice where twenty days' written notice of a resolution declaring the necessity of the improvement was required, held not a jurisdictional defect. Green v. Cincinnati, 7 Ohio Cir. Ct. Rep. 233.

Other land cannot be taken than that described as required for the improvement in the notice to land owners. Re Central Park Com'rs, 51 Barb. (N. Y.) 277.

improvement is paid for out of the municipal revenue, and not by the levy of a special assessment or tax on the property benefited.¹²

Where a proper municipal body, after sufficient notice, voted an improvement of a street, but such vote was afterwards rescinded, the matter reconsidered, and without notice the improvement was extended by vote, an assessment for such improvement is held void. *Angus v. Hartford*, 74 Conn. 27, 49 Atl. 192.

See §§ 612 and 613 *ante*, vol. 2.

12. Notice need not be provided. *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230; *Hawley v. Harrall*, 19 Conn. 142.

Notice held not a jurisdictional fact. *Toledo v. McMahon*, 9 Ohio Cir. Ct. Rep. 194; *Bolton v. Cleveland*, 35 Ohio St. 319; *Finnell v. Kates*, 19 Ohio St. 405; *Kirby v. Winton Place*, 2 Ohio Dec. 171. But see, *Anderson v. Cincinnati*, 10 Ohio Dec. 794, 23 Wkly. L. Bul. 430, holding that notice is jurisdictional to proceeding to open, widen or extend a street.

See *Pittsburg, etc. R. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454; *Willard v. Albertson*, 23 Ind. App. 164, 53 N. E. 1077, modified 23 Ind. App. 164, 54 N. E. 403; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071; *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397; *Same*, 19 Ind. App. 26, 48 N. E. 1042.

Notice not necessary to lay out a sewer. *Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908.

If no notice is required none need be given. *Re Zborowski*, 68 N. Y. 88; *Clark v. Lyon*, 68 N. Y. 609; *Denver v. Campbell*, 33 Colo.

162, 80 Pac. 142; *Marsh v. Oregon*, 105 Mo. 226, 16 S. W. 896; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230.

It is not necessary that an interested party be given an opportunity to be present at the adoption of an order providing for the opening of a street on a certain day where it had already been laid out and established. *Hawley v. Harrall*, 19 Conn. 142.

Statute requiring notice construed. *Re Ludlow St.*, 68 N. Y. S. 1046, 59 App. Div. 180, aff'd 172 N. Y. 542, 65 N. E. 494; *Marsh v. Oregon*, 105 Mo. 226, 16 S. W. 896.

Under proper power streets and alleys may be vacated simply by the passage of an ordinance, without notice to abutting owners. *Dempsey v. Burlington*, 66 Iowa 687, 24 N. W. 508.

Notice not necessary to build sidewalk. *Highland v. Galveston*, 54 Tex. 527. Same as to street improvements. *Connor v. Paris*, 87 Tex. 32, 27 S. W. 88.

Certain act requiring notice held directory only. *Huntingdon Borough v. Foster*, 14 Pa. Co. Ct. 292. See also, *Oil City v. Lay*, 164 Pa. St. 370, 30 Atl. 289.

Under statute authorizing the improvement of streets and issuance of bonds therefor upon petition of abutting property owners, no notice is necessary. *Jones v. Seattle*, 19 Wash. 669, 53 Pac. 1105.

It is the authority to collect from the property owner for the

§ 1850. Form, requisites and validity of notice.

The notice required to be given of an intention to make an improvement should conform to the requirements of the particular statute or charter provision under which the improvement is to be made at least in substance.¹³

Improvement that depends upon notice; no notice is required of an intention to make an improvement at public expense. *State v. Elizabeth*, 51 N. J. L. 246, 17 Atl. 91; *Fritts v. Board of Com'rs*, 7 N. J. Law J. 90.

An ordinance providing for notice when none is required is not thereby rendered invalid. *Hoover v. People*, 171 Ill. 182, 49 N. E. 367.

Notice is necessary when repairs are to be made if the cost is to be charged against adjacent property. *Cook v. Portland*, 35 Ore. 383, 58 Pac. 353.

13. *Clark v. Elizabeth*, 32 N. J. L. 357.

See chapter 38 *post*, vol. 5.

Sufficiency of Notice. A municipal ordinance directing that a street be improved and the cost assessed against property benefited thereby is judicial in nature, and is invalid unless notice and an opportunity to be heard was given the owners of such property. *Sears v. Atlantic City*, 72 N. J. L. 435, 60 Atl. 1093, *aff'd* 73 N. J. L. 710, 64 Atl. 1062.

Under a charter requirement that a published notice shall contain a copy of the resolution specifying the kind of improvement to be made, and designating the street to be improved, and a general description sufficient for the identification of the property to

be charged with the improvement, it was held that the notice should contain a literal copy of the resolution, describe the portion of the street to be improved, and also give the numbers of the lots to be charged. *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441.

A notice which designates the portion of a street to be paved and macadamized and stating that it shall be known as "paving Dist. No. 2," and giving its boundaries, is sufficient. *Armstrong v. Ogden City*, 9 Utah 255, 34 Pac. 53.

Notice need not state terms of the proposed ordinance relative to material, grade, etc. *Gist v. Rackliffe*, etc. Const. Co., 224 Mo. 369, 123 S. W. 921.

Where notice of the proposed improvement was required to be posted, and headed in letters of not less than an inch in length, notice with heading printed in letters of $\frac{3}{4}$ inch type does not confer jurisdiction on the authorities to make the improvement. *Bank of British Columbia v. Portland*, 41 Ore. 1, 67 Pac. 1112.

Notices held insufficient. *Specht v. Detroit*, 20 Mich. 168; *Lyman v. Cicero*, 222 Ill. 379, 78 N. E. 830.

Statutory requirements construed. *Gage v. Chicago*, 201 Ill. 93, 66 N. E. 374; *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369; *East St. Louis v. Davis*, 233 Ill.

It should be reasonably sufficient to inform property owners of the nature and extent of the contemplated improvement and the property chargeable with the cost thereof, and should state the *time and place of hearing* that interested parties may be given ample opportunity to appear and make objections if desired.¹⁴ A notice stating that an ordinance has been introduced in the council without stating the time when it will be considered, has been held defective.¹⁵

553, 84 N. E. 674; *Nixon v. Burlington*, 141 Ia. 316, 115 N. W. 239.

Notice held to be sufficient.

California. *German Savings, etc. Socy. v. Ramish*, 138 Cal. 120, 69 Pac. 89, aff'd 138 Cal. 120, 70 Pac. 1067; *King v. Lamb*, 117 Cal. 401, 49 Pac. 561; *Perine v. Erzgraber*, 102 Cal. 234, 36 Pac. 585; *Schmidt v. Market St. etc. R. Co.*, 90 Cal. 37, 27 Pac. 61.

Colorado. *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107.

Idaho. *McGilvery v. Lewiston*, 13 Idaho 338, 90 Pac. 348.

Illinois. *Lamphere v. Chicago*, 212 Ill. 440, 72 N. E. 426; *Carbondale v. Walker*, 240 Ill. 18, 88 N. E. 296.

Maine. *Dorman v. Lewiston*, 81 Me. 411, 17 Atl. 316; *Jones v. Portland*, 57 Me. 42; *Preble v. Portland*, 45 Me. 241.

Maryland. *Baltimore v. Boul-
din*, 28 Md. 328.

Minnesota. *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175.

Missouri. *Walsh v. First National Bank*, 139 Mo. App. 641, 123 S. W. 1001.

New Jersey. *Woodruff v. Orange*, 32 N. J. L. 49; *Peters v. Newark*, 31 N. J. L. 360; *Malone v. Jersey City*, 28 N. J. L. 500.

Ohio. *Canton v. Wagner*, 54 Ohio St. 329, 45 N. E. 953.

Ordinance held sufficient notice. *Schrum v. Salem*, 13 Ind. App. 115, 39 N. E. 1050.

It is within the power of the legislature to prescribe the kind of notice and how it shall be given. *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144.

Proceedings for making an improvement upheld though one notice required was not given. *Spaulding v. Baxter*, 25 Ind. App. 485, 58 N. E. 551.

Notice insufficient in that it was not accompanied by a copy of the resolution, as required. *Burget v. Greenfield*, 120 Ia. 432, 94 N. W. 933.

Notice of hearing before commissioners to assess benefits after the completion of the improvement is not sufficient. *Sears v. Atlantic City*, 72 N. J. L. 435, 60 Atl. 1093, aff'd 73 N. J. L. 710, 64 Atl. 1062.

Notice containing clerical error upheld in particular instance. *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022.

14. *Brinley v. Perth Amboy*, 29 N. J. L. 259.

15. *Boice v. Plainfield*, 38 N. J. L. 95.

§ 1851. Same—description of improvement.

While the judicial decisions differ somewhat concerning certain details in the description of the proposed improvement, resulting from construction of laws more or less variant¹⁶ they are reasonably uniform in sus-

16. **Description in notice.** Improvement limited to street named in notice. *Stephenson v. Salem*, 14 Ind. App. 386, 42 N. E. 44.

Opening street. *Owen v. Chicago*, 53 Ill. 95.

Language of notice confusing. *Woodruff v. Orange*, 32 N. J. L. 49.

Notice, held defective in description of extent, under particular charter. *In re Orange St.*, 50 How. Pr. (N. Y.) 244.

Failure to describe extent of proposed sewer renders notice bad. *White v. Harris*, 116 Cal. 470, 48 Pac. 382.

In case of sewer improvement size of sewer should be stated, and a statement that it is to be "of various diameters" is not sufficient. *Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306.

Failure to describe place to be improved with sidewalk with reasonable clearness and strictness, will relieve the property from the assessment. *City v. Blymyer Mfg. Co.*, 7 Wkly. L. Bul. (Ohio) 30.

Where the extent of the improvement was changed at a hearing held in pursuance of notice given, the meeting postponed but no new notice given, the proceedings, held invalid. *Shaffner v. St. Louis*, 31 Mo. 264.

Postponing notices of different

improvements. *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023.

Gutters are included in a notice to pave a street—being part of the roadway. *City Street Imp. Co. v. Taylor*, 138 Cal. 364, 71 Pac. 446.

Where the notice states the intention to be to lay curbs where not already laid on a specified street, no assessment can be made on abutting property to pay cost of removing curbs and replacing same with new. *City Street Imp. Co. v. Taylor*, 138 Cal. 364, 71 Pac. 446.

A notice stating that the reconstruction of a street shall be made with "asphaltum" without stating what kind of asphaltum, is sufficient. *Verdin v. St. Louis* (Mo., 1894), 27 S. W. 447; *Verdin v. St. Louis*, 131 Mo. 26 33 S. W. 480.

The notice must show the substance of the ordinance. *State v. Long Branch Com'rs*, 54 N. J. L. 484, 24 Atl. 368.

Notice need not state terms of ordinance as to grade, material, etc., under particular statute. *Gist v. Rackliffe, etc. Const. Co.*, 224 Mo. 369, 123 S. W. 921.

Notice, held sufficient. *Delaware, etc. Canal Co. v. Buffalo*, 167 N. Y. 589, 60 N. E. 1119.

Proceedings held invalid—not sufficient notice. *East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674.

taining the sound and salutary proposition that the improvement should be described in such a manner that an interested property owner may judge with reasonable certainty the effect it will have on his property. Obviously property owners who will have to pay the cost of the improvement, or else have their property sold to satisfy the same, should be apprised in the notice of the character and extent of the improvement.¹⁷ The notice may refer to plans and specifications, describing them, and stating where they can be seen.¹⁸

§ 1852. Same—who entitled to notice.

What persons are entitled to notice is to be ascertained from the provisions of the controlling law and the circumstances of the particular case. The notice should be given in the manner and to the persons specified in the law¹⁹ who are usually the owners of the property to be taken or which must bear the expense of the improvement.²⁰

Notices, held defective in particular instances. *Ladd v. Spencer*, 23 Ore. 193, 31 Pac. 474; *Re Mt. Pleasant Ave.*, 10 R. I. 320.

See chapter 38 *post*, vol. 5.

17. *Hawthorne v. East Portland*, 13 Ore. 271, 10 Pac. 342; *Cincinnati v. Carry*, 10 Ohio Dec. 783, 23 Wkly. L. Bul. 359.

18. *Clinton v. Portland*, 26 Ore. 410, 38 Pac. 407.

See § 1886 *post*.

Notice may refer to specifications on file with a board, or a named officer, for a description of material. *Swift v. St. Louis*, 180 Mo. 80, 79 S. W. 172.

Reference to specifications on file with city clerk—notice, held sufficient. *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107.

See § 1886 *post*.

19. *Zalesky v. Cedar Rapids*, 118 Ia. 714, 92 N. W. 657.

See chapter 38 *post*, vol. 5.

Notice to be accompanied by a copy of the resolution. *Burget v. Greenfield*, 120 Ia. 432, 94 N. W. 933.

20. Notice to be given to those property owners who will be liable for the cost of the improvement as well as to those whose land is taken. *Paul v. Detroit*, 32 Mich. 108.

In proceedings to open a street, notice to those whose land will be taken will not amount to notice to an interested property owner whose land does not adjoin the street. *Kidder v. Peoria*, 29 Ill. 77.

Where notice is required by statute to be served on owner of property, and by another section

§ 1853. Same—time.

The time within which the notice is to be given named in the law, of course, must be observed.²¹ If no time

it is required to serve notice on the husband where the owner is a married woman, notice is required to be served on both husband and wife, otherwise the wife's property might be taken without notice to her. *Lebanon v. Avritt*, 15 Ky. L. Rep. 494.

Where notice was required to be given to the person who paid the general taxes on the property in question for "the last preceding year," notice served in May, 1900, on payer of taxes in 1898 was properly served, although taxes for 1899 became a lien before notice was served. *Field v. Chicago*, 198 Ill. 224, 64 N. E. 840.

One owning a fractional part of the lot involved served with notice is liable for his proportional part of the cost of the improvement although he was served as sole owner and the other owners were not served with notice. *Louisiana v. McAllister*, 104 Mo. App. 152, 78 S. W. 314.

Notice, held sufficient as being served on the "owner" of the property. *Johnson v. Cincinnati*, 30 Ohio Cir. Ct. Rep. 644.

Notice to a lessee. *Clemmer v. Cincinnati*, 28 Ohio Cir. Ct. Rep. 89.

Executors, held proper persons to receive notice in particular case. *Roberts v. St. Bernard*, 29 Ohio Cir. Ct. Rep. 725.

Notice to an administrator is not notice to heirs. *Boonville v. Ormrod*, 26 Mo. 193.

Where property was devised to the executrix for life, notice to her bound her both in a representative and an individual capacity. *Peck v. Bridgeport*, 75 Conn. 417, 53 Atl. 893.

No notice to remaindermen in particular instance. *Peck v. Bridgeport*, 75 Conn. 417, 53 Atl. 893.

21. A publication for ten days as law specified, was held sufficient though it was not for the ten days designated by the order of the proper board. *Chambers v. Satterlee*, 40 Cal. 497.

And where it is provided that if one-third in value of the property owners affected appear within ten days after last publication and protest, the improvement shall not be made, an ordinance passed within such ten days is valid if no protest is made within the ten days and the improvement not commenced until the expiration of such time. *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518.

Where notice of a resolution of a council passed Dec. 7, 1885, was served March 26, 1886, held not a compliance with a statute requiring it to be served "immediately." *Fulton v. Dover*, 8 Houst. (Del.) 78, 6 Atl. 633.

Seventeen days' notice held insufficient under law requiring thirty days' notice. *Washington v. Nashville*, 31 Tenn. (1 Swan) 177.

Notice published once a week for two weeks is insufficient under

is specified the period is said to be discretionary with the proper municipal authorities; however, it should be reasonable.²² The ordinary rules of law relating to the method of computing time are applicable.

§ 1854. Same—manner of giving.

The notice must be given in the manner prescribed by the law,²³ whether by personal service, actual or by copy,²⁴

law requiring two weeks' notice unless the meeting is held two weeks after the first publication. *Auditor General v. Calkins*, 136 Mich. 1, 98 N. W. 742, 10 Det. Leg. N. 980.

Where statute requires notice of five days to be given, one of six days is good. *Gage v. Chicago*, 196 Ill. 512, 63 N. E. 1031.

Six days' notice, held sufficient. *Field v. Chicago*, 198 Ill. 224, 64 N. E. 840.

Five days, held sufficient. *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217.

No notice of adjourned meetings need be given. *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217.

Where return of service of notice is required to be made six days prior to that on which the hearing is to be held, the return must be made six clear days before, otherwise notice is invalid. *Appeal of Powers*, 29 Mich. 504.

Statute construed. *Astor v. New York*, 37 N. Y. Super. Ct. (5 Jones & S.) 539.

Charter requirements construed. *Milner v. Trenton*, 66 N. J. L. 150, 48 Atl. 531.

Notice upheld. *California Imp. Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802.

See chapter 38 *post*, vol. 5.

22. Length of notice discretionary with board. *Dyker Meadow Land, etc. Co. v. Cook*, 38 N. Y. S. 222, 3 App. Div. 164.

Statute requiring service of notice, held to afford reasonable notice to property owner. *Cleney v. Norwood*, 137 Fed. 962.

23. *California*. *King v. Lamb*, 117 Cal. 401, 49 Pac. 561.

Massachusetts. *Hildreth v. Lowell*, 77 Mass. (1 Gray) 345.

Missouri. *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513.

New York. *Loomis v. Little Falls*, 72 N. Y. S. 774, 66 App. Div. 299, *aff'd* 176 N. Y. 31, 68 N. E. 105.

Pennsylvania. *Darlington v. Com.*, 41 Pa. (5 Wright) 68.

Where council is required to give notice, it may be given by the street commissioner. *Hand v. Elizabeth*, 31 N. J. L. 547.

See chapter 38 *post*, vol. 5.

24. Mode of giving notice. Where giving of notice by publication (as authorized) is not made the exclusive mode, personal notice will be sufficient. *Peck v. Bridgeport*, 75 Conn. 417, 53 Atl. 893.

Charter, held to require notice by publication and also personal service on property owners. *Appeal of Powers*, 29 Mich. 504.

by posting,²⁵ or by publication²⁶ in the form,

Where there is no provision for constructive notice, reasonable actual notice must be given. *Locker v. South Amboy Borough*, 62 N. J. L. 197, 40 Atl. 637; *Landis v. Vineland Borough*, 60 N. J. L. 264, 37 Atl. 625.

Where notice is required to be personally served or by leaving it at owner's residence, notice left on table in owner's office during his absence is insufficient. *Mills v. Detroit*, 95 Mich. 422, 54 N. W. 897.

Where the charter provision is for constructive notice by publication, a property owner is not entitled to personal notice. *Boice v. Plainfield*, 38 N. J. L. 95.

25. Posting notice. Statute requiring posting of notices construed. *Pepper v. Neiman*, 4 Cal. App. 55, 87 Pac. 286.

Acts relative to publishing and posting of notices construed. *Gill v. Dunham*, 99 Cal. XVII, 34 Pac. 68; *Washburn v. Lyons*, 97 Cal. 314, 32 Pac. 310.

Act requiring posting of notices along line of contemplated street improvement construed. *Sacramento Pav. Co. v. Anderson*, 1 Cal. App. 672, 82 Pac. 1069; *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364.

Under a requirement that notice be posted along the line of a street improvement after it has been posted on council chamber door two days, a posting along the line of improvement on the eighth day of a month when the notice was posted on council chamber door on the sixth, held proper. *Greenwood*

v. Hassett, 128 Cal. XVIII, 61 Pac. 173.

26. *California*. *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, modified 128 Cal. 236, 60 Pac. 772; *California Imp. Co. v. Reynolds*, 133 Cal. 88, 55 Pac. 802; *Mulberry v. O'Dea*, 4 Cal. App. 385, 88 Pac. 367.

Illinois. *Dickey v. Chicago*, 152 Ill. 468, 38 N. E. 932.

Indiana. *Swain v. Fulmer*, 135 Ind. 8, 34 N. E. 639.

Minnesota. *State v. District Court*, 33 Minn. 235, 22 N. W. 625; *Id.*, 33 Minn. 252, 22 N. W. 632.

New Jersey. *Locker v. South Amboy Borough*, 62 N. J. L. 197, 40 Atl. 637.

New York. *In re Agnew*, 4 Hun 435; *Re Douglass*, 9 Abb. Pr. (N. S.) 84.

Oregon. *Bank of British Columbia v. Portland*, 41 Ore. 1, 67 Pac. 1112.

Pennsylvania. *Re Womelsdorf Alley*, 8 Pa. Co. Ct. 207.

Publication. Statute requiring notice by publication must be strictly observed. *Gurley v. New Orleans*, 124 La. 390, 50 So. 411.

Power to amend notice by one directed to have same published. *Ladd v. Spencer*, 23 Ore. 193, 31 Pac. 474.

Designation of newspaper by council. *Appeal of Powers*, 29 Mich. 504.

Designation of newspaper is jurisdictional. *Chase v. Los Angeles*, 122 Cal. 540, 55 Pac. 414.

Notice required to be printed in German paper must be printed in German, not in English. *State*

language, newspaper, within the period, the number of

v. Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

Where statute required notice to be published in at least two daily papers, publication in two papers, one of which was a German paper, is not sufficient. *Wannenwetsch v. Baltimore*, 117 Md. 32, 73 Atl. 701.

Appearance in early edition only, held good. *Guest v. Brooklyn*, 9 Hun (N. Y.) 198.

Mere change in name of newspaper pending publication of notice does not affect its validity. *Clinton v. Portland*, 26 Ore. 410, 38 Pac. 407.

The fact that in some issues of a paper the publication of a notice appeared in the supplement to the paper, does not affect its validity. *Lent v. Tillson*, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419, aff'g 72 Cal. 404, 14 Pac. 71.

Where it is provided that fifteen days shall expire after posting of notice before the work shall be done, the work may be commenced after fifteen days from first posting of the notice. *Oakland Bank of Savings v. Sullivan*, 107 Cal. 428, 40 Pac. 546.

Frequency of publication. *Mills v. Detroit*, 95 Mich. 422, 54 N. W. 897; *Re Bassford*, 63 Barb. (N. Y.) 161, aff'd 50 N. Y. 509.

Publication for two consecutive weeks, but for only thirteen days, held sufficient. *Trenton v. Collier*, 68 Mo. App. 483.

A requirement that notice be published by two insertions in one or more daily papers, notice in a daily paper on Saturday and Sun-

day, held sufficient. *Smith v. Hazard*, 110 Cal. 145, 42 Pac. 465.

Requirement that notice be published daily for ten days, Sundays excepted, is not complied with by publication for eight days, no paper being published the other two days, and the notice is void. *Haskell v. Bartlett*, 34 Cal. 281.

Notice required to be published in a daily newspaper, nothing further provided—publication in paper published all days in week except Monday, and printed in German—the notice was printed in English—was sufficient. *Richardson v. Tobin*, 45 Cal. 30.

It will be inferred from a requirement of — days' notice that more than one day is required. *Olds v. Erie City*, 79 Pa. (29 P. F. Smith) 380.

Act requiring five days' publication of notice of improvement before passage of ordinance means before the ordinance's passage, not necessarily before its introduction. *Merrifield v. Scranton*, 5 Pa. Co. Ct. 388.

Sixty days' notice by publication in paper of the application for the passage of an improvement ordinance requires in terms but one publication. *Central Sav. Bank v. Baltimore*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283.

And under such requirement it is sufficient that sixty days elapsed after publication of such notice and before the passage of the ordinance. *Baltimore v. Little Sisters of the Poor*, 56 Md. 400.

Publication on alternative days, failure does not render void. *Gil-*

times and the days or weeks—whether alternate or consecutive—required.

§ 1855. Same—return of service or proof of publication.

Ordinarily it is required that the *return of service should state facts* showing that the law was observed as to the time and manner of service and the persons served.²⁷ However, minor defects or errors in the return and manner of service are properly disregarded.²⁸ Frequently parol evidence will be received to supply omissions or cure defects.²⁹ The law is liberal in permitting amendments of incomplete or defective returns. *Deputies* are usually authorized to act for their principals in the serving or posting of notices.³⁰

§ 1856. Petition or consent of property owners affected.

Under many charters, where the cost of the improvement is to be paid for by special assessments or taxation against private property, the consent of the property owners whose property must bear the burden is required as a condition precedent to proceed with the

more v. Utica, 60 Hun 618, 15 N. Y. S. 274, aff'd 131 N. Y. 26, 29 N. E. 841.

27. A statement by the officer securing the service of his conclusion that service was had in the required manner is not a sufficient return. Thus a return stating that "personal" service was had on certain named persons is insufficient because it is uncertain whether his idea of personal service is the same as the law requires. *State v. St. Louis*, 1 Mo. App. 503.

See chapter 38 *post*, vol. 5.

28. Where notice was required to be served on abutting property owners, held sufficient if notice was in fact served upon them, *ra*

ardless of any defects in the returns or of the absence of a return. *Dyer v. Wood*, 166 Ind. 44, 76 N. E. 624.

29. Defective proof of publication supplied by parol. *Clinton v. Portland*, 26 Ore. 410, 38 Pac. 407.

30. Where the charter provides for the posting of notices by the city engineer and also provides for deputy engineers clothed with authority of the engineer, the posting may be by a deputy who may make affidavit of such posting, and he may amend such affidavit after making the same. *Bank of British Columbia v. Portland*, 41 Ore. 1, 67 Pac. 1112.

See § 426 *ante*, vol. 2.

contemplated improvements.³¹ This is usually evidenced by petition, signed by the requisite number of land owners whose property fronts on the proposed improvement, or those whose property is in the assessment or taxing district.³² In construing particular laws many

31. Consent of property owners required. *Philadelphia v. Lewis*, 5 Phila. (Pa.) 577.

A provision that unless two-thirds of the persons assessed for municipal improvements shall file their dissent the assessment shall be binding and conclusive, held valid against the contention that the power vested in the property owners was judicial. Such power may be properly vested in the property owners. *Wilson v. Trenton*, 55 N. J. L. (26 Vroom.) 220, 26 Atl. 83.

The grade of a street may be altered with the assent of two-thirds of the abutting owners. Under such law any alteration or interference with the grade without such assent is a trespass. *Mott v. New York*, 2 Hilt (N. Y.) 358.

In the absence of legal provisions the consent of abutters to a change of grade need not be in writing. *Stretch v. Hoboken*, 47 N. J. L. (18 Vroom.) 268.

Where charter provides that street may be improved and paid for by local assessment upon petition of majority of property owners, and that, when necessary, may be improved without petition, the power of the council to determine when public necessity demanded the improvement of a street is final unless exercised arbitrarily or fraudulently. *Diamond v. Mankato*, 89 Minn. 48, 53 N. W. 911, 61 L. R. A. 448.

32. Consent of property owners or petition, required.

Arkansas. *Craig v. Board of Improvement*, 84 Ark. 390, 105 S. W. 867.

California. *Mulligan v. Smith*, 59 Cal. 206; *Dyer v. Miller*, 58 Cal. 585; *Gatley v. Leviston*, 63 Cal. 365.

Illinois. *Chicago v. Larned*, 204 Ill. 390, 67 N. E. 789.

Indiana. *Daly v. Higman*, 43 Ind. App. 357, 87 N. E. 669; *Case v. Johnson*, 91 Ind. 477; *Covington v. Nelson*, 35 Ind. 532.

Maine. *Googin v. Lewiston*, 103 Me. 119, 68 Atl. 694.

Minnesota. *State v. District Court*, 89 Minn. 292, 94 N. W. 870.

Missouri. *Platte City v. Paxton*, 141 Mo. App. 175, 124 S. W. 531.

Nebraska. *Jones v. South Omaha* (Neb., 1902), 94 N. W. 957.

New York. *People v. Rochester*, 21 Barb. (N. Y.) 656; *Re Banta*, 60 N. Y. 165; *Donovan v. Oswego*, 86 N. Y. S. 155, 90 App. Div. 397, rev'g 39 Misc. Rep. 291, 79 N. Y. S. 562.

Ohio. *Whipple v. Toledo*, 29 Ohio Cir. Ct. Rep. 42.

Wisconsin. *Loewenbach v. Milwaukee*, 139 Wis. 49, 119 N. W. 388.

United States. *Liebman v. San Francisco*, 24 Fed. 705.

Petition of property owners. A charter provision requiring a peti-

courts have held that the petition is essential to confer jurisdiction, and that the costs of an improvement or-

tion of a majority of property owners to authorize the improvement, held not repealed by an amended charter authorizing the council to ordain improvements by a vote of two-thirds of the council without petition. The two modes are not repugnant and therefore the law does not repeal the former by implication. *Erie v. Bootz*, 72 Pa. St. 196.

Petition. *State (Ogden) v. Hudson*, 29 N. J. L. 104; *Corry v. Gaynor*, 22 Ohio St. 584; *Anderson v. Hamilton County Com'rs*, 12 Ohio St. 635.

Petition and notice. *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

Power of borough to order street improvement upon petition of property owners. *Marcoz v. Wilmerding Borough*, 37 Pa. Super. Ct. 185.

Contract for improvement without petition, held void. *Sleeper v. Bullen*, 6 Kan. 300.

A resolution ordering macadamizing embraced grading also, held that a contract let thereunder was not invalid under a charter forbidding that grading be done without a petition of the property owners. *Gafney v. San Francisco*, 72 Cal. 146, 13 Pac. 467.

Council may be compelled to act on petition of property owners for improvement. *Appeal of Johnson*, 75 Pa. St. 96.

A recital in the ordinance that a majority of the property owners had petitioned for the improve-

ment is *prima facie* evidence that the petition exists. *Farrell v. West Chicago*, 181 U. S. 404, 21 Sup. Ct. 609, 45 L. Ed. 924.

Municipal authorities, held to have no power to improve more or less of a street than prayed for in petition. *Minor v. Hamilton*, 20 Ohio Cir. Ct. Rep. 4, 11 Ohio Cir. Dec. 16.

Board of aldermen held, under statute, to have authority to grant part of sidewalks asked for in a petition and refuse others. *Marshall v. Rainey*, 78 Mo. App. 416.

Street improvements, required.

Indiana. *Shrum v. Salem*, 13 Ind. App. 115, 39 N. E. 1050; approving *Allen v. Salem*, 10 Ind. App. 650, 38 N. E. 425.

Minnesota. *Bradley v. West Duluth*, 45 Minn. 4, 47 N. W. 166.

Nebraska. *Omaha v. Gsanter*, 4 Neb. 52, 93 N. W. 407; *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734; *South Omaha v. Tighe*, 67 Neb. 572, 93 N. W. 946; *McCaffrey v. Omaha*, 72 Neb. 583, 101 N. W. 251; *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677; *State v. Birkhauser*, 37 Neb. 521, 56 N. W. 303.

New York. *Re Garvey*, 77 N. Y. 523; *Re Delaware & H. Canal Co.*, 60 Hun (N. Y.) 204, 14 N. Y. S. 585; *Miller v. Amsterdam*, 149 N. Y. 288, 43 N. E. 632, aff'g *Smith v. Amsterdam*, 78 Hun (N. Y.) 609, 28 N. Y. S. 1021.

Pennsylvania. *Pittsburg v. Walter*, 69 Pa. St. 365; *Philadelphia v. Lea*, 5 Phila. (P.) 77; *Re Fred-*

dered without the requisite consent of the property owners cannot be collected as a special assessment or tax.³³

erick Street, 11 Pa. Co. Ct. Rep. 114.

Wisconsin. Dean v. Madison, 9 Wis. 402.

Grading street at expense of property. Steinmuller v. Kansas City, 3 Kan. App. 45, 44 Pac. 600.

Grade of street may be altered by two-thirds of the abutting owners. Re Walter, 21 Hun (N. Y.) 533, aff'd in 83 N. Y. 538.

Change of grade of street may be on petition of the abutting property owners. Folmsbee v. Amsterdam, 142 N. Y. 118, 36 N. E. 821, aff'g 66 Hun (N. Y.) 214, 21 N. Y. S. 42.

Street opening included. Woodruff v. Elizabeth, 30 N. J. L. 176; Brooklyn v. Patchen, 8 Wen. (N. Y.) 47.

Private, alley; opening. People v. Judge of Recorder's Ct. of Detroit, 40 Mich. 64.

Paving street. McQuinn v. Peri, 16 La. Ann. 326; Henderson v. Baltimore, 8 Md. 352; Bouldin v. Baltimore, 15 Md. 18; Baltimore v. Eschback, 18 Md. 276.

Re-paving. Re Smith, 99 N. Y. 424, 2 N. E. 52; Jex v. New York, 103 N. Y. 536, 9 N. E. 39.

Rule applied to the curbing of a street not ordered to be paved. Jones v. South Omaha, 3 Neb. 551, 554, 94 N. W. 957.

Vacating street. Gargan v. Louisville, N. A. & C. Ry. Co., 89 Ky. 212, 12 S. W. 259, 6 L. R. A. 340; Excelsior Brick Co. v. Haverstraw, 62 Hun (N. Y.) 620, 16 N. Y. S. 681; Pettibone v. Hamilton, 40 Wis. 402; Warren v. Wausau,

66 Wis. 206, 28 N. W. 187; James v. Darlington, 71 Wis. 173, 36 N. W. 834.

Widening street. Carron v. Martin, 26 N. J. L. 594, 69 Am. Dec. 584, rev'g Martin v. Carron, 26 N. J. L. 228.

Streets may be widened upon petition or consent of abutting owners. Re Frederick St., 150 Pa. St. 202, 24 Atl. 669.

Sewers. Keese v. Denver, 10 Colo. 112, 15 Pac. 825; Works v. Lockport, 28 Hun (N. Y.) 9; Bacon v. Nanny, 55 Hun (N. Y.) 606, 7 N. Y. S. 804; Van Brunt v. Flatbush, 128 N. Y. 50, 27 N. E. 973, rev'g 59 Hun (N. Y.) 192, 13 N. Y. S. 545.

Statute construed and mayor and council held authorized to establish a general sewer system when necessary without petition from majority of property owners in the sewer district. Perry v. Davis, 18 Okla. 427, 90 Pac. 865.

33. Jones v. South Omaha, 3 Neb. 551, 554, 94 N. W. 957; Portsmouth Savings Bank v. Omaha, 67 Neb. 50, 93 N. W. 231; Re Delaware & H. Canal Co., 8 N. Y. S. 352, rev'd in 60 Hun (N. Y.) 204, 14 N. Y. S. 485.

When petition is required, the ordinance providing for improvement without the requisite petition is void. Covington v. Brinckman, 25 Ky. L. Rep. 1949, 79 S. W. 234.

Where proceedings under a petition of property owners have been annulled, the corporate authorities cannot adopt another ordinance

However, whether such step is jurisdictional, of course, depends upon the proper construction of the controlling law. Frequently no consent or petition is required as a preliminary, to proceed with certain improvements,³⁴

and proceed as the ownership of property affected may have been materially changed. *Vennum v. Milford*, 202 Ill. 423, 66 N. E. 1040.

34. Consent or petition not required.

California. *Spaulding v. Weston*, 84 Cal. 141, 24 Pac. 377.

Indiana. *De Puy v. Wabash*, 133 Ind. 336, 32 N. E. 1016, approving *McEneney v. Sullivan*, 125 Ind. 407, 25 N. E. 540.

Kansas. *Tarman v. Atchison*, 69 Kan. 483, 77 Pac. 111.

Michigan. *Auditor General v. Chase*, 132 Mich. 630, 94 N. W. 178, 10 Det. Leg. N. 34.

Missouri. *St. Louis v. Clemens*, 36 Mo. 467.

Nebraska. *Orr v. Omaha*, 2 Neb. 771, 90 N. W. 301.

New Jersey. *State (Mann) v. Jersey City*, 24 N. J. L. 662; *State (Malone) v. Jersey City*, 28 N. J. L. 500; *Jelliff v. Newark*, 48 N. J. L. 101, 2 Atl. 627, 49 N. J. L. 239, 12 Atl. 770; *State v. Camden*, 53 N. J. L. 322, 21 Atl. 565.

New York. *Ganson v. Buffalo*, 2 Abb. Dec. 236.

Ohio. *Corry v. Cincinnati* (Super. Ct. Cin.), '22 Wkly. Law Bul. 194.

Pennsylvania. *Philadelphia v. Tryon*, 35 Pa. St. 401; *Spring Garden Com'rs v. Wister*, 18 Pa. St. 195; *Beaumont v. Wilkesbarre*, 142 Pa. St. 198, 21 Atl. 888; *Spring Garden Com'rs v. Wistar* (Pa.), 9 Leg. Int. 102.

Prescribed vote of council, as two-thirds, may pass, without petition. *Lafayette v. Fowler*, 34 Ind. 140; *Jessing v. Columbus*, 1 Ohio Cir. Ct. Rep. 90.

Grade of street. *Burr v. New-castle*, 49 Ind. 322; *State v. Jersey City*, 52 N. J. L. 490, 19 Atl. 1096.

By general ordinance, *Napa v. Easterby*, 76 Cal. 222, 18 Pac. 252.

Sidewalk. *Wilkin v. Houston*, 48 Kan. 584, 30 Pac. 23.

Changing grade. *Re Buhler*, 32 Barb. (N. Y.) 79, 19 How. Pr. (N. Y.) 317; *Mott v. Rush*, 2 Hill. (N. Y.) 472; *Re Walter*, 83 N. Y. 538, aff'g 21 Hun (N. Y.) 533; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004, aff'g 39 Hun (N. Y.) 285.

Opening and widening of street. *Granger v. Syracuse*, 38 How. Pr. (N. Y.) 308.

Extension of street. *People v. Port Jervis*, 100 N. Y. 283, 3 N. E. 194.

Dispensing with by charter amendment during pendency of proceedings sustained. *Elwood v. Rochester*, 43 Hun (N. Y.) 102.

Vacating streets. *Excelsior Brick Co. v. Haverstraw*, 142 N. Y. 146, 36 N. E. 819, rev'g 66 Hun 631, 21 N. Y. S. 99.

Sewers. *Park Ecclesiastical Soc. v. Hartford*, 47 Conn. 89; *St. Louis v. Peters*, 36 Mo. 456; *Brewster v. Syracuse*, 19 N. Y. 116; *Philadelphia v. Tryon*, 35 Pa. St. 401; *Wood v. McGrath*, 150 Pa. St. 51, 24 Atl. 682, 16 L. R. A. 715.

as, for example, where the costs thereof are not paid by special assessment or taxation.³⁵

Laws of this character have been construed as applicable to *original improvements* only,³⁶ or to *reconstruction* as distinguished from *repairs*,³⁷ and *slight changes* are sometimes permitted without consent or petition,³⁸ but where the cost of the improvement is increased thereby a new petition is usually required.³⁹

§ 1857. Same—form and requisites of petition.

The form and requisites of the petition, the essential averments, the number, qualification and character of the signers are usually all specified, in more or less detail, in the governing law. Where the presentation of a sufficient petition is regarded as jurisdictional, some courts are exacting touching the substance thereof.⁴⁰ To

35. *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526.

36. Relaying stone pavement with brick, held not to be an original improvement, requiring petition. *Renting v. Titusville*, 175 Pa. St. 512, 34 Atl. 916.

Held to refer to original improvement and not to repairs, as the laying of sidewalks of new material. *State v. District Court of Ramsey County*, 89 Minn. 292, 94 N. W. 870.

37. What constitutes a reconstruction (not a repair), so as to require petition of owner of majority of property. *Farraher v. Keokuk*, 111 Ia. 310, 82 N. W. 773.

38. Slight change of street grade, without consent sustained. *Auditor General v. Chase*, 132 Mich. 630, 94 N. W. 178, 10 Detroit Leg. N. 34.

Making a slight change in the grade of a street in paving it will not invalidate the assessments therefor, although the property

owners did not consent by petition thereto, where it appears that the abutters are in no way injured. *O'Reilly v. Kingston*, 39 Hun (N. Y.) 285; *aff'd* in 114 N. Y. 439, 21 N. E. 1004.

39. Where property owners petition that street be "graded and graveled," at a cost of \$750, the work cannot be changed to macadamizing and guttering, at a cost of over \$5000 without a new petition. *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234.

40. Form and requisites of petition. A petition, signed by the owners of a majority of the frontage on a street to be graded, is jurisdictional, and hence a petition wanting in essential averments is tantamount to no petition. *Turrill v. Gratton*, 52 Cal. 97.

An averment in a petition that "in the opinion of the petitioners, the improvement asked for should be made" is not sufficient under

be sufficient the petition should be definite and certain that it may give proper notice to all parties interested. It must contain all jurisdictional averments,⁴¹ and shown

a law requiring the petition to contain "a statement that, in the opinion of the petitioners, the public interest requires that the improvement asked for should be made." Such defect is not cured by the final resolution of determination on the part of the council. The defect being jurisdictional may be raised at any stage of the proceeding. *Re Grove St.*, 61 Cal. 438.

41. The petition must state all jurisdictional facts in order to confer jurisdiction on the municipal authorities.

California. *Re Grove St.*, 61 Cal. 438.

Indiana. *Wiles v. Hoss*, 114 Ind. 371, 16 N. E. 800.

Kansas. *Kansas City v. Breyfogle*, 8 Kan. App. 276, 55 Pac. 508.

Maine. *Kidsor v. Bangor*, 99 Me. 139, 58 Atl. 900.

Missouri. *St. Louis v. Frank*, 9 Mo. App. 579, aff'd 78 Mo. 41; *St. Louis v. Cruikshank*, 16 Mo. App. 495.

New Jersey. *Cronin v. Jersey City*, 38 N. J. L. 410; *Wirth v. Jersey City*, 56 N. J. L. 216, 27 Atl. 1065; *App v. Stockton*, 61 N. J. L. 520, 39 Atl. 921.

Pennsylvania. *Re Merchant St.*, 9 Phila. (Pa.) 590.

Sufficiency of petition for street and alley opening. *St. Louis v. Frank*, 9 Mo. App. 579, aff'd 78 Mo. 41; *St. Louis v. Cruikshank*, 16 Mo. App. 495; *Havermans v. Troy*, 50 How. Pr. (N. Y.) 510;

People v. Whitney's Point, 32 Hun (N. Y.) 508.

Petition for street opening must show clearly and definitely the location of the line of the proposed opening. *Wirth v. Jersey City*, 56 N. J. L. (27 Vroom) 216, 27 Atl. 1065.

Petition to grade street held valid although it did not embrace a request to grade and pave intersections thereof. *Wahlgreen v. Kansas City*, 42 Kan. 243, 21 Pac. 1068.

Jurisdictional requirements under *St. Louis* charter. *St. Louis v. Gleason*, 93 Mo. 33, 8 S. W. 348.

Petition for street improvement held good though it contained no request to grade and pave the intersections. *Wahlgreen v. Kansas City*, 42 Kan. 243, 21 Pac. 1068.

Petitions, held sufficient. *Re Vacation of Henry St.*, 123 Pa. St. 346, 16 Atl. 785, 24 Wkly. Notes Cas. 60; *Allen v. Portland*, 35 Ore. 420, 58 Pac. 509; *Wiles v. Hoss*, 114 Ind. 371, 16 N. E. 800.

Petition insufficient. *Cronin v. Jersey City*, 38 N. J. L. (9 Vroom) 410.

Sidewalk, held sufficient. *Fayette v. Rich*, 122 Mo. App. 145, 99 S. W. 8.

Description of improvement, held sufficient. *Patterson v. Macomb*, 179 Ill. 163, 53 N. E. 617.

Petition for sewer, held sufficient. *Piard v. Jersey City*, 30 N. J. L. 148.

A petition to have the flags and curbs in a street reset when nec-

on its face that it has been signed properly and unconditionally by the number of qualified persons, or their duly constituted legal or personal representatives, prescribed by the law.⁴²

essary and new ones placed when required, is not sufficient notice, being too uncertain. *Cronin v. Jersey City*, 38 N. J. L. 410.

Course of street. *Havermans v. Troy*, 50 How. Pr. (N. Y.) 510.

Descriptive of material. *Rhodes v. Denver*, 10 Colo. App. 99, 49 Pac. 430.

"Vitrified brick" followed by a description of the quality required, held sufficient description of material. *National Surety Co. v. Kansas City Hydraulic Press Brick Co.*, 73 Kan. 196, 84 Pac. 1034; *Atkin v. Wyandotte Coal, etc. Co.*, 73 Kan. 768, 84 Pac. 1040.

Petition to be in writing and properly signed. *Merritt v. Kewanee*, 175 Ill. 537, 51 N. E. 867.

A petitioner is one who signs a written request for the improvement. Those who verbally declare in favor of it are not such. *Tone v. Columbus*, 1 Ohio Cir. Ct. Rep. 305.

To confer jurisdiction, the petition must be signed unconditionally. *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677.

Matter contained in a petition that forms no part of the substance thereof is not binding on the municipal authorities. *People v. Rochester*, 21 Barb. (N. Y.) 656.

Failure to insert name of owner of land desired to be taken for a street deprives board of jurisdiction. *People v. Whitney's Point*, 32 Hun (N. Y.) 508.

The fact that a very small strip of such owner's land was to be taken, or that it was not intended to include his land in the described area, will not cure the petition. *People v. Whitney's Point*, 32 Hun (N. Y.) 508.

In one case where a former petition was used it was held that the burden was on those desiring to uphold the proceedings to show that the old petition had been re-acknowledged or assented to by the land owners. *State v. Bayonne*, 54 N. J. L. (25 Vroom) 293, 23 Atl. 648.

The jurisdiction to proceed with the improvement is not destroyed by the fact that an abutter who signed the petition for the improvement subsequently conveyed the property. *Laird v. Cincinnati*, 6 Ohio Dec. 1006, 5 Wkly. Law Bul. 903.

42. Number of property owners required must sign.

Illinois. *Trap v. Grant Park*, 192 Ill. 351, 61 N. E. 442; *Taylor v. Bloomington*, 186 Ill. 497, 58 N. E. 216; *Patterson v. Mascomb*, 179 Ill. 163, 53 N. E. 617; *Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278.

Maryland. *Swann v. Cumberland*, 8 Gill (Md.) 150.

Minnesota. *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053; *State v. Bury*, 101 Minn. 424, 112 N. W. 534.

New York. *Lathrop v. Buffalo*, 3 Abb. Dec. (N. Y.) 30.

Sometimes close questions arise relating to the qualifications specified by law of the signers, as for example,

Number of petitioners under particular laws.

Indiana. Kyle v. Malin, 8 Ind. 34; Indianapolis v. Mansur, 15 Ind. 112.

Kansas. Kansas City v. Kimball, 60 Kan. 224, 56 Pac. 78.

Louisiana. Ready v. New Orleans, 27 La. Ann. 169; Barber Asphalt Paving Co. v. Gogreve, 41 La. Ann. 251, 5 So. 848.

Maryland. Swann v. Cumberland, 8 Gill. (Md.) 150; Holland v. Baltimore, 11 Md. 186, 69 Am. Dec. 195; Baltimore v. Bouldin, 23 Md. 328.

Oregon. Allen v. Portland, 35 Ore. 420, 58 Pac. 509.

What constitutes three-fourths in interest under particular circumstances. Wamelink v. Cleveland, 40 Ohio St. 381, aff'g 2 Cleveland L. Rep. 394.

Where it is required that a majority in value of the property owners sign the petition, the value of the property is to be determined from the last assessment. Board of Improvement Dist. No. 5 v. Offenhauser, 84 Ark. 257, 105 S. W. 265.

Held, under particular statute, the fact that less than a majority of the property owners in the assessment district signed the petition, does not render an assessment void. Whipple v. Toledo, 29 Ohio Cir. Ct. Rep. 42.

Whether or not a majority of owners of frontage signed the petition must be determined from the frontage created by the vacation of an abutting street. S. D.

Mercer Co. v. Omaha, 79 Neb. 284, 112 N. W. 617.

In ascertaining the value of property in an improvement district it is proper not to include a street railway which ran through the district. But held under statute to be proper to include assessed value of church and college property. Lenon v. Brodie, 81 Ark. 208, 98 S. W. 979.

Majority of owners, held to mean owner or owners of majority of running feet frontage. Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251, 5 So. 848.

One-third the owners in quantity on each side of a street, means one-third the owners on each side taken separately, and not one-third of total owners on both sides. Mobile v. Dargan, 45 Ala. 310.

The street to be improved is considered as a whole, and not in parts requiring particular needs to each part. Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251, 5 So. 848.

Where two petitions were filed differing only in character of paving to be used, held both should be counted to ascertain whether requisite number of signers had requested the improvement. Wamelink v. Cleveland, 2 Cleve. L. Rep. 394, 4 Ohio Dec. 572, aff'd 40 Ohio St. 381.

Ordinance as to number of signers construed. Baltimore v. Bouldin, 23 Md. 328.

Requirement that application be signed by some of the owners

who are owners, or a majority of abutting owners, or a majority in interest, or the owners of "property adjoining the locality to be affected," or owners on the last preceding assessment roll, or similar expressions used in the various laws, or who are owners where the property has been mortgaged or leased for a term of years;⁴³

means at least two owners. *State (Pope) v. Union*, 32 N. J. L. 343.

Petition not signed by majority owners of frontage; effect of under Wisconsin statutes. *Lawton v. Racine*, 137 Wis. 593, 119 N. W. 331.

Under a charter requiring a petition to the council for street improvements to be signed by the resident owners of more than one-half the abutting property, the petition need not show that the signers are a majority of such resident owners, in the absence of provisions as to how the fact of residence shall appear; it will be presumed that the council judged correctly until the contrary appears. *Wright v. Tacoma*, 3 Wash. Ter. 410, 19 Pac. 42.

Where city authorities have power to open streets and alleys without a petition, the fact that a petition for the establishment of an alley was signed by less than a majority of property owners does not affect the jurisdiction of the council. *State v. Superior Court*, 44 Wash. 476, 87 Pac. 521.

Signature followed by word "conditionally," is invalid and cannot be counted. *Newton v. Emporium Borough*, 225 Pa. St. 17, 73 Atl. 984.

Verbally declaring in favor of a street improvement does not

make one a petitioner. *Tone v. Columbus*, 1 Ohio Cir. Ct. Rep. 305.

Validity of petition signed by majority of owners not affected by subsequent enlargement of district for purpose of assessment. *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

43. Qualification of petitioners in particular case. *Re Royal St.*, 16 La. Ann. 393.

Less than required number. *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053.

Statute construed. *Re Royal St.*, 16 La. Ann. 393.

The owners of lands of deceased persons, held to be the heirs or devisees. An administrator is not an owner. *Mobile v. Dargan*, 45 Ala. 310.

One who dedicates a street to the public which has never been accepted is an "owner" of land, and he is thus authorized to sign a petition. *DeGroot v. Jersey City*, 55 N. J. L. (26 Vroom) 120, 25 Atl. 272.

Some laws require the signatures to the petition to be of persons described as owners on the last preceding assessment roll. The signature of persons not so described will be unavailing. *Kahn v. San Francisco*, 79 Cal. 388, 21 Pac. 849, 25 Pac. 403.

In determining whether a ma-

and the legal requirements are usually strictly enforced as will appear by reference to the numerous judicial decisions relating to this subject contained in the notes.

jority in value of assessable real property has been signed for, improvements made on property since the last assessment may be included in its value. *Ahren v. Board of Improvements*, 69 Ark. 68, 61 S. W. 575.

Property signed for by the owner who sold before petition was presented is properly included. *Ahern v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575.

Only signers who were owners at time of passage of ordinance can be counted. *Tone v. Columbus*, 1 Ohio Cir. Ct. Rep. 305.

A signer afterwards conveying his property does not deprive the authorities of jurisdiction to act on the petition. *Laird v. Cincinnati*, 6 Ohio Dec. 1006, 5 Wkly. Law Bul. 903.

Where land was conveyed to secure a loan, the borrower taking back a lease with privilege of purchase, the borrower is proper party to sign for the property. *Laird v. Cincinnati*, 6 Ohio Dec. 1006, 5 Wkly. Law Bul. 903.

The width of intersecting streets should not be counted in computing frontage. *People v. Syracuse*, 63 N. Y. S. 878, 30 Misc. Rep. 409.

Board of education, held proper signer to petition. *Becker v. Columbus*, 18 Ohio Cir. Ct. Rep. 888, 9 Ohio Cir. Dec. 855.

Persons having merely an oral agreement to purchase real property are not owners thereof. *Re Iowa St. 24 Pittsb. Leg. J. (N. S.)* 468.

In possession under agreement to purchase. *Ahern v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575.

In particular instance, owners of street railway right of way for water pipes, and telegraph and light poles and wires, held properly excluded as signers for improvement of the street. *Ahern v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575.

The mortgagor of property is properly counted, although there had been a decree of foreclosure entered to foreclose the mortgage. *Ahern v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575.

It is proper to exclude public property, it not being assessable. *Ahern v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575.

Where a petition was filed and an ordinance passed in pursuance thereof which was subsequently declared invalid, the same petition cannot be refiled so as to authorize another ordinance because ownership of the property may have changed materially. *Vennum v. Milford*, 202 Ill. 423, 66 N. E. 1040.

Municipal authorities may assume that owners signed in good faith. *Maguire v. Smock*, 42 Ind. 1, Wils. 92, 13 Am. Rep. 353.

Evidence that petitioners are not owners of record will authorize finding that petition is insufficient. *South Omaha v. Tighe*, 67 Neb. 572, 93 N. W. 946.

The general rules of law applicable to those signing in a representative capacity, as officers of corporations,

Land owned by state and abutting on a street may be signed for by governor for street improvement. *People v. Board*, 2 How. Pr. (N. S.) 423.

City cannot sign for property owned by it to make required number of signers for frontage. *Atlanta v. Smith*, 99 Ga. 462, 27 S. E. 696.

City (owner of property) must give its consent like any other petitioner. *People v. Syracuse*, 63 N. Y. S. 878, 30 Misc. Rep. 409.

Where the application was required to be made by five or more freeholders and legal voters, it must show on its face that the signers were such. *Kent v. Enosburg Falls*, 71 Vt. 255, 44 Atl. 343.

Where a leaf from an old petition was detached and attached to a new one, held, in an action of *certiorari* to test validity of ordinance passed in pursuance of such petition, incumbent upon those asserting its validity to show that those whose names were on such leaf had reacknowledged or assented to the use of their names on the new petition. *State v. Bayonne*, 54 N. J. L. 293, 23 Atl. 648.

Church property, though exempt from general taxation, is liable for assessments for local improvement, and should be included in determining whether a majority in value of property in the district was signed for. *Ahern v. Board of Improvements*, 69 Ark. 68, 61 S. W. 575.

The signature of a surviving

partner of a firm is good only for his *pro rata* portion of the firm real estate. *Andrew v. Auditor*, 5 Ohio S. & C. C. P. Dec. 242.

In particular instance, held signer must be both owner of real estate and resident of district. *Board of Improvement v. Cotter*, 71 Ark. 556, 76 S. W. 552.

A widow, being only the life tenant of an estate cannot sign for same. *Ahern v. Board of Improvements*, 69 Ark. 68, 61 S. W. 575.

Held unnecessary under particular statute for wife to join husband in signing. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

Under a law providing that the "laying out of new streets shall be on the application of some of the owners of the lands," etc., held, that the applicant must be signed by at least two land owners. *State (Pope) v. Union*, '32 N. J. L. 343.

A majority of the abutting property owned by residents will be sufficient. *Wright v. Tacoma*, 3 Wash. Ter. 410, 19 Pac. 42.

The majority in interest should be those who own property abutting on the part of the street to be opened and not owners of property on the entire street. *Spear v. Pittsburg*, 166 Pa. St. 86, 30 Atl. 1013.

Under a law providing that a street may be vacated on petition of a majority in interest of abutting owners along "the line of the proposed improvement," consent of owners further along the street need not be obtained. Ap-

agents, attorneys, trustees, guardians, tenants for life or a term of years, tenants in common, executors or administrators, are invoked in petitions for improvements.⁴⁴

peal of Gant (Pa.), 23 Pitts. Leg. J. (N. S.) 219.

Nominal grantees of property, held not to be "resident owners of property liable to taxation." *Forbis v. Bradbury*, 58 Mo. App. 506.

Owners of "property adjoining the locality to be affected," held to mean property adjoining or near the improvement which is physically affected or the value of which is commercially affected directly by the improvement to a degree in excess of the effect on the property in the place generally. *Little Rock v. Katzenstein*, 52 Ark. 107, 12 S. W. 198.

Held, that a stockholder in a corporation owning property in the district to be improved is not an owner of such property nor is an administrator an owner of his intestate's estate. *Rector v. Board of Public Improvements*, 50 Ark. 116, 6 S. W. 519.

Lessee. "Owner" held to be one who is an owner of a freehold estate in the property to be assessed, and hence a lessee under a perpetual lease with privilege of purchase is an owner. *Laird v. Cincinnati*, 6 Ohio Dec. 1006, 5 Wkly. Law Bul. 903.

Lessee under lease for ninety-nine years renewable forever, the property standing in his name for taxation, may sign for such property as owner. *St. Bernard v. Kemper*, 60 Ohio St. 244, 54 N. E. 267, 45 L. R. A. 662.

Where signature of owners is required a lessee under a lease for ninety-nine years renewable forever cannot sign. *Holland v. Baltimore*, 11 Md. 186, 69 Am. Dec. 195.

44. In absence of evidence of their authority, executors, administrators and agents cannot sign, nor can the signature of a homestead and railroad corporation made by its president and secretary be counted where it does not affirmatively appear that they had authority. *Kahn v. San Francisco*, 79 Cal. 388, 21 Pac. 849, 25 Pac. 403.

Agent. Signature need not be the personal act of the property owner. *Tone's Executors v. Columbus*, 1 Ohio Cir. Ct. Rep. 305.

Signature by agent. *State v. Bayonne*, 54 N. J. L. 293, 23 Atl. 648; *People v. Board of Assessors*, 193 N. Y. 248, 86 N. E. 466, rev'g 111 N. Y. S. 924, 127 App. Div. 851; *Columbus v. Sohl*, 44 Ohio St. 479, 8 N. E. 299; *Columbus v. Slyh*, 44 Ohio St. 484, 8 N. E. 302.

A petition signed by agents where no fraud appeared and the agency was subsequently ratified, held good. *Columbus v. Sohl*, 44 Ohio St. 479, 8 N. E. 299; *Columbus v. Slyh*, 44 Ohio St. 484, 8 N. E. 302; *Columbus v. Agler*, 44 Ohio St. 485, 8 N. E. 302.

Attorney. Petition may be signed by the properly authorized attorneys of property owners,

§ 1858. Same—withdrawal of consent.

Petitioners may be allowed to withdraw their consent or signatures at any time before the municipal authori-

People v. Board, 2 How. Pr. (N. S.) 423.

The named was signed "per H. attorney." The attorney assumed to act under a written power of attorney which was not proved. The attorney had not seen his principal. Held, on *certiorari* to test the validity of the ordinance that the attorney cannot be counted as a signer. *State v. Bayonne*, 54 N. J. L. (25 Vroom) 293, 23 Atl. 648.

A clerk authorized to sign, signed as follows, "Wardens and vestry of Trinity Parish, by James Laidlaw, clerk," held sufficient as signature of the "Rector, Wardens, and Vestrymen of Trinity Parish, Portland." *Allen v. Portland*, 35 Ore. 420, 58 Pac. 509.

Corporation. The signature of a homestead and railroad corporation made by its president and secretary, without evidence of authority, bad. *Kahn v. San Francisco*, 79 Cal. 388, 21 Pac. 849, 25 Pac. 403.

President and secretary of corporation cannot sign for corporate property without special authority. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

But signing of corporate name by an officer may be ratified by its board of trustees. *Day v. Fairview Borough*, 62 N. J. L. 621, 43 Atl. 578.

Ratification of signature by corporation signed by unauthorized officer, though it may estop the corporation from denying its va-

lidity, will not affect rights of others after commencement of suit to enjoin the improvement. *Minor v. Hamilton*, 20 Ohio Cir. Ct. Rep. 4, 11 Ohio Cir. Dec. 16.

The signature of a corporation to a petition is legal without its seal. *Allen v. Portland*, 35 Ore. 420, 58 Pac. 509.

Corporation may sign for property the legal title of which is held in trust for it by two of its officers. *Allen v. Portland*, 35 Ore. 420, 58 Pac. 509.

Executor. Although clothed with power of sale, an executor cannot sign for property. *Ahern v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575.

Where executors and trustees of an estate held same for life of another with full power of control and management, their signature was that of owner. *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231.

The guardian of the estate of an imbecile may sign the petition where the property of his ward is to be affected by the proposed improvement. *Laird v. Cincinnati*, 6 Ohio Dec. 1006, 5 Wkly. Law Bul. 903.

Where one who had not legal title to land signed as "trustee" the court cannot change his signature to that of guardian of his children so as to bind the property owned by them. *Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1028.

Husband. Where requirement is for owners to sign, husband of

ties have acted on the petition by notice to the proper officers, and this even though the petition is thereby rendered insufficient for want of the requisite number of signers.⁴⁵ And it has been held that the signing of a

owner cannot sign for owner. *Merritt v. Kewanee*, 175 Ill. 537, 51 N. E. 867.

Petition may be signed for wife by husband with her authority. *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231.

A married woman property owner's signature by her husband, ratified by her, is her signature. *Board of Improvement Dist. No. 5 v. Offenhauser*, 84 Ark. 257, 105 S. W. 265.

Owner of perpetual leasehold may bind property to what extent in Ohio? *Kemper v. St. Bernard*, 14 Ohio Cir. Ct. Rep. 134, 7 Ohio Dec. 617.

Partner. One of two partners may sign for half the partnership property. *Earl v. Board of Improvement*, 70 Ark. 211, 67 S. W. 312.

Tenant for life. The law declared that a tenant for ninety-nine years or ninety-nine years renewable forever, or the executor or administrator of such tenant, or the guardian of an infant owner, or a mortgagee in possession, shall be deemed as the "owner." Held, that a tenant for life cannot be counted under such law. *Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1028.

One who owns life estate in one-half a tract of land and has sole management of it during minority of child then 13, may sign as owner. *Allen v. Portland*, 35 Ore. 420, 58 Pac. 509.

Tenant in common. Tenant in common cannot sign for co-tenant. *Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1028.

All tenants in common must sign before property can be counted. *Newton v. Emporium Borough*, 225 Pa. St. 17, 73 Atl. 984.

Only half of property owned by two tenants in common and signed for by only one, should be counted. *Ahren v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575.

Trustee. Signature as "trustee." *Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1028.

Form of signature. A signature of one who owned the property as follows: "Martha M. Crowell, Adm'x Estate of C. F. Crowell," was not her signature as Adm'x, but was sufficient as owner, the words following her name being merely *descriptio personae*. *Allen v. Portland*, 35 Ore. 420, 58 Pac. 509.

45. Withdrawal of consent. If there is a sufficient number of withdrawals to reduce the number of petitioners to less than that required, the power of the corporate authorities to make such improvement is thereby taken away. Held further, consent cannot be withdrawn after a contract to have the work done has been entered into by the municipal authorities. *Irwin v. Mobile*, 57 Ala. 6.

remonstrance by one who signed the petition for an improvement is a sufficient withdrawal thereof.⁴⁶ Some charters forbid one who has petitioned for a local improvement within a named time thereafter, from withdrawing his name, or becoming a remonstrant.⁴⁷

§ 1859. Hearing on proposed improvements.

Laws requiring consideration of proposed improvements before designated municipal officers, boards or committees at which property owners and persons interested may be heard are common,⁴⁸ particularly where

Cannot withdraw after the passage of the ordinance prayed for by the petition. *Newton v. Emporium Borough*, 225 Pa. St. 17, 73 Atl. 984.

46. After signing a petition asking a donation of money to aid in the construction of a railroad, a remonstrance was filed, signed by a majority of the persons who had signed the petition; held that such remonstrance was effectual to withdraw the names of those who signed the remonstrance from the petition after the petition had been referred to a council committee. If such withdrawal reduces the number of petitioners to less than that required by law the council has no further jurisdiction to proceed. *Noble v. Vincennes*, 42 Ind. 125.

It was held in an early New York case that a petition properly signed and in due form and regularly submitted, which asked for local improvements is properly before the council for consideration, and the latter body need not examine a remonstrance filed by some of the petitioners asking that their names be stricken

from the petition. *White v. Buffalo*, 1 *Sheld.* (N. Y.) 180.

47. *Smith v. Syracuse Imp. Co.*, 161 N. Y. 484, 55 N. E. 1077; *People v. Syracuse*, 63 N. Y. S. 878, 30 *Misc. Rep.* 409.

48. Consideration of a proposed improvement. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

Hearing of persons interested. *People v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768.

Whether or not it is necessary to give protesting or objecting property owners an opportunity to be heard before the proper municipal authorities depends upon charter or statutory provisions requiring same. *Washburn v. Chicago*, 198 Ill. 506, 64 N. E. 1064.

If not so required none need be given. *Parsons v. Grand Rapids*, 141 Mich. 467, 104 N. W. 730; *Chicago v. Bassett*, 238 Ill. 412, 87 N. E. 384; *State v. Jersey City*, 48 N. J. L. 429, 6 Atl. 23; but if required, such provision is mandatory. *Gray v. Burr*, 138 Cal. 109, 70 Pac. 1068; *Lyman v. Cicero*, 222 Ill. 379, 78 N. E. 830; *Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774; *State v. Jersey City*, 25 N. J.

the improvement may result in taking or damaging private property, or in levying local assessments or special taxation against property, to equalize the presumed benefit; and the courts are generally strict in enforcing all mandatory provisions relating thereto.⁴⁹ Under such laws the fixing of a time for a public hearing is essential to the validity of the proceeding and ordinarily without it, no jurisdiction is acquired.⁵⁰

The substantial provisions of the law must be observed; the powers relating to the consideration of the intended improvement cannot be delegated; nor can objections thereto be limited; nor the hearing in any essential particulars restricted;⁵¹ and if, after a hearing and determination, subsequent changes which are not merely formal, but vital, are made, notice and hearing on the new plans becomes necessary.⁵² Thus, where the terri-

L. 309; *Lambert v. Paterson*, 72 N. J. L. 437, 60 Atl. 1131.

When the report of a committee on a remonstrance is received and ordered filed, it amounts to an adoption. *Knopf v. Gilsonite Roofing, etc. Co.*, 92 Mo. App. 279.

49. *Gray v. Burr*, 138 Cal. 109, 70 Pac. 1068.

Personal appearance of owner or his representative before the council, held necessary. *Hensley v. Butte*, 36 Mont. 32, 92 Pac. 34.

After due notice and convening of the council, it may adjourn in its discretion, to any other specified time which has the effect of carrying over the proceedings of the time named, to be then taken up at the stage at which they were left at the preceding meeting. The object of the law is to give persons interested full opportunity to be heard. *Ireland v. Rochester*, 51 Barb. (N. Y.) 413, 426.

50. *Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774.

51. The power conferred upon the council to hear, cannot be delegated, for example, to the clerk, nor can the council limit objections made in writing, where the charter allows a hearing before the council itself. *State (Durant) v. Jersey City*, 25 N. J. L. 309.

52. Necessity of hearing on subsequent change of proposed plan. *Washburn v. Chicago*, 198 Ill. 506, 64 N. E. 1064.

Where after the passage of an ordinance for a public hearing as required by ordinance another ordinance, is passed changing the paving material at an increased cost, held that the subsequent ordinance was void as to such increase. *Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774.

Making change in plan for the improvement. *Hyland v. Ossin-*

tory to be improved is enlarged the property owners are to be notified and have a hearing or an opportunity therefor, otherwise the proceeding will be a mere nullity.⁵³

§ 1860. Remonstrances.

In justice to the property owners when they must bear the burden of the cost of the improvements, they are frequently given by express provision of law an opportunity to protest or remonstrate against the proposed improvement at a hearing duly convened for this purpose before specified officers, committees or boards.⁵⁴

ing, 107 N. Y. S. 225, 57 Misc. Rep. 212.

In Illinois a different material and a lower cost may be substituted for the original provisions, without a new public hearing (*McChesney v. Chicago*, 205 Ill. 611, 69 N. E. 82), and it is there provided that the improvement may be changed without new hearing provided the cost is not increased more than twenty per cent. *Chicago v. Kerfoot & Co.*, 208 Ill. 387, 70 N. E. 349.

Objectors having had several opportunities to be heard during proceedings are not entitled to a new hearing. *Taintor v. Trenton*, 192 Mass. 522, 78 N. E. 545.

After public hearing, commission held authorized to change material for paving street, without further hearing. *People v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768, 73 N. Y. S. 1144, 67 App. Div. 625.

53. It is in the nature of a judicial proceeding against property owners, and its effect is to take their property for public use. Questions to be considered at new

hearing. *Ireland v. Rochester*, 51 Barb. (N. Y.) 413, 428, 434.

54. *Arkansas*. *Keel v. Board of Directors, etc.*, 59 Ark. 513, 27 S. W. 590.

California. *Pacific Paving Co. v. Sullivan Estate Co.*, 137 Cal. 261, 70 Pac. 86; *Gray v. Burr*, 138 Cal. 109, 70 Pac. 1068; *City Street Imp. Co. v. Laird*, 138 Cal. 27, 70 Pac. 916; *Smith v. Hazard*, 110 Cal. 145, 42 Pac. 465; *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156, 39 Pac. 535; *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518.

Indiana. *Kirkland v. Indianapolis*, 142 Ind. 123, 41 N. E. 374; *House v. Greensburg*, 93 Ind. 533.

Kansas. *Marshall v. Leavenworth*, 44 Kan. 459, 24 Pac. 975.

Louisiana. *Daniels v. New Orleans*, 26 La. Ann. 1.

Missouri. *Fruin-Bambrick Const. Co. v. Geist*, 37 Mo. App. 509; *Knopf v. Gilsonite Roofing & Paving Co.*, 92 Mo. App. 279.

New Jersey. *Green v. Jersey City*, 42 N. J. L. 565; *State (Durant) v. Jersey City*, 25 N. J. L. 309; *Vanderbeck v. Jersey City*, 44 N. J. L. 626.

Laws which forbid proceeding with the improvement if a specified proportion or number in value of property owners affected thereby shall protest or remonstrate against it are usually construed as mandatory.⁵⁵ All essential provisions relating to objections should be followed.⁵⁶ The remonstrance must be made and signed by the number of persons duly qualified and as prescribed,⁵⁷

New York. In re Street Opening and Improvement Board, 133 N. Y. 436, 31 N. E. 316; In re Street Opening Board, 82 Hun (N. Y.) 580, 31 N. Y. S. 732.

Oregon. Clinton v. Portland, 26 Ore. 410, 38 Pac. 407.

Utah. Armstrong v. Ogden City, 12 Utah 476, 43 Pac. 119.

55. *California.* Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262; Girvin v. Simon, 127 Cal. 491, 59 Pac. 945.

Indiana. Sauntman v. Maxwell, 154 Ind. 114, 54 N. E. 397; Spiegel v. Gansberg, 44 Ind. 418.

Mississippi. Nugent v. Jackson, 72 Miss. 1040, 18 So. 493.

Missouri. Forbis v. Bradbury, 58 Mo. App. 506.

Montana. Hensley v. Butte, 36 Mont. 32, 92 Pac. 34.

New Jersey. Jersey City Brewing Co. v. Jersey City, 42 N. J. L. 575.

Oregon. Portland v. Oregon Real Estate Co., 43 Ore. 423, 72 Pac. 322; Oregon Real Estate Co. v. Portland, 40 Ore. 56, 66 Pac. 442.

56. *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107; *Maley v. Clark*, 33 Ind. App. 149, 70 N. E. 1005.

Statutes construed. City Street

Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916; *Clarke v. Lawrence*, 75 Kan. 26, 88 Pac. 735; *Re Street Opening Board*, 133 N. Y. 436, 31 N. E. 316; *Re Street Opening Board*, 82 Hun 580, 31 N. Y. S. 732, aff'd 148 N. Y. 764, 43 N. E. 985.

A qualified protest, as, for instance, one in which the property owners object to the improvement being made at the time proposed but consent to its being made two years in the future, is insufficient. *McMillan v. Butte*, 30 Mont. 220, 76 Pac. 203.

Objection, held good though made to only part of the improvement contemplated. *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156, 39 Pac. 535.

57. *Re Tompkins Square*, 17 Abb. Pr. (N. Y.) 324; *House v. Greensburg*, 93 Ind. 533.

Who may protest. One owning land adjacent to but outside the boundary of a city and adjacent to the terminus of a street cannot protest against the vacation of such street; he does not come within a statute giving such right of protest to "property owners adjacent thereto, or by those having a direct or substantial interest therein." *House v. Greensburg*, 93 Ind. 533.

and presented within the time specified by the law.⁵⁸

One whose property will not be assessed cannot object to an improvement therefor on the ground that the property will not be benefited. *Carson v. St. Francis Levee Dist.*, 59 Ark. 513, 27 S. W. 590.

Resident property owners, only may protest. *Kirkland v. Board of Public Wks.*, 142 Ind. 123, 41 N. E. 374; *Marshall v. Leavenworth*, 44 Kan. 459, 24 Pac. 975.

Charter provision construed. *Daniel v. New Orleans*, 26 La. Ann. 1.

The number of resident owners of real estate entitled to protest is to be determined merely by residence and ownership, and age, sex, mental condition, extent or value of ownership, are not to be considered. *Clark v. Lawrence*, 75 Kan. 26, 88 Pac. 735.

Authorized agent may sign. *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156, 39 Pac. 535; *Fruin-Bambrick Const. Co. v. Geist*, 37 Mo. App. 509.

No evidence of authority of the agent need accompany the remonstrance. *Sedalia v. Scott*, 104 Mo. App. 595, 78 S. W. 276.

A co-tenant may sign for the other co-tenant. *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156, 39 Pac. 535.

A personal representative of a deceased owner exercising complete control over the property may sign a remonstrance against an improvement as owner, if his right is not challenged by an heir or devisee. *Chan v. South Omaha*, 85 Neb. 434, 123 N. W. 464.

Guardian who has complete

control of ward's estate may sign. *Chan v. South Omaha*, 85 Neb. 434, 123 N. W. 464.

Corporation, signature by president of, held good. *Chan v. South Omaha*, 85 Neb. 434, 123 N. W. 464.

Unless specially authorized by the board of directors the officers of a corporation owning land have no authority to object to improvements. *Sedalia v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014.

An administrator cannot sign a protest for property of the deceased owner. *Sedalia v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014.

Private persons cannot object to opening of street where city has the right of way. *Goodell v. Kalamazoo*, 63 Mich. 416, 29 N. W. 880.

Remainderman cannot sign remonstrance as one who would be assessed for a street opening. *Re Glenwood Avenue*, 115 N. Y. S. 654, 131 App. Div. 204.

58. *California*. *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518.

Colorado. *Hildreath v. Longmont*, 47 Colo. 79, 105 Pac. 107.

Indiana. *McKee v. Pendleton*, 162 Ind. 667, 69 N. E. 997.

New York. *Loomis v. Little Falls*, 72 N. Y. S. 774, 66 App. Div. 299.

One given ample time by statute in which to object must not wait until the improvement is completed and the benefits accrued before filing his objections. *Ed-*

§ 1861. Same—withdrawal of protest.

A signer to a protest or remonstrance may withdraw his signature any time before it is filed with the designated officer or body, but it is held in some jurisdictions that he cannot do so thereafter, as the filing makes effective the objections.⁵⁹ So a protestant may withdraw his signature within the time allowed for protesting and before the protest is filed.⁶⁰ But the rule has been announced in some states that the withdrawal may occur any time before action on the remonstrance, or, at least up to the time appointed for the hearing.⁶¹

On the contrary, when the filing of a valid remonstrance has the effect of ousting municipal authorities of jurisdiction the withdrawal thereafter of a sufficient number of signers so as to reduce the number to less than required by law before final action is taken, will not

wards House Co. v. Jackson, 91 Miss. 429, 45 So. 14.

Premature filing. Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262.

Remonstrance is not rendered insufficient by failure of the clerk of the council to sign the endorsement of time of filing same. City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666.

All remonstrances presented within proper time should be considered. (Under Jersey City Charter) Green v. Jersey City, 42 N. J. L. 565.

59. Sedalia v. Scott, 104 Mo. App. 595, 78 S. W. 276.

60. Where the council may proceed with the improvement unless a majority of the resident owners liable to be taxed for the improvement shall not within ten days after publication of the council's resolution that the improvement is necessary, protest

against the same, a protestant may withdraw his signature within the ten days. Sedalia v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

A signer who files a letter withdrawing his signature before the protest is filed, is not to be counted as a protestant. Sedalia v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014.

61. *Alabama.* Irwin v. Mobile, 57 Ala. 6.

Indiana. Black v. Campbell, 112 Ind. 122, 13 N. E. 409.

Kansas. State v. Eggleston, 34 Kan. 714, 10 Pac. 3.

Minnesota. Slingerland v. Norton, 59 Minn. 351, 61 N. W. 322.

Nebraska. State v. Nemaha County, 10 Neb. 32, 4 N. W. 373.

Ohio. Hays v. Jones, 27 Ohio St. 218; Dutton v. Hanover, 42 Ohio St. 215.

reconfer jurisdiction.⁶² *A fortiori* it has been held that the withdrawal of objections by owners so as to reduce the number of signers below the number required after the time fixed by the council for the hearing, does not reconstitute the council with jurisdiction, but a new proceeding must be had.⁶³

§ 1862. Submission to, and approval of, electors.

As a condition precedent to the advancement of certain public improvements, many charters and laws provide that the proposition shall first be submitted to, and approved by, a majority of the electors of the municipality.⁶⁴ Such provisions are mandatory and must be observed.⁶⁵

62. *City Street Improvement Co. v. Babcock*, 123 Cal. 205, 55 Pac. 762; *Sedalia v. Scott*, 104 Mo. App. 595, 78 S. W. 276; *Knopf v. Gilsonite Roofing, etc. Co.*, 92 Mo. App. 279, 284; *State v. Jersey City*, 44 N. J. L. 626; *Roebeling v. Trenton*, 58 N. J. L. 40, 32 Atl. 685.

63. *Armstrong v. Ogden City*, 12 Utah 476, 43 Pac. 119.

But in Louisiana it was held that upon withdrawal of objections, the improvement was properly proceeded with. *New Orleans v. Stewart*, 18 La. Ann. 710.

64. § 694 *ante*, vol. 2.

California. *Redondo Beach v. Barkley*, 151 Cal. 176, 90 Pac. 452; *Oakland v. Thompson*, 151 Cal. 572, 91 Pac. 387.

Missouri. *State ex rel. v. Allen*, 178 Mo. 555, 77 S. W. 868; *State v. Allen*, 183 Mo. 283, 82 S. W. 103.

New Jersey. *Marcellus v. Garfield Borough*, 71 N. J. L. 373, 58 Atl. 1099; *Lockwood v. East Orange*, 73 N. J. L. 518, 64 Atl. 144.

New York. *Mead v. Turner*, 119 N. Y. S. 526, 134 App. Div. 691, 112 N. Y. S. 127, aff'g 60 Misc. Rep. 145.

North Carolina. *Hendersonville v. Webb & Co.*, 148 N. C. 120, 61 S. E. 670.

Texas. *Houston v. Glover*, 40 Tex. Civ. App. 177, 89 S. W. 425, distinguishing between a contract with an architect for plans for a building and a contract for the erection of the building.

Washington. *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. Rep. 836.

Wisconsin. *Smith v. Burlington*, 129 Wis. 336, 109 N. W. 79.

United States. *Defiance v. McGonigale*, 150 Fed. 689, 80 C. C. A. 425, aff'g 140 Fed. 621.

65. **Public works.** Assessment of benefits for sewer, held valid, though cost exceeded charter limit, etc. *Park Ecclesiastical Soc. v. Hartford*, 47 Conn. 89.

Establishing park. *People v. Salomon*, 46 Ill. 415.

§ 1863. Mode of paying for improvement.

Usually when a municipal corporation has power to make or provide for the making of improvements, it has

Street improvement; approval of voters not necessary. *Barber Asphalt Pav. Co. v. Gogreve*, 41 La. Ann. 251, 5 So. 848.

Levee; election held irregular. *Byrne v. Parish of East Carroll*, 45 La. Ann. 392, 12 So. 521.

Subway for railroad tracks. *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

City hall and fire engine house; vote of people not required. *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715.

Public school. *Decatur v. Wilson*, 96 Ga. 251, 23 S. E. 240.

Vacating street; proposition to be submitted to voters under charter of Mankato, Minn. *Lamm v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

Act may be accepted by the voters before the expiration of time named. *Workman v. Worcester*, 118 Mass. 168.

Lighting. *Citizens Gas Light Co. v. Wakefield*, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457; *Hudson Electric Light Co. v. Hudson*, 163 Mass. 346, 40 N. E. 109; *Carthage v. Carthage Light Co.*, 97 Mo. App. 20, 70 S. W. 936; *Thompson Houston Electric Co. v. Newton*, 42 Fed. 723, holding that submission of the entire proposition may be made prior to the adoption of the ordinance providing for the lighting plant.

Where the electors have voted in favor of a municipal lighting plant, a contract made thereafter

with a private corporation to furnish light is void. *George v. Wyandotte Electric Light Co.*, 105 Mich. 1, 62 N. W. 985; *Campbell v. Wyandotte*, *Id.*

Only the matters expressly directed need be submitted to the voters. Hence, where the law does not so require, the rate of interest of the bonds, their sale at par and the place of payment need not be approved by the electors. *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014.

Entire proposition may be submitted. *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077.

Water supply. *Hornby v. Beverly*, 48 N. J. L. 110, 2 Atl. 637; *Thompson v. Sumner*, 9 Wash. 310, 37 Pac. 450.

Ordinance providing for the erection of waterworks may be passed before the approval of the proposition by the voters, and made to take effect on such approval. *Taylor v. McFadden*, 84 Iowa. 262, 50 N. W. 1070.

Held under particular law that contract for supply valid, without submission to voters. *East Jordan Lumber Co. v. East Jordan*, 100 Mich. 201, 58 N. W. 1012.

"General" or "special" election. *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014.

A street improvement was held not to be a "public utility" within the meaning of the Oklahoma constitution requiring submission to electors. § 1618 *ante*.

power to make arrangements to meet the expense thereof.⁶⁶ The mode of paying for public improvements is sometimes prescribed by statute or charter,⁶⁷ but in the absence of express direction the method to be adopted is within the discretion of the proper municipal authorities.⁶⁸ A grant of power authorizing the paying for public improvements by special assessments is usually construed as not affecting the power of the municipal corporation to make improvements and pay therefor out of the general revenue.⁶⁹ However, the rule is different

66. *Clark v. Des Moines*, 19 Ia. 199, 87 Am. Dec. 423; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. 586; *Memphis v. Brown*, 20 Wall. (U. S.) 289, 22 L. Ed. 264; *Bigelow v. Perth Amboy*, 25 N. J. L. 297.

May borrow money to pay for things they are expressly authorized to buy. *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721.

Authority to open streets, two-thirds of the expense to be borne by abutting property owners, does not affect the city's right to incur indebtedness therefor; it being intended that the city should pay all costs thereof and collect two-thirds from the property owners. *Argenti v. San Francisco*, 16 Cal. 255.

Power "to establish and regulate markets," is authority to purchase a market site on credit. *Ketchum v. Buffalo*, 14 N. Y. 356, aff'g 21 Barb. 294.

67. *Louisville v. Hexagon Tile Walk Co.*, 103 Ky. 552, 20 Ky. L. Rep. 236, 45 S. W. 667; *Covington v. Nadaud*, 103 Ky. 455, 20 Ky. L. Rep. 151, 45 S. W. 498.

68. *Illinois*. *Ricketts v. Hyde Park*, 85 Ill. 110; *Fagan v. Chicago*, 84 Ill. 227.

Indiana. *Indianapolis v. Imberry*, 17 Ind. 175.

Iowa. *Shelby v. Burlington*, 125 Ia. 343, 101 N. W. 101.

Kentucky. *Neff v. Covington Stone, etc. Co.*, 108 Ky. 457, 21 Ky. L. Rep. 1454, 22 Ky. L. Rep. 139, 55 S. W. 697, 56 S. W. 723; *Cassidy v. Covington*, 12 Ky. L. Rep. 980, 16 S. W. 93.

Missouri. *Kolkmeier v. Jefferson*, 75 Mo. App. 678.

New York. *Re Turfler*, 44 Barb. (N. Y.) 46, 19 Abb. Pr. 140.

North Dakota. *Pine Tree Lbr. Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357.

69. *California*. *Chambers v. Satterlee*, 40 Cal. 497.

Indiana. *Evansville v. Summers*, 108 Ind. 189, 9 N. E. 81.

Kansas. *Garden City v. Trigg*, 57 Kan. 632, 47 Pac. 524.

Kentucky. *Guffield v. Bowling Green*, 6 B. Mon. (45 Ky.) 224.

New Jersey. *Tappan v. Long Branch Police Commission*, 59 N. J. L. 371, 35 Atl. 1070.

Pennsylvania. *Commonwealth v. George*, 148 Pa. St. 463, 24 Atl. 59, 61.

Wisconsin. *McCullough v. Campbellsport*, 123 Wis. 334, 101 N. W. 709.

under authority to make the improvements only at the expense of the property abutting thereon.⁷⁰

Various methods of paying for improvements exist, and whether the mode prescribed is exclusive depends on the proper construction of the controlling law.⁷¹ Sometimes the improvements are paid for by special assessment or special taxation,⁷² by general taxation,⁷³ by

70. *North Pacific Lumbering, etc. Co. v. East Portland*, 14 Ore. 3, 12 Pac. 4; *Findley v. Hull*, 13 Wash. 236, 43 Pac. 28.

71. *Illinois. Gault v. Glen Ellyn*, 226 Ill. 520, 80 N. E. 1046; *East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674.

Kentucky. Cassidy v. Covington, 12 Ky. L. Rep. 980, 16 S. W. 93; *Kearns v. Covington*, 12 Ky. L. Rep. 981, 16 S. W. 94.

Missouri. Joplin v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506.

New Jersey. Locker v. South Amboy, 62 N. J. L. 197, 40 Atl. 637.

Not necessary to record determination of council whether improvement should be paid for by property owners or out of general fund. *Indianapolis v. Imberry*, 17 Ind. 175.

Confirmation of special assessment for sewer system including pumping plant, cannot be objected to because funds for paying for pumping station site were not properly raised, no objection having been made at time of purchase of same. *Snyder v. West Hammond*, 225 Ill. 154, 80 N. E. 93.

A city prohibited from loaning its credit or money cannot issue interest bearing warrants for improvements as the work pro-

gresses. *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29.

Money raised to improve a street cannot be used for building wharf unless wharf is properly an incident to constructing street. *Snyder v. Rockport*, 6 Ind. 237.

72. By special assessments on abutting property. *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357.

Sewers by special assessment. *Davies v. New Orleans*, 40 La. Ann. 806, 6 So. 100; *Re Drake*, 69 Hun (N. Y.) 95, 23 N. Y. S. 264, 52 N. Y. St. Rep. 606.

A constitutional provision relating to an estimate and assessment of the benefits of public improvements upon city streets, held to be self-enforcing and to require no legislation to enforce it. *McDonald v. Patterson*, 54 Cal. 254; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *Hilton v. Heverin*, 69 Cal. XV, 11 Pac. 27.

Ordinance providing for collection of interest on special taxbill must conform to the general law. *Western Springs v. Hill*, 177 Ill. 634, 52 N. E. 959.

Local improvement at a price far in excess of any benefit to abutting property, held unauthor-

a bond issue to be determined by the electors,⁷⁴ by warrants or other evidences of debt,⁷⁵ out of the general revenue,⁷⁶ by citizens and property owners who agreed thereto although under no legal obligation to do so,⁷⁷ or by a combination of methods.⁷⁸ Thus, under some char-

ized. *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532.

Forbidding the appropriation of moneys raised for highway purposes to repair sidewalks. *Ellis v. Lowville*, 7 Lans. (N. Y.) 434.

See chapter 38 *post*, vol. 5.

73. See chapter on Taxation, *post*, vol. 5.

74. Bonds. *Yarnold v. Lawrence*, 15 Kan. 126; *McCurdy v. Lawrence*, 15 Kan. 133.

Raised by an issue of bonds at an election of the electors. *Trowbridge v. Hudson*, 14 Ohio Cir. Dec. 76.

See chapter on Municipal Bonds, *post*, vol. 5.

75. Under a particular law, held that commissioners of highways had power to borrow money on the credit of the town to pay for rebuilding a bridge or repairing the same. *Boots v. Washburn*, 79 N. Y. 207.

Under a charter restricting the city to contract for improvements only by paying for the improvements by warrants against the property abutting upon the improvement to be paid for, a contract by which the city agrees to pay for an improvement from its general fund is void. *Northern Pacific Lumbering and Mfg. Co. v. East Portland*, 14 Ore. 3, 12 Pac. 4.

76. Improvements at street intersections. *State v. Sioux Falls*, 25 S. D. 3, 124 N. W. 963.

Construction of a sewer. *Commonwealth v. George*, 148 Pa. 463, 24 Atl. 59, 61.

Lighting plant. *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278.

Part of cost of improving alley. *Collins v. Keokuk*, 147 Ia. 233, 605, 124 N. W. 601.

Replacing worn and decayed curb stones with new ones and lining up the curb is repair work, and cannot be assessed against property, in St. Louis. *Perkinson v. Schmaake*, 108 Mo. App. 255, 83 S. W. 301.

Expense for street improvement is not a "current expense," for which a city is authorized to pay from current annual revenues. *Berlin Iron Bridge Co. v. San Antonio, Tex. Civ. App.* (1899), 50 S. W. 408.

77. § 1864 *post*.

78. Special assessment or out of general revenue. *Kolkmeier v. Jefferson*, 75 Mo. App. 678; *Dunn v. Tarentum Borough*, 23 Pa. Super. Ct. 332.

Constructing sewer on credit or issuing installment bonds therefor to be paid by special assessment. *Atchison v. Price*, 45 Kan. 296, 25 Pac. 605.

The charter provided that repairs of streets are to be made at the public expense; and that macadamizing and paving shall be by special assessment; held, that macadamizing and paving

ters the municipal authorities may provide that certain designated parts of an improvement shall be paid for out of the general revenue and the other parts by special assessment, or by special assessment and special taxation.⁷⁹

The power often vested in the municipal authorities to point out the method of making assessments^{79a} does not warrant a violation of mandatory legal provisions relating to the mode of apportionment.⁸⁰ As the ordi-

cannot be done at the general expense as repairs. *Murtaugh v. Paterson*, 45 N. J. L. 267.

City authorized to pay half of cost of improvement and assess other half against property benefited. *Maddux v. Newport* (Ky., 1890), 14 S. W. 957; *Cassidy v. Covington* (1891), 16 S. W. 93, 12 Ky. L. Rep. 980.

79. *Ronan v. People*, 193 Ill. 631, 61 N. E. 1042; *Middaugh v. Chicago*, 187 Ill. 230, 58 N. E. 459; *Cramer v. Charleston*, 176 Ill. 507, 52 N. E. 73; *Re Turfler*, 44 Barb. (N. Y.) 46, 19 Abb. Pr. 140.

Where improvement is to be paid for by local assessment, city may still provide for paying any deficiency out of general funds. *Garden City v. Trigg*, 57 Kan. 632, 47 Pac. 524.

City held, by two-thirds vote of council, to be authorized to make street improvement over protest of the property owner, in excess of benefits to property, the excess to be paid out of general revenue. *Gardiner v. Bluffton*, 173 Ind. 454 (1909), 89 N. E. 853, rehearing denied (1910), 90 N. E. 898.

"Public grounds," abutting which a city was required to pay for improving street to center

thereof. *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

Where a grant of power recited that local assessments could be made by special assessment, or by special taxation, or both, and that the ordinance providing for the same should specify whether the same should be by special assessment, or special taxation, or both, it was held that a city could not combine special assessment, special taxation, and general taxation in making a single improvement. *Kuehner v. Freeport*, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774.

79a. *Chamberlain v. Evansville*, 77 Ind. 542.

80. *Shreveport v. Prescott*, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193; *Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943.

Assessment against property owners is invalid where the inference to be drawn from the ordinance is that the improvement is to be paid for by the city. *Greenville v. Harvie*, 79 Miss. 754, 31 So. 425.

Specification that a church shall pay for all of street improvement

nance is the foundation upon which all subsequent proceedings are based, it is the law in some jurisdictions that the method of paying for the improvement must be provided therein.⁸¹

§ 1864. Agreements of citizens and property owners to pay for improvements.

Agreements of citizens and property owners to pay the expense or a part thereof, of improvements, when they were under no legal obligation to do so, have been sanctioned by the courts and held not to be opposed to public policy.⁸² Thus a promise made by citizens to pay a part of the expense of opening a street, which, under the law, was to be imposed upon the property owners in proportion to benefits, etc., was judicially declared, in New Jersey, not against good public policy, and hence, an ordinance passed to open the street in pursuance of such promise was decided not to be void on this ground.⁸³

§ 1865. Sufficiency of ordinance relating to payments in installments.

Many charters provided for the payment of the cost

when it owned only a part of the ground fronting thereon renders an ordinance void where a statute provides that such improvements shall "be made at the expense of the lots or parts of lots fronting thereon." *Roman Catholic German Church v. Weighaus*, 16 Ky. L. Rep. 446.

The fact that an ordinance wrongly specifies the benefits to be assessed against property owners, does not render the whole ordinance void. *Re Wheeler Ave. Sewer*, 214 Pa. St. 504, 63 Atl. 894.

81. *Dolese v. McDougall*, 78 Ill. App. 629, 643, aff'd 182 Ill. 486, 55 N. E. 547; *Hyde Park v. Thatcher*, 13 Ill. App. 613, 616.

82. *Ford v. North Des Moines*, 80 Iowa 626, 45 N. W. 1031; *Parks v. Boston*, 8 Pick. (25 Mass.) 218, 19 Am. Dec. 322; *Crockett v. Boston*, 5 Cush. (59 Mass.) 182; *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394.

83. *State v. Orange*, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62. See cases in opinion *pro* and *con* fully discussing question, and note to 14 L. R. A. 62, 63, 64 and cases.

Private contributions towards defraying expenses of public improvement, do not affect acts of authorities in determining whether improvement should be made, and details of making it. *Towne v. Newton*, 169 Mass. 240, 47 N. E. 1029.

of certain improvements by special assessment or taxation in installments. The usual requirement is that the ordinance directing the improvement shall prescribe the number of payments, within the restrictions of the charter.⁸⁴ The Illinois statute provides that special assessments may be divided into not more than seven installments, the first to include all fractional amounts, leaving the others equal in amount and multiples of one hundred dollars. In that state an ordinance which divided the assessments into seven installments, the first including twenty per cent of the assessment, together with all fractional amounts, leaving the others equal in amount and multiples of one hundred dollars, was sustained; the court ruling that the statute did not limit the first installment to one-seventh of the whole assessment plus the fractional amount.⁸⁵ So the failure of the ordinance to make the first installment include all fractional amounts does not render it void.⁸⁶ So the fact that the ordinance provides that the first installment of twenty per centum shall be paid upon the confirmation of the assessment and twenty per centum of the total each year thereafter does not render it void for uncertainty as to the time of payment of the deferred installments.⁸⁷

An ordinance which provided that "the assessments shall be divided into and collected by installments," in accordance with the statute (specifying it), "and that the amount of the first of said installments shall be twenty per cent of the total of said assessment," was pronounced sufficient. The statute provided for the number and time of payment of each installment. "The ordinance, taken with the statute, is certain and specific."⁸⁸

84. St. Louis Charter, art. VI, § 25; The Revised Code of St. Louis (Woerner, 1907), p. 415.

Drainage assessments. Gray v. Cicero, 177 Ill. 459, 53 N. E. 91.

85. Latham v. Wilmette, 168 Ill. 153, 48 N. E. 311.

86. Delamater v. Chicago, 158 Ill. 575, 42 N. E. 444.

87. Davis v. Litchfield, 155 Ill. 384, 40 N. E. 354.

88. Andrews v. People ex rel., 164 Ill. 581, 584, 45 N. E. 965.

Division of assessment into in-

§ 1866. Estimate of cost of improvement.

Where the improvement is to be paid for by special assessment or taxation, the provision is frequent that the total cost thereof shall be estimated by designated officers and sometimes it is required to be indorsed on the improvement ordinance. This provision is generally regarded as mandatory,⁸⁹ but it is sometimes held di-

stallments not in accordance with the requirements of the law, held no ground for refusing judgment of sale if the objector is not thereby prejudiced. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

An ordinance providing that the assessment should be paid in seven installments, the first at a certain time and remainder at yearly intervals, and stating that the division shall be so made that the first installment shall include all fractional amounts, leaving each of the remaining installments equal in amount and multiples of \$100, is not open to the objection of uncertainty as failing to state the proportion of the assessment to be paid in the first installment. *Parker v. La Grange*, 171 Ill. 344, 49 N. E. 550.

Further respecting the ordinance providing for payment by installments under the Illinois statute, see *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327; *Danforth v. Hinsdale*, 177 Ill. 579, 52 N. E. 877.

89. *Illinois*. *Moore v. Mattoon*, 163 Ill. 622, 45 N. E. 567; *Barber v. Chicago*, 152 Ill. 37, 38 N. E. 253.

Indiana. *McKernan v. Indianapolis*, 38 Ind. 223.

Kansas. *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Hentig v.*

Gilmore, 33 Kan. 234, 6 Pac. 304. *Massachusetts*. *Morse v. Street Com'rs.*, 197 Mass. 292, 83 N. E. 891.

Minnesota. *Weller v. St. Paul*, 5 Minn. 95.

Missouri. *Kinealy v. Gay*, 7 Mo. App. 203; *Barber-Asphalt Paving Co. v. Hezel*, 76 Mo. App. 135; *De Soto ex rel. v. Showman*, 100 Mo. App. 323, 73 S. W. 257; *Kirksville ex rel. v. Coleman*, 103 Mo. App. 215, 220, 77 S. W. 120; *Independence v. Briggs*, 58 Mo. App. 241; *Marshall v. Rainey*, 78 Mo. App. 416; *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; *Boonville v. Stephens (Mo. App.)*, 95 S. W. 314.

Nebraska. *Moss v. Fairbury*, 66 Neb. 671, 92 N. W. 721; *John v. Connell*, 61 Neb. 267, 85 N. W. 82.

New Jersey. *Paterson, etc. R. Co. v. Nutley*, 72 N. J. L. 123, 59 Atl. 1032; *Pope v. Union*, 32 N. J. L. 343.

South Dakota. *Whittaker v. Deadwood*, 23 S. D. 538, 122 N. W. 590.

Texas. *Frosh v. Galveston*, 73 Tex. 401, 11 S. W. 402; *Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128; *Dallas v. Atkins (Tex. Civ. App. 1895)*, 32 S. W. 780.

Wisconsin. *Pound v. Chippewa Co. Supervisors*, 43 Wis. 63.

rectory only, depending on the intent of the law involved;⁹⁰ and under some laws such estimate is not required, or is held not applicable to certain kinds of improvements.⁹¹

Charter and statutory provisions construed.

Illinois. Illinois Cent. R. Co. v. People, 170 Ill. 224, 48 N. E. 215; Lamphere v. Chicago, 212 Ill. 440, 72 N. E. 426; Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878.

Michigan. Baisch v. Grand Rapids, 84 Mich. 666, 48 N. W. 176; Beecher v. Detroit, 92 Mich. 268, 52 N. W. 731.

New Jersey. Humphreys v. Bayonne, 60 N. J. L. 406, 38 Atl. 761.

Ohio. Longworth v. Cincinnati, 10 Ohio Dec. 683, 23 Wkly. Law Bul. 100.

Proceedings under particular law, held void. Friedenwald v. Shipley, 74 Md. 220, 21 Atl. 790, 24 Atl. 156.

Amending ordinance without changing estimate of cost indorsed on back does not affect its validity. Bambrick v. Campbell, 37 Mo. App. 460.

Estimate not invalid because made before board's resolution describing the proposed improvement and fixing a day for public hearing thereon. Givins v. Chicago, 186 Ill. 399, 57 N. E. 1045.

Requirement that first resolution of board contain estimate of cost, held sufficiently complied with where a resolution was adopted that a street be paved, and another resolution calling on the engineer for an estimate of the cost, and then another resolution containing the estimate. Heiple

v. Washington, 219 Ill. 604, 76 N. E. 854.

Sufficiency of description of street improvement in estimate therefor. Peru & I. R. Co. v. Hanna, 68 Ind. 562.

90. Estimate of cost for sewer system. System adopted without estimate of cost included. Cheney v. Beverly, 188 Mass. 81, 74 N. E. 306.

The failure of the commissioner of highways to make an estimate of the cost of an improvement as required by ordinance is no ground for setting aside an assessment on land to help pay for the improvement. The requirement, held directory only. Dickinson v. Worcester, 138 Mass. 555.

91. Contract for grading of streets may be legally let although no estimate of the expense thereof as required by the charter was made or filed where the estimate is intended only for the benefit of the lot owners, and it does not limit the amount of the bid or cost of the work. Nash v. St. Paul, 8 Minn. 172.

In a proceeding for the construction of sidewalks omission to make and file the estimate of expense, held to be a mere informality. Griggs v. St. Paul, 11 Minn. 308; De Rochbrune v. St. Paul, 11 Minn. 313.

Power to make a contract for street paving, held did not depend upon the filing of an estimate of the expense thereof, hence such

Sometimes the estimate must be made prior to the letting of the contract for the work,⁹² or at least in advance of the construction of the improvement, especially where the charter in express terms so requires,⁹³ but usually it may be made before,⁹⁴ or after the passage of

filing need not be alleged by a contractor in an action to recover for work done under such contract. *Nash v. St. Paul*, 8 Minn. 172.

A requirement that the city engineer shall make an estimate of the cost "before the city council shall make any contract for building bridges or sidewalks, or for any work on streets, or for any other work or improvements," does not apply to a contract with a company to supply the city with illuminating gas. *Nebraska City v. Nebraska City Hydraulic Gas-light, etc. Co.*, 9 Neb. 339, 2 N. W. 870.

No estimate is necessary for change of grade in a street. *Waddell v. New York*, 8 Barb. (N. Y.) 95.

City of first-class in Ohio can order street improvement without estimate of cost. *Hubbard v. Norton*, 28 Ohio St. 116.

92. *Indiana*. *Alley v. Lebanon*, 146 Ind. 125, 44 N. E. 1003.

Minnesota. *Weller v. St. Paul*, 5 Minn. 95. But see *Griggs v. St. Paul*, 11 Minn. 308.

Missouri. *Kirksville v. Coleman*, 103 Mo. App. 215, 77 S. W. 120.

New York. *Reilly v. New York*, 54 N. Y. Super. Ct. 463; *Re Feust*, 8 N. Y. S. 420, *aff'd* 121 N. Y. 299, 24 N. E. 479.

Texas. *Corsicana v. Kerr*, 89 Tex. 461, 35 S. W. 794.

Wisconsin. But see *Pabst Brewing Co. v. Milwaukee*, 126 Wis. 110, 105 N. W. 563.

United States. *Edgar v. Pittsburgh*, 114 Fed. 586.

93. Execution of a contract for the construction of a sewer prior to an estimate of the costs thereof, though unauthorized, held not to invalidate the ordinance directing the construction. *People v. New York*, 5 Barb. (N. Y.) 43.

The estimate of the expense and the amount thereof to be assessed upon the owners or occupants of premises liable for such assessment need not be made until entering upon the construction of the work, as in building a sewer. *Laimbeer v. New York*, 4 Sandf. (6 N. Y. Super. Ct.) 109.

Before payment for the removal of garbage or a contract therefor is made, an estimate of the necessary expense and the passage of an appropriation ordinance are necessary. *Kelley v. Broadwell* (Neb.), 92 N. W. 643.

Unless required to be made in advance of the construction of the improvement, an estimate not so made will not invalidate the proceedings. *Haughawout v. Raymond*, 148 Cal. 311, 83 Pac. 53; *Ronan v. People*, 193 Ill. 631, 61 N. E. 1042.

94. *Wadlow v. Chicago*, 159 Ill. 176, 42 N. E. 866.

the improvement ordinance or resolution.⁹⁵ Estimates should be made and reported by the officers, boards or committees acting together designated in the law, and approved when so required in the manner prescribed, otherwise they may be avoided.⁹⁶ As certain charter or

95. *Kansas City v. Cullinan*, 65 Kan. 68, 68 Pac. 1099; *Gilmore v. Norton*, 10 Kan. 491.

96. Failure to observe a legal provision requiring an estimate of the probable cost of the improvement to be made and a report of a list of lot owners with the proportion of expenses due each lot which was to be approved by the council, held fatal. Such report and its approval held to be a condition precedent to the letting of a valid contract. *Corsicana v. Kerr*, 89 Tex. 461, 35 S. W. 794, aff'g *Kerr v. Corsicana* (Tex. Civ. App.), 35 S. W. 694.

Estimate and apportionment of cost must be made by the proper officer. *Walsh v. First Nat. Bank*, 139 Mo. App. 641, 123 S. W. 1001; *Rich Hill v. Donnan*, 82 Mo. App. 386.

Estimate by engineers not residents, upheld. *Abilene v. Lambing*, 78 Kan. 484, 96 Pac. 838.

Where it is required that the estimate be signed by the engineer of the board of local improvements, his signature is sufficient without that of the president of the board. *East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674.

If required to be made by the city engineer or other "proper officer" the street commissioner may be directed to prepare the same. *Bevier v. Watson*, 113 Mo. App. 506, 87 S. W. 612.

Where three commissioners are appointed to estimate the cost of an improvement and their report is signed by only two of them and there is nothing to show that the other participated therein, it is insufficient and cannot support a judgment confirming a special assessment for the improvement. *Phelps v. Mattoon*, 177 Ill. 169, 52 N. E. 288. *Examine Murphy v. Chicago*, 186 Ill. 59, 57 N. E. 847; *Markley v. Chicago*, 170 Ill. 358, 48 N. E. 952; *Moore v. Mattoon*, 170 Ill. 316, 48 N. E. 908; *Hinkle v. Mattoon*, 170 Ill. 316, 48 N. E. 908.

A board required to estimate the cost of a proposed improvement may adopt an estimate made by the city surveyor. *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 141.

Estimate must be contained in board's record of first resolution. *Chicago Union Traction Co. v. Chicago*, 209 Ill. 444, 70 N. E. 659.

Such estimate kept on file in board's office, indexed and accessible to all, is not a compliance with such requirement. *Chicago Union Traction Co. v. Chicago*, 209 Ill. 444, 70 N. E. 659.

An ordinance based on a resolution, the record of which did not contain the engineer's estimate of cost of the improvement as required, held void. *Becker v. Chicago*, 208 Ill. 126, 69 N. E. 748.

statutory provisions are construed, the estimate is frequently made the basis of the contract for the improvement and must be considered with the ordinance;⁹⁷ however, under some law it is held that it is no part of the plans and specifications and hence a bidder has no right to rely upon it in making his bid, and that in such case the municipal authorities possess no power to contract that work to be done will be limited by such estimate.⁹⁸

A *second estimate* may be made when it is found that the original is not sufficient. But all formalities required

A mere reference to engineer's estimate of cost in board's resolution is not a compliance with requirement that the estimate shall be made a part of the record of the resolution. *Kilgallen v. Chicago*, 206 Ill. 557, 69 N. E. 586.

But the engineer's full report need not be contained in the resolution; the final estimate is sufficient. *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217.

Estimate of cost indorsed on ordinance need be only of that to be paid for by city. *Seibert v. Cavender*, 3 Mo. App. 421.

97. Under particular charter the ordinance authorizing the grading and macadamizing of a certain street directed that the macadam should extend from curb to curb. The law required the city engineer to estimate the cost of the work. Held, such estimate, being a basis for the contract, must be considered with the ordinance; and that the estimate for grading the whole street includes the space reserved for sidewalks. *Independence v. Briggs*, 58 Mo. App. 241.

Notwithstanding the estimate

for street improvements is the basis of a contract therefor it need not show the different parts of the work included in such improvement where such parts appear when considered with the ordinance. *Independence v. Briggs*, 58 Mo. App. 241.

The law required the awarding of contracts for public work to be to the lowest bidder. The advertisement for bids only gave estimates for a part of the work. Held, that a contract based on such estimates was not a contract with the lowest bidder and hence was void. *Rielly v. New York*, 54 N. Y. Sup. Ct. (22 J. & S.) 463.

The law required the advertisement for bids which were to be let to the lowest bidder, to state as near as possible the quantity and quality of the work to be done, held that an estimate which was only a random guess could not form the basis for legal contract. *Re Anderson*, 109 N. Y. 554, 17 N. E. 209, aff'g 47 Hun (N. Y.) 203.

98. *Nash v. St. Paul*, 23 Minn. 132.

in the first instance must be observed.⁹⁹ And where proceedings are dismissed for invalidity, there must be a new estimate of cost and a public hearing before another ordinance is adopted.¹

The *sufficiency of the estimates* is to be determined by a proper construction of the law involved and the nature of the proposed improvement.² Obviously, it should be

99. *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467.

After estimate has been made and public consideration of the improvement had, a second and larger estimate cannot be made. *Chicago v. Wilder*, 184 Ill. 397, 56 N. E. 395.

1. *Bass v. Chicago*, 195 Ill. 109, 62 N. E. 913.

2. *Sufficiency of estimate.*

California. *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

Illinois. *Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874; *Jones v. Chicago*, 213 Ill. 92, 72 N. E. 798; *East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674; *Cramer v. Charleston*, 176 Ill. 507, 52 N. E. 73; *Gage v. Chicago*, 162 Ill. 313, 44 N. E. 729.

Michigan. *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 41; *Baisch v. Grand Rapids*, 84 Mich. 666, 48 N. W. 176; *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526.

Ohio. *Wewell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196.

Pennsylvania. *Erie v. Brady*, 150 Pa. St. 462, 24 Atl. 641.

Washington. *Wingate v. Tacoma*, 9 Wash. 253, 37 Pac. 441.

"Estimate" of the cost of an improvement, held to mean an approximation of the cost of the work. A statement that the cost

of an improvement would not exceed a certain amount is not sufficient. *Boonville v. Rogers*, 125 Mo. App. 142, 101 S. W. 1120; *Boonville v. Braxton* (Mo. App.), 101 S. W. 1123.

Estimate; meaning of provisions for. *Ireland v. Rochester*, 51 Barb. (N. Y.) 414, 427.

A statement that the work is to be done according "to the drawings of said ordinance attached," where the ordinance does not refer to drawings, does not show that the ordinance was not followed. *Barber v. Chicago*, 152 Ill. 37, 38 N. E. 253.

The fact that the order approving a report estimating the cost of the work has an earlier number than the ordinance ordering the improvement does not prove that the estimate of cost was made prior to the passage of the ordinance. *Wadlow v. Chicago*, 159 Ill. 176, 42 N. E. 866.

Description of location in estimate sufficient. *McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191; *Gage v. Wilmette*, 230 Ill. 428, 82 N. E. 656; *Northwestern University v. Wilmette*, 230 Ill. 80, 82 N. E. 615; *McChesney v. Chicago*, 227 Ill. 450, 81 N. E. 435; *Gage v. Chicago*, 225 Ill. 218, 80 N. E. 127; *Gage v. Chicago*, 223 Ill. 602, 79

definite and certain,³ and based upon the cost for cash, but it is sufficient if the cost for cash is readily ascertainable from the estimate made.⁴ *Estimates in gross* have been upheld,⁵ but under laws requiring *detailed estimates* further specification is necessary;⁶ however,

N. E. 294; *Mexico v. Lakenan*, 129 Mo. App. 180, 108 S. W. 141.

Correcting erroneous estimate. *West Chicago Park Comrs. v. Schillinger*, 117 Ill. App. 525.

3. A requirement of an estimate of the cost of an improvement is not complied with by an estimate that the work "should be done at a cost not to exceed \$1.47 per square yard," it being too indefinite. *Boonville v. Stephens* (Mo. App., 1906), 95 S. W. 314.

4. *Kansas Town Co. v. Argentine*, 5 Kan. App. 50, 47 Pac. 542, aff'd 59 Kan. 779, 54 Pac. 1131.

5. *Wewell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196.

Where a board was required to report to the council a detailed estimate of the cost of an improvement, a report by it of the gross cost of same will not have the effect of invalidating special assessments levied to pay the cost of such improvement. *Goodville v. Detroit*, 103 Mich. 283, 61 N. W. 526.

6. Estimate in gross sum, held insufficient. *Peoria v. Ohl*, 209 Ill. 52, 70 N. E. 632; *Bickerdike v. Chicago*, 203 Ill. 636, 68 N. E. 161.

Where, as a prerequisite to a valid improvement ordinance, the city engineer is required to estimate the cost of the improvement, "particularly stating the items, and cost of each," an "approximate estimate of quantities and

cost" made by him showing merely the amount of surface to be paved with stone and the amount with asphaltum, and the cost of each a foot completed, held not sufficient and an ordinance passed thereafter authorizing the improvement was void. *Erie v. Brady*, 150 Pa. St. 462, 24 Atl. 641.

Where a detailed estimate of the cost of paving and curbing a street is required, an estimate which gives the surface to be paved, kind of pavement, cost a yard, and aggregate cost, number of lineal feet of curbing, its character, and cost a foot and aggregate cost, is sufficient. *Olson v. Topeka*, 42 Kan. 709, 21 Pac. 219. See also *Argentine v. Simmons*, 54 Kan. 699, 39 Pac. 181.

A statement in an estimate that the paving of a street is to be stone and asphalt sufficiently describes its character. *Id.*

The following, held sufficient: "Granite concrete combined curb and gutter on cinders, 7,126 lineal feet at 70 cents, \$4,988.20; paving with asphalt on six inches of Portland cement concrete swept with natural hydraulic cement, 11,349 square yards at \$2.50, \$28,372.50; adjustment of sewers, catch-basins and man-holes \$1,139.30; total \$34,500." *Hulbert v. Chicago*, 213 Ill. 452, 72 N. E. 1097, dismissed 202 U. S. 275, 26 Sup. Ct. 617, 50 L. Ed. 1026.

it seems that an itemized estimate need only show the estimated cost of the *substantial component elements* of the improvement.⁷ In a word, an itemized estimate is sufficient if it shows precisely what work or material is covered by each item.⁸ It is not necessary that the estimate set out in minute detail each separate item of material and labor to go into the improvement, but as stated, only the substantial component parts need be contained therein.⁹ It is sometimes required that the

7. *Clark v. Chicago*, 214 Ill. 318, 73 N. E. 358; *Connecticut Mut. Life Ins. Co. v. Chicago*, 217 Ill. 352, 75 N. E. 365.

Estimate assumed to have been sufficiently specific, when. *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526; *Moore v. Detroit*, 103 Mich. 292, 61 N. W. 529.

Requirement that detailed estimate of cost be given, held complied with. *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108, 7 Det. Leg. N. 283.

8. *Carbondale v. Walker*, 240 Ill. 18, 88 N. E. 296; *Chicago, etc. R. Co. v. Chicago*, 230 Ill. 9, 82 N. E. 399; *Oak Park v. Galt*, 231 Ill. 482, 83 N. E. 212; *Chicago Union Traction Co. v. Chicago*, 215 Ill. 410, 74 N. E. 449.

Where the law contemplates separate estimate for each separate improvement an estimate for a combined water and light plant was held sufficient though it did not separate the cost of the water from the light. *Cary v. Blodgett*, 10 Cal. App. 463, 102 Pac. 668.

Where no attempt is made by the officers to determine the qualities of material for the improvement separately, the court may in a proper action reduce the amount of the assessment in accordance

with the evidence. *Re Feust*, 121 N. Y. 299, 24 N. E. 479, aff'g 55 Hun 607, 8 N. Y. S. 420, 28 N. Y. St. Rep. 721.

9. "It is not necessary that the estimate contain a complete inventory of every article that is to enter into the construction of the improvement. If it contains the substantial component elements of the improvement it is sufficient." *Chicago v. Gage*, 237 Ill. 328, 86 N. E. 633.

"The extent to which separate items are to be set down in the estimate depends upon the nature of the improvement. While the estimate must be something more than the gross sum in one item, still it is not necessary to have the minute details as to all materials that go into an improvement set out in different items. Only the substantial component elements of the improvement are required to be placed in separate items." *Oak Park v. Galt*, 231 Ill. 482, 83 N. E. 212.

An objection that the estimate does not contain the estimated cost of lead and twine which would be necessarily used in calking the joints of the water mains, or an item showing the estimated cost of the stones or brick upon

costs of the various items of the improvement shall be separately stated;¹⁰ but manifestly an estimate for a sidewalk need not be made separately for each lot where the same kind of walk of the same dimensions is to be laid in front of all lots.¹¹

§ 1867. Provision for means of payment.

Before entering into contracts for certain improvements usually provisions for means to pay therefor is required to be made, otherwise the contract may be void.¹² This requirement is not applicable where the

which the thirteen hydrants provided for by the ordinance were to be placed, is not well taken. *Donovan v. Donovan*, 236 Ill. 636, 86 N. E. 575.

Where the estimate fails to show that the cost of the sub-foundation of the street curbing therein referred to was included, it is insufficient. *Lyman v. Cicefo*, 222 Ill. 379, 78 N. E. 830.

An estimate which failed to refer to the foundation of concrete and sand for a brick street, and to state the material to be used for crossings and to show whether the curbing was to be set in natural earth or on a foundation of other material was held fatally defective. *Doran v. Murphysboro*, 225 Ill. 514, 80 N. E. 323.

10. *People v. Peyton*, 214 Ill. 376, 73 N. E. 768.

11. *Mexico v. Lakenan*, 129 Mo. App. 180, 187, 108 S. W. 141.

12. *Illinois*. *Marysville v. Schoonover*, 78 Ill. App. 189.

Louisiana. *State v. King*, 109 La. 799, 33 So. 776.

Massachusetts. *Webb Granite, etc. Co. v. Worcester*, 187 Mass. 385, 73 N. E. 639.

New Jersey. *Hurley v. Trenton*, 4 McQ.—64

67 N. J. L. 350, 51 Atl. 1109, aff'g 66 N. J. L. 538, 49 Atl. 518.

New York. *Donovan v. New York*, 33 N. Y. 291.

Ohio. *Emmert v. Elyria*, 74 Ohio St. 185, 78 N. E. 269; *Hurst v. Belle Valley*, 30 Ohio Cir. Ct. Rep. 563.

Texas. *Kuhls v. Laredo* (Tex. Civ. App. 1894), 27 S. W. 791; *Fourth Nat. Bank v. Dallas* (Tex. Civ. App., 1903), 73 S. W. 841.

United States. *Berlin Iron Bridge Co. v. San Antonio*, 62 Fed. 882.

When cost of improvements exceeds appropriation, city not liable for excess. *Continental Bridge Co. v. Philadelphia*, 34 Leg. Int. (Pa.) 114, 12 Phila. 185.

Where constitution provides that no debt shall be created unless provision shall be made for raising money to pay same, a note given without complying with such requirements is void. *Noel v. San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 263.

Lack of funds is no defense to condemnation of ground for parks and squares, when. *Re Cedar Rapids*, 85 Ia. 39, 51 N. W. 1142.

entire cost of the improvement is charged against the property owners and not against the municipal revenues; ¹³ nor does it apply to emergency work, or ordinary expenses for repairs.¹⁴ Unless the law so requires funds on hand is not necessarily a condition precedent to contracting for the improvement.¹⁵

Lack of funds held no defense by board of water commissioners in case of *mandamus* to compel them to extend a water main, where the board of trustees of the village were compelled to include the expense in the annual tax levy if the extension was made. *People v. Pierce*, 119 N. Y. S. 21, 64 Misc. Rep. 627.

Indebtedness, held not invalid because expense exceeded estimate of revenues. *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746.

Bonds issued to contractor are void where no provision was made for interest and sinking fund. *Howard v. Smith*, 91 Tex. 8, 38 S. W. 15.

Determining time of creating debt and making provisions for paying same. *Winston v. Ft. Worth* (Tex. Civ. App., 1898), 47 S. W. 740.

Contractor held entitled to recover for certain work, although city had paid out all funds raised for that purpose. *Sherman v. Connor* (Tex. Civ. App., 1903), 72 S. W. 238.

Contracts relating to waterworks are often limited by laws providing that the proposed expenditure shall not exceed the yearly income of the waterworks. *Cincinnati v. Cincinnati*, 11 Ohio Cir. Ct. Rep. 309, 5 O. C. D. 372.

13. *California*. *Rice v. Haywards*, 107 Cal. 398, 40 Pac. 551. *Connecticut*. *Cook v. Ansonia*, 66 Conn. 413, 34 Atl. 183.

Iowa. *Re Cedar Rapids*, 85 Ia. 39, 51 N. W. 1142.

New Jersey. *Dixey v. Atlantic City*, 71 N. J. L. 120, 58 Atl. 370.

New York. *Boots v. Washburn*, 79 N. Y. 207; *Re Lewis*, 51 Barb. (N. Y.) 82, 35 How. Pr., § 162.

Improvement not requiring payment for a year and a half or more thereafter are not included. *Defiance Water Co. v. Defiance*, 90 Fed. 753.

14. *Appeals of Lehigh Coal, etc. Co.*, 112 Pa. St. 360, 5 Atl. 231.

Incurring indebtedness for improvement requiring more than amount allowed by annual tax levy. *Rice v. Hayward*, 107 Cal. 398, 40 Pac. 551.

15. *Missouri*. *Pryor v. Kansas City*, 153 Mo. 135, 54 S. W. 499.

New Jersey. *Dixey v. Atlantic City*, 71 N. J. L. 120, 58 Atl. 370.

New York. *Bradley v. Van Wyck*, 72 N. Y. S. 1034, 65 App. Div. 293.

Ohio. *Cincinnati v. Holmes*, 56 Ohio St. 104, 46 N. E. 514.

Where there is no constitutional, statutory or charter requirement a city need not have funds on hand to pay for a lighting plant before contracting for same. *Mitchell v. Negaunee*, 113

§ 1868. Certification of sufficiency of funds available.

Certification by designated officers that there are available funds sufficient to meet the expense of the proposed improvement prior to incurring an obligation therefor is frequently prescribed.¹⁶ This requirement has been held inapplicable where the improvement is to be paid for by special assessment or taxation against the property,¹⁷ and to proceedings in eminent domain for the purpose of street improvements.¹⁸

Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468, 4 Det. Leg. N. 318.

Constitutional provision relating to providing funds for paying debt at or before contracting same, held to apply only to interest bearing contracts. *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681.

Statute, held not applicable to construction of sewer before passage of statute. *Googin v. Lewiston*, 103 Me. 119, 68 Atl. 694.

16. *Braman v. Elyria*, 26 Ohio Cir. Ct. Rep. 731; *Pullen v. Smith*, 26 Ohio Cir. Ct. Rep. 549; *Holmes v. Avondale*, 11 Ohio Cir. Ct. Rep. 430, 1 Ohio Cir. Dec. 188; *Rhodes v. Toledo*, 6 Ohio Cir. Ct. Rep. 9.

Contract providing that city shall pay one-half of cost of street improvement, held void in absence of clerk's certificate that money required by the contract is in the treasury, as required by statute. *Holmes v. Avondale*, 11 Ohio Cir. Ct. Rep. 430, 1 Ohio Cir. Dec. 188.

A certificate that there is unappropriated money in the treasury "sufficient to pay," held sufficient where the expense could only be estimated approximately. *Carthage v. Diekmeier*, 30 Ohio Cir. Ct. Rep. 806.

Statute, held inapplicable. *Beck-*

with v. New York, 106 N. Y. S. 175, 121 App. Div. 462.

Amending certificate. Certificate limits city's liability to amount named therein. *Carthage v. Diekmeier*, 79 Ohio St. 323, 87 N. E. 178.

Some laws provide that no ordinance or other order for the expenditure of money shall be passed without stating specifically the items of expense to be made under it, and no such ordinance shall take effect until the city auditor shall certify that there is money in the city treasury especially set apart to meet such expense. Law construed in particular case. *Lowry v. Cincinnati*, 7 Ohio Dec. 81, 1 Wkly. Law Bul. 102.

Particular law construed providing that no contract should be binding against the city unless the comptroller shall certify that the "means" required to make the payments under such contract are provided and applicable thereto. *People v. Palmer*, 35 N. Y. S. 231, 13 Misc. Rep. 727.

17. *Cincinnati v. McErlane*, 7 Ohio Dec. 535, 3 Wkly. Law Bul. 843.

18. *Tyler v. Columbus*, 6 Ohio Cir. Ct. Rep. 224.

§ 1869. Appropriation.

Laws requiring an appropriation as a preliminary to making or to contracting for making certain improvements are generally construed as mandatory.¹⁹ Usually the provision does not apply to emergency work.²⁰

§ 1870. Preliminary resolution or ordinance.

Certain improvements are sometimes begun by a preliminary resolution or ordinance.²¹ This constitutes the preliminary expression of opinion that the improvement is necessary or desirable. Usually the ordinance or resolution is required to be published, in order to advise the property owners, and thus enable them to protest or remonstrate if they think fit.²² This preliminary step

19. *Chicago v. Morton Milling Co.*, 196 Ill. 580, 63 N. E. 1043; *Louisville v. Gosnell*, 22 Ky. L. Rep. 1524, 61 S. W. 476; *Attorney Gen. v. Boston*, 142 Mass. 200, 7 N. E. 722.

The city will be held not liable for a greater sum than that appropriated for public work under law requiring an appropriation as a condition precedent to entering into the contract. Rule applied to the construction of a bridge. *Continental Bridge Co. v. Philadelphia*, 34 Leg. Int. (Pa.) 114.

In Illinois it is not necessary to pass an appropriation ordinance prior to passing one providing for the rental of hydrants from the waterworks company. *Cain v. Wyoming*, 104 Ill. App. 538.

Where the law requires an appropriation as a preliminary in making contracts for repairs on public buildings unless such appropriation has been made, a contract therefor is invalid. *Harri-son v. Philadelphia*, 3 Phila. (Pa.) 138.

Council, held without authority to pass resolution authorizing purchase of strip of ground for purpose of widening street, before an appropriation therefor had been made. *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577.

20. *Heman v. St. Louis*, 213 Mo. 538, 112 S. W. 259.

21. Not required. *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707.

It is not fatal to proceedings to foreclose street assessment lien that no resolution of necessity was passed by council, or notice thereof given, when notice and hearing were given property owner before the assessment was made. *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243.

22. *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81; *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243; *Nevada v. Eddy*, 123 Mo. 546, 558, 27 S. W. 471; *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088.

Printing resolution. *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924.

is jurisdictional under some laws.²³ The preliminary ordinance or resolution should substantially inform the public of the kind and general nature of the contemplated improvement, but it need not give a detailed description.²⁴ To illustrate, when it is proposed to grade

Publication of preliminary resolution declaring necessity for, etc. Upington v. Oviatt, 24 Ohio St. 232.

Recording resolution. Carbondale v. Walker, 240 Ill. 18, 88 N. E. 296.

23. Anderson v. Cincinnati, 10 Ohio Dec. 794, 23 Wkly. Law Bul. 430.

Resolution determining the expediency of electric light plant, held necessary prerequisite and passing of such resolution after contracting for the plant is of no avail. Bay City Traction, etc. Co. v. Bay City, 155 Mich. 393, 119 N. W. 440, 15 Det. Leg. N. 1039.

24. Sufficiency of resolution. Resolution need not state in what manner the improvement shall be paid for. Zeigler v. Chicago, 213 Ill. 61, 72 N. E. 719; Jones v. Chicago, 213 Ill. 92, 72 N. E. 798.

Order declaring prayer of petition granted is not necessary in street opening proceedings. Pittsburg, etc. R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451.

Resolutions, held to comply with charter. Kundinger v. Saginaw, 132 Mich. 395, 93 N. W. 914, 9 Det. Leg. N. 650; Bank of British Columbia v. Portland, 41 Ore. 1, 67 Pac. 1112.

A petition cannot be rejected by a board of public works on the ground that it will establish a bad precedent. Rhodes v. Board of

Public Works, 10 Colo. App. 99, 49 Pac. 430.

Description of improvement in resolution illustrated.

California. Chase v. Trout, 146 Cal. 350, 80 Pac. 81; Dowling v. Hibernia Savings, etc. Socy., 143 Cal. 425, 77 Pac. 141; Grant v. Barber, 135 Cal. 188, 67 Pac. 127; McDonnell v. Gillon, 134 Cal. 329, 66 Pac. 314; Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299; Fay v. Reed, 128 Cal. 357, 60 Pac. 927; Cohen v. Alameda, 124 Cal. 504, 57 Pac. 377; Randolph v. Gawley, 47 Cal. 458; Lambert v. Cummings, 2 Cal. App. 642, 84 Pac. 266.

Illinois. Ogden, etc. Co. v. Chicago, 224 Ill. 294, 79 N. E. 699; McLennan v. Chicago, 218 Ill. 62, 75 N. E. 762.

Iowa. Bennett v. Emmetsburg, 138 Ia. 67, 115 N. W. 532.

Missouri. Joplin v. Freeman, 125 Mo. App. 717, 103 S. W. 130; Muff v. Cameron, 134 Mo. App. 607, 114 S. W. 1125, rehearing denied 134 Mo. App. 607, 117 S. W. 116.

New York. Delaware, etc. Canal Co. v. Buffalo, 56 N. Y. S. 976, 39 App. Div. 333, aff'd 167 N. Y. 589, 60 N. E. 1119.

Street. Resolution held sufficiently certain which declared for paving "F. street between the north line of M. street and the north of K. avenue." Waco v.

a street at the cost of property owners the resolution should describe the general character of such grading so

Chamberlain, 92 Tex. 207, 47 S. W. 527.

A resolution to improve a street "where necessary" is insufficient. *People v. Ladd*, 47 Cal. 603.

Description in resolution relative to improving street need not include "that portion required by law to be kept in order by the railroad company having tracks thereon." *San Francisco Paving Co. v. Egan*, 146 Cal. 635, 80 Pac. 1076.

Sewer. A resolution relative to the construction of sewers which failed to state material to be used, size of sewers, or number of branch sewers to be built, held insufficient to support a warrant for assessment for same. *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290.

A first resolution, held sufficient which described an improvement as "a brick sewer, with manholes and catch-basins." *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

Sidewalk. *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721.

Roadway, sidewalk and gutters. *Dugger v. Hicks*, 11 Ind. App. 374, 36 N. E. 1085.

Detailed specifications need not be set out in the ordinance for a sidewalk under law requiring the ordinance to state the kind, size and location and designate the terminal points of the walk. *Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112.

Details need not be given in ordinance or resolution ordering

improvement. *Dugger v. Hicks*, 11 Ind. App. 374, 36 N. E. 1085; *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721.

Resolution need not describe improvement in same detail as was done in the ordinance. *Gage v. Chicago*, 207 Ill. 56, 69 N. E. 588.

Material. Ordinance for sidewalk which provides that the improvement shall be made of such one of three kinds of stone enumerated therein as shall be determined by the council on reception of bids, is not void for uncertainty. *Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112.

A resolution declaring an intention to "sidewalk and curb Date street," held defective in not describing the improvement in that the material was not specified. *Crouse v. Barrows*, 156 Cal. 154, 103 Pac. 894.

Aided by reference. A reference to plans in a resolution is not rendered insufficient by the fact that the plans are not attached to it. *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. 53.

Resolution of intention may be aided by reference to plans and specifications. *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. 53.

A resolution failing to describe character of the improvement held not aided by specifications of same in a later order therefor. *Schwiesan v. Mahon*, 128 Cal. 114, 60 Pac. 683.

Reference to specifications by resolution held sufficient. *Hil-*

that the owners may ascertain how such work will affect their property.²⁵ Under a charter providing that, before ordering any improvement, the council shall pass a resolution of intention so to do, describing the work, a resolution for the improvement of a street, "to consist of the construction therein of granite or artificial stone curbing," confers no jurisdiction to order the work.²⁶ So where the charter requires the resolution authorizing condemnation proceedings to describe the property "with particularity sufficient for an ordinary conveyance thereof," a resolution which does not contain separate descriptions of the property proposed to be condemned nor the names of the owners, is insufficient.²⁷

Whether the mayor should sign the preliminary resolution or ordinance depends upon the particular charter. Sometimes this is not necessary.²⁸ This subject is fully considered elsewhere in this work.²⁹

§ 1871. Declaration of necessity for improvement.

As elsewhere stated, the general rule is that, unless required in express terms, the ordinance need not recite the necessity of its enactment.³⁰ However, under some charters the necessity and utility of certain kinds of improvements must be declared.³¹ This may be done

dreth v. Longmont, 47 Colo. 79, 105 Pac. 107.

See § 1886 *post*.

25. *Kirksville v. Coleman*, 103 Mo. App. 215, 77 S. W. 120.

26. *San Jose Imp. Co. v. Auzeais*, 106 Cal. 498, 39 Pac. 859.

As to description of improvement, see §§ 1883 to 1887 *post*.

27. *Owosso v. Richfield*, 80 Mich. 328, 45 N. W. 129.

28. *Howeth v. Jersey City*, 30 N. J. L. 93.

Particular case as to veto by mayor of resolution where legislative body consisted of two

branches. *Re Canal and Charles Sts.*, 18 R. I. 129, 25 Atl. 975.

29. §§ 588, 691 *ante*, vol. 2.

30. § 680 *ante*, vol. 2.

31. If the necessity for the improvement was not determined by the proper authorities, equity will not compel a property owner to pay an assessment for such improvement. *Lisbon Ave. Land Co. v. Lake*, 134 Wis. 470, 113 N. W. 1099.

Necessity of proceedings to determine necessity of improvement. *St. Louis v. Frank*, 9 Mo. App. 579, *aff'd* in 78 Mo. 41.

Failure to pass ordinance de-

in the preliminary resolution or ordinance.³² Such a declaration has been held jurisdictional.³³ Sometimes it does not apply to condemnation proceedings.³⁴

While as indicated, municipal charters differ as to this requirement, but in construing them most of the decisions are to the effect that neither the ordinance nor resolution providing for the improvement, or any part of the

declaring necessity for improvement, held not to invalidate the assessment, under particular statute. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

Contra. Resolution declaring improvement necessary, held condition precedent to the exercise of the authority to pass a valid ordinance. *Walker v. Potter*, 18 Ohio St. 85.

32. *Michigan Central R. Co. v. Huehn*, 59 Fed. 335.

Declaration of necessity. Under Missouri statutes, held resolution should not only state necessity, but also kind of paving in improving streets. *Kirksville v. Coleman*, 103 Mo. App. 215, 77 S. W. 120.

Resolution held not to be a determination by the council, within the meaning of a charter. *Blanchard v. Barre*, 77 Vt. 420, 60 Atl. 970.

An order stating that the safety and convenience of the city required a drain to be laid, is a sufficient finding of its necessity. *Wright v. Boston*, 63 Mass. (9 Cush.) 233.

Declaration of necessity may be general but if it covers all necessary things to be done to complete the improvement referred to, it

will be sufficient. *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

Declaration, held to show necessity for improvement. *Kersten v. Milwaukee*, 106 Wis. 200, 81 N. W. 984, 48 L. R. A. 851.

The acceptance of an offer of a citizen to open a street across his property, is a sufficient declaration of its necessity. *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384.

33. *Dakota.* *McLauren v. Grand Forks*, 6 Dak. 397, 43 N. W. 710.

Kansas. But see, *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815.

Michigan. *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *White v. Saginaw*, 67 Mich. 33, 34 N. W. 255.

New York. Re *Schreiber*, 3 Abb. N. C. (N. Y.) 68.

Ohio. *Stephen v. Daniels*, 27 Ohio St. 527.

Vermont. *Kent v. Enosburg Falls*, 71 Vt. 255, 44 Atl. 343.

Declaration of necessity, held not jurisdictional. *Pennsylvania Co. v. Cole*, 132 Fed. 668.

34. *Caldwell v. Carthage*, 49 Ohio St. 334, 31 N. E. 602; *Krumberg v. Cincinnati*, 29 Ohio St. 69; *Longworth v. Cincinnati*, 23 Wkly. Law Bul. (Ohio) 100,

proceedings therefor, need contain a formal declaration of necessity.³⁵

§ 1872. Plans and specifications.

Provisions that plans and specifications of the proposed improvement shall be prepared by designated municipal officers and filed at a place named are common;³⁶

35. *California*. Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

Illinois. Culver v. Chicago, 171 Ill. 399, 49 N. E. 573.

Indiana. Pittsburg, etc. R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551; Barber Asphalt Pav. Co. v. Edgerton, 125 Ind. 455, 25 N. E. 436; Pittsburg C. C. & St. L. Ry. Co. v. Hays, 17 Ind. App. 261, 44 N. E. 375.

Maine. Dorman v. Lewiston, 81 Me. 1, 17 Atl. 316; Cassidy v. Bangor, 61 Me. 434.

Maryland. Baltimore v. John Hopkins Hospital, 56 Md. 1.

Massachusetts. New England Hospital v. Street Com'rs, 188 Mass. 88, 74 N. E. 294; Com. v. Abbott, 160 Mass. 282, 35 N. E. 782; Wright v. Boston, 9 Cush. (63 Mass.) 233.

Michigan. Beecher v. Detroit, 92 Mich. 268, 52 N. W. 731; Davies v. Saginaw, 87 Mich. 439, 49 N. W. 667; Naegely v. Saginaw, 101 Mich. 532, 60 N. W. 46.

Minnesota. Diamond v. Mankato, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448; Cook v. Slocum, 27 Minn. 509, 8 N. W. 755.

Missouri. Akers v. Kolkmeier, 97 Mo. App. 520, 71 S. W. 536; Taylor v. St. Louis, 14 Mo. 20, 55 Am. Dec. 89; Miller v. Anheuser, 2 Mo. App. 168.

Nebraska. Morse v. Omaha, 67 Neb. 426, 93 N. W. 734.

New York. Elwood v. Rochester, 43 Hun 102; Trinity Church v. Higgins, 4 Rob. (27 N. Y. Super. Ct.) 1.

North Carolina. Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Ohio. Cincinnati v. Mathers, 6 Ohio Dec. 755, 4 Wkly. Law Bul. (Ohio) 273; Strauss v. Cincinnati, 24 Wkly. Law Bul. (Ohio) 422.

Oregon. Clinton v. Portland, 26 Ore. 410, 38 Pac. 407; Strowbridge v. Portland, 8 Ore. 67.

Texas. Kerr v. Corsicana (Tex. Civ. App. 1895), 35 S. W. 694; Connor v. Paris, 87 Tex. 32, 27 S. W. 88.

Wisconsin. Boyd v. Milwaukee, 92 Wis. 456, 66 N. W. 603.

36. Plans and specifications for improvements are generally required to be prepared by municipal officers. Tabor v. Grafmiller, 109 Ind. 206, 9 N. E. 721.

Under charter requiring contract to be let to the lowest bidder a street paving contract awarded on specifications prepared by each of the different bidders, held void. Mazet v. Pittsburgh, 137 Pa. 548, 20 Atl. 693.

and whether such provisions should be construed as mandatory, as viewed by the weight of the adjudications,³⁷ or merely directory as held by some courts,³⁸ must be determined, of course, from the phraseology and supposed intent of the particular law involved.³⁹

37. *California*. Bolton v. Gileran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33.

Indiana. Liebold v. Traster, 41 Ind. App. 278, 83 N. E. 781.

Massachusetts. Compare Beckford v. Needham, 199 Mass. 369, 85 N. E. 473.

Minnesota. Rogers v. St. Paul, 22 Minn. 494.

Missouri. Barber Asphalt Pav. Co. v. O'Brien, 128 Mo. App. 267, 107 S. W. 25; De Sota v. Showman, 100 Mo. App. 323, 78 S. W. 257.

New Jersey. Coar v. Jersey City, 35 N. J. L. 404.

Ohio. Re Akron St., 5 Ohio St. & C. Pl. Dec. 697, 7 Ohio N. P. 454.

Pennsylvania. Verona Borough v. Alleghany Valley R. Co., 152 Pa. St. 368, 25 Atl. 518; Mazet v. Pittsburgh, 137 Pa. St. 548, 20 Atl. 693.

Wisconsin. State v. Burzenberg, 108 Wis. 435, 84 N. W. 858; Wells v. Burnham, 20 Wis. 112; Kneeland v. Milwaukee, 18 Wis. 411, 417; Myrick v. La Crosse, 17 Wis. 442.

38. An ordinance provision directing that the superintendent of streets should make a plan and record of the depth, etc., of sewers being built and repaired, held to be directory only and hence failure in this respect will not render a sewer assessment invalid. Kelso v. Boston, 120 Mass. 297.

Provision requiring a municipal board to file a copy of the map, showing a plan of the sewer district with the common council, held to be directory merely. Re New York Protestant Episcopal Public School, 47 N. Y. 556; Re Upson, 89 N. Y. 67.

39. Where contract is required to be let on plans filed with the city clerk, a contract let when no plans are so filed is invalid. De Soto v. Showman, 100 Mo. App. 323, 73 S. W. 257.

Held, failure to file plan or specifications of the location, etc., in a street opening proceeding as law expressly requires, fatal, although the land owner had actual knowledge of the proposed action. Verona v. Allegheny Val. Ry., 152 Pa. St. 368, 25 Atl. 518.

The making and filing of estimates of the work, held to be a condition precedent to the publication of the notice to property owners. Myrick v. LaCrosse, 17 Wis. 442.

Failure to file plans of the sewer proposed to be constructed and the filing of defective specifications, held fatal. Kneeland v. Milwaukee, 18 Wis. 411, 417; Wells v. Burnham, 20 Wis. 112.

Absence of profile and specification in engineer's office, held not to prevent recovery on the part of the contractor for doing the work in a case where it was shown not to be customary to make pro-

The plans and specifications are for the purpose of enabling bidders (when the work is to be let on competitive bidding), to make intelligent bids, and to insure competition by making the requirements of the proposed improvement definite and certain.⁴⁰ The word "plans"

files of that kind of work. *Sheehan v. Owen*, 82, Mo. 458.

In order to provide for the establishment of a particular sewer district, held not necessary for board to prepare a plan of drainage for the entire city under particular law. *Re New York Protestant Episcopal Public School*, 47 N. Y. 556.

Court declined to vacate an assessment because of omission to file a plan of sewerage in the absence of showing of a fraud. *Re Mayor*, 50 N. Y. 504.

Omission to file a map in accordance with a requirement to prepare maps and plans of streets to be laid out, altered, etc., held not fatal, the same being a mere formal matter. *Re Upson*, 89 N. Y. 67.

Failure of such a map to show a proposed sewer does not invalidate an assessment for the sewer. *Roosevelt Hospital v. New York*, 84 N. Y. 108. See also, *Re New York Protestant Episcopal Public School*, 47 N. Y. 556.

40. **Plans and specifications.** Purpose or plans. *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321.

Competitive bidding and the rules relating thereto, see § 1183 *et seq.*, *ante*, vol. 3.

Ordinance may provide for competitive bidding and it should be followed. § 1192 *ante*, vol. 3.

When plans and specifications are to be furnished the bidders. § 1211 *ante*, vol. 3.

Reference to, and aided by, plans and specifications on file in an accessible place. § 1212 *ante*, vol. 3.

Form and contents. § 1207 *ante*, vol. 3.

Details, or where details are impossible except to a limited extent. § 1208 *ante*, vol. 3.

Amount of material or work indefinite. § 1209 *ante*, vol. 3.

Publication and posting. §§ 1213 to 1216 *ante*, vol. 3.

Republication. § 1217 *ante*, vol. 3.

What held to be a sufficient compliance requiring a plan, profile and specifications of the work to be filed, etc. *Rogers v. St. Paul*, 22 Minn. 494.

Plans in the alternate, held sufficient, where it did not appear any one was misled or that the cost of the work was increased thereby. *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841, *aff'd* 15 N. Y. S. 274, 68 Hun 618.

The plans should be fully adequate to enable bidders to make a reasonable, accurate estimate of the work. *Houghton v. Burnham*, 22 Wis. 301.

The plan, profile, etc., should be sufficient to readily advise persons of ordinary intelligence of the extent of the proposed im-

means a profile, drawing, chart or picture showing in a general way the nature of the work to be done, while the word "specification" means a detailed statement of the character of the improvements which are to be done.⁴¹

Where competitive bidding is required, the law demands that the request for bids must invite and not restrict competition;⁴² therefore, ordinarily the specifica-

provement, and how abutting property owners are to be affected thereby. *Re Akron St.*, 5 Ohio S. & C. P. Dec. 697, 7 Ohio N. P. 454.

When specifications are sufficiently definite. *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309.

Particularity of plans for sewer system. *Mead v. Turner*, 112 N. Y. S. 127, 60 Misc. Rep. 145, *aff'd* 119 N. Y. S. 526, 134 App. Div. 691.

Sufficient in particular case for a "wooden block pavement." *Rogers v. St. Paul*, 22 Minn. 494, 513.

Specifications leaving the amount of certain specified work and material to be determined by city officials which in effect confer upon them the power to determine the amount of taxes to be levied, held to invalidate the contract. *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33.

There were no plans or system of cremation adopted for a proposed garbage plant, and the specifications adopted required each bidder to submit complete plans and specifications fully showing and describing the buildings, machinery and other appurtenances for a plant to be capable of destroying not less than one hun-

dred tons of garbage daily; held such scheme was so indefinite, uncertain, and unascertainable as to prevent competition in bidding, and hence the charter requirements as to preparing plans and specifications had not been complied with. *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685.

In fixing the location of proposed improvement resort may be had to physical monuments as well as to the ordinance, and plats properly forming part of the record, but the ordinance and records cannot thereby be contradicted. *People v. Willison*, 237 Ill. 584, 86 N. E. 1094.

41. *McCoy v. Randall*, 222 Mo. 24, 121 S. W. 31.

Fixing price for the work in the specification in violation of law renders contract void. *Frame v. Felix*, 167 Pa. St. 47, 31 Atl. 375, 27 L. R. A. 802.

A clause attached to the plans and specifications filed therewith to the effect that the contractor should file a bond as a guaranty that he will faithfully perform the work and will keep for the same price the pavement in good repair for five years, forms no part of the ordinance. *Cole v. People*, 161 Ill. 16, 43 N. E. 607.

42. § 1199 *ante*, vol. 3.

tions cannot be so drawn as to confine the bidding to one company, firm or individual, although others are engaged in the same business and can do the work or supply the material, as for example, restricting the bidding to patented articles manufactured by a particular firm,⁴³ or material obtained from a particular locality.⁴⁴ Nor can they be so drawn as to require the work to be done within the state,⁴⁵ or, the employment alone of union labor or the use of the union label.⁴⁶ But they may require, under conditions elsewhere explained, patented articles or materials,⁴⁷ and restrict the hours of labor and forbid alien labor.⁴⁸

Where the plans and specifications are incorporated in the improvement ordinance,⁴⁹ or where such ordinance gives a full and detailed description of the improvement and the plans and specifications could add nothing thereto,⁵⁰ the substance of the requirement is satisfied, and failure to file the plans and specifications in literal compliance with the law is not fatal to the proceedings.

The time,⁵¹ and place of filing plans and specifica-

43. See §§ 1197, 1198 *ante*, vol. 3.

44. § 1204 *ante*, vol. 3.

45. § 1202 *ante*, vol. 3.

46. § 1203 *ante*, vol. 3.

47. §§ 1197, 1198 *ante*, vol. 3.

48. § 1200 *ante*, vol. 3.

49. Where plans are incorporated in the ordinance they need not be filed as required by statute, as the statutory provision that they be filed and may be made a part of the ordinance by reference, is a mere substitute for their incorporation in the ordinance. *Platte City v. Paxton*, 141 Mo. App. 175, 124 S. W. 531.

50. The ordinance provided that the proposed improvement should be executed in accordance with the maps, profiles and specifica-

tions furnished by the city. The fact that no such plans, etc., were prepared and filed does not invalidate the assessment for the improvement, where the ordinance providing therefor gives a full and detailed description of the improvement and the plans and profiles could add nothing thereto. *White v. Alton*, 149 Ill. 626, 37 N. E. 96.

51. *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321.

The ordinance required the filing of specifications "immediately"; held that filing as soon as practicable was a substantial compliance. *Galveston v. Heard*, 54 Tex. 420.

Plans for sidewalk need not be filed at time the ordinance au-

tions,⁵² and by whom they should be filed,⁵³ and approved when so required,⁵⁴ that they may appear to be authentic,⁵⁵ are usually definitely stated in the charter or improvement ordinance.

thorizing the work is passed. *Platte City v. Paxton*, 141 Mo. App. 175, 124 S. W. 531.

Plans and specifications for the work need not be prepared and filed before the adoption of the council resolution, calling for proposals. If filed before the ordinance providing for the work is adopted this will be sufficient. *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841.

52. The plans must be on file at the designated place else subsequent proceedings are invalid. *Barber Asphalt Pav. Co. v. O'Brien*, 128 Mo. App. 267, 107 S. W. 25.

See § 1212 *ante*, vol. 3.

Failure to file in the city engineer's office specifications, as called for in the advertisement for the public work, held did not affect the right of the city to enter into a contract therefor. *Hitchcock v. Galveston*, 3 Woods. 287, 12 Fed. Cases No. 6,534.

The fact that after so filing in recorder's office a plat the city engineer took it to his own office where it was accessible to the recorder's office does not affect the validity of the filing. *Reed v. Cedar Rapids*, 137 Ia. 107, 111 N. W. 1013.

53. *Fayette v. Rich*, 122 Mo. App. 145, 99 S. W. 8.

54. Generally the plan for improvement is required to be affirmed or approved in a manner designated, and until this is done

the municipal authorities cannot proceed to lay out the street. *Re Fairmount Place*, 12 Phila. (Pa.) 586.

Under particular law a plan approved by the court though not recorded, held valid. *Kensington Com'rs v. Wood*, 10 Pa. St. 93, 49 Am. Dec. 582.

Plan for sewer construction to be approved by the board of public works; method of approval, etc. *Menefee v. Bell*, 62 Mo. App. 659; *Coar v. Jersey City*, 35 N. J. L. (6 Vroom) 404.

Act of council in approving plans for two different street improvements by one vote is irregular but does not affect its power to impose assessment therefor. *Nelson v. South Omaha*, 84 Neb. 434, 121 N. W. 453.

55. Where plans are filed by the engineer and approved by the city council, they are sufficiently shown to be authentic. *Gill v. Dunham*, 99 Cal. XVII, 34 Pac. 68.

Failure to mark "filed" does not affect validity of plans, as such marking is a mere matter of identity. *Akers v. Kolkmeier*, 97 Mo. App. 520, 71 S. W. 536; *Bridewell v. Cockerell*, 122 Mo. App. 196, 99 S. W. 22.

Plans left in the proper office for inspection though not marked "filed," held compliance with law. *Houghton v. Burnham*, 22 Wis. 301.

§ 1873. Change of plans.

Whether plans filed and approved can be changed thereafter, will depend upon the controlling law, the time of the change, by whom made and the authority therefor, the materiality as it relates to the nature, extent and cost of the improvement and the apportionment thereof, notice to parties interested, ratification, etc.⁵⁶

Usually the plans may be changed any time before the execution of the work.⁵⁷ But a change of grade after

56. Subsequent change in plan, held not to invalidate. *Barber Asphalt Paving Co. v. Gaar*, 115 Ky. 334, 24 Ky. L. Rep. 2227, 73 S. W. 1106.

Right to change plans before work completed. *State v. Miles*, 138 Ind. 692, 38 N. E. 400.

Right to change plans by resolution for building of waterworks. *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885.

The council declared the paving of the street necessary. Thereafter the plan for the improvement was changed, held immaterial. *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

Resolution declaring the paving of the street to be necessary omitted to specify the width of new roadway. The board of public works specified a roadway equal in width to the old roadway. Prior to the letting of contract new plans were filed increasing the width of the roadway four feet. Held, not to invalidate proceedings. *Fuller v. Grand Rapids*, 105 Mich. 529, 63 N. W. 530.

City may provide for changing improvement after it has been made. *Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55.

Statutes in Kentucky provide for change of plans by board of public works with consent of contractor. *Lindenberger Land Co. v. Park & Co.*, 27 Ky. L. Rep. 437, 85 S. W. 213.

Change that lessens the cost does not affect the validity of an apportionment warrant for street improvement. *Id.*

Ordinance reserving to the commissioner of public works the right to change the plans and specifications as he may deem necessary or desirable, held invalid for uncertainty. *Lake Shore, etc. R. Co. v. Chicago*, 144 Ill. 391, 33 N. E. 602; *Illinois Cent. R. Co. v. Chicago*, 144 Ill. 392, 33 N. E. 602.

Pavement may be widened by council after street improvement has been entered upon. *Nixon v. Burlington (Ia.)*, 115 N. W. 239.

Change of specifications. § 1219 *ante*, vol. 3.

57. *Indiana*. *State v. Miles*, 138 Ind. 692, 38 N. E. 400.

Kansas. *Argentine v. Simmons*, 53 Kan. 491, 37 Pac. 14.

Michigan. *Fuller v. Grand Rapids*, 105 Mich. 529, 63 N. W. 530; *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

the resolution requiring the street to be graded and after the time for protesting by the property owners has expired, renders the proceedings under such resolution invalid.⁵⁸ So where an ordinance locates a proposed sewer and the assessment therefor is confirmed, subsequent change in the location invalidates the proceedings.⁵⁹

If the departure from the plans is substantial and material, the assessments therefor cannot be enforced.⁶⁰ Thus where no fire hydrants were included in the ordinance providing for laying water pipe, they cannot be added to the improvement thereafter.⁶¹ So where a dirt road was constructed when a macadam road was provided for, an assessment cannot be enforced.⁶² So a change which materially increased the cost of the work is unauthorized without adopting and publishing a new resolution or notice.⁶³

Wisconsin. *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885.

58. *Mason v. Sioux Falls*, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802.

A contract was let for grading a street according to plans and estimates. Thereafter an ordinance was passed changing the grade. No new plans or contract was made. The grading was done in accordance with the last established grade. Assessment therefor, held void. *Argentine v. Simmons*, 53 Kan. 491, 37 Pac. 14.

59. *Church v. People*, 174 Ill. 366, 51 N. E. 747.

60. *Illinois.* *Eustace v. People*, 213 Ill. 424, 72 N. E. 1089; *Chicago v. Ayers*, 212 Ill. 59, 72 N. E. 32.

Kentucky. *Petter v. Allen*, 21 Ky. L. Rep. 1122, 54 S. W. 174.

Missouri. *Sedalia v. Abell*, 103 Mo. App. 431, 76 S. W. 497; *Kansas City v. Askew*, 105 Mo. App. 84, 79 S. W. 483; *Barton v. Kansas*

City, 110 Mo. App. 31, 83 S. W. 1093; *McCormick v. Moore*, 134 Mo. App. 669, 114 S. W. 40.

New York. *Tredwell v. Brooklyn*, 43 N. Y. S. 458, 11 App. Div. 224.

Pennsylvania. *Re Scranton Sewer*, 213 Pa. St. 4, 62 Atl. 173.

City cannot build sewers in street not provided for, nor build more catch-basins in connection with a sewer than provided for. *People v. McWethy*, 177 Ill. 334, 52 N. E. 479.

Merely because additional work is beneficial and valuable to that provided for will not justify its being made. *People v. McWethy*, 177 Ill. 334, 52 N. E. 479.

61. *Cicero v. Green*, 211 Ill. 241, 71 N. E. 884.

62. *Gage v. People*, 193 Ill. 316, 61 N. E. 1045, 56 L. R. A. 916.

63. *Mason v. Sioux Falls*, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802, 2 S. D. 652, 51 N. W. 774.

On the other hand slight variation from the plans, not materially affecting the improvement is not considered a change in plan nor a different improvement from that provided.⁶⁴ Thus the construction of a sewer three and one-half feet from the line designated will not invalidate an assessment therefor, if no injury results, since this is a substantial compliance with the requirement.⁶⁵

§ 1874. Specification of material.

The specification of the material to be used in the proposed improvement when required should be definite and certain⁶⁶ that those familiar with the subject may not be misled.⁶⁷ A resolution providing for paving a street with either bituminous macadam, sheet asphalt or brick paving blocks, was held insufficient for failure to specify the "kind" of improvement.⁶⁸ However, it has been held in Ohio that an ordinance specifying several kinds

64. *Illinois*. *Marshall v. People*, 219 Ill. 99, 76 N. E. 70; *People v. Bridgeman*, 218 Ill. 568, 75 N. E. 1057; *Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396; *Pierson v. People*, 204 Ill. 456, 68 N. E. 383; *Wells v. Raymond*, 201 Ill. 435, 66 N. E. 210.

Kentucky. *Orth v. Park & Co.*, 117 Ky. 779, 25 Ky. L. Rep. 1910, 79 S. W. 206.

Missouri. *Marionville v. Henson*, 65 Mo. App. 397; *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86.

Ohio. *Kohler Brick Co. v. Toledo*, 29 Ohio Cir. Ct. 599.

65. *People v. Church*, 192 Ill. 302, 61 N. E. 496. Compare, *Church v. People*, 179 Ill. 205, 53 N. E. 554.

66. § 1838 *ante*.

67. **Specification of material.** An ordinance specifying that "the second layer of material in the construction of a sidewalk should

be composed of one part Portland cement and one part torpedo gravel, or other gravel satisfactory to the commissioner of public works," is void for indefiniteness. *People v. Birch*, 201 Ill. 81, 66 N. E. 358.

Description of material for pavement. *Becker v. Washington*, 94 Mo. 375, 7 S. W. 291; *Morley v. Weakley*, 86 Mo. 451; *Verdin v. St. Louis*, 131 Mo. 26, 27 S. W. 447.

Brick to be used. *Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874.

"Wooden block." *Rogers v. St. Paul*, 22 Minn. 494.

"Asphalt." *Redershelmer v. Flower*, 52 La. Ann. 2089, 28 So. 299.

Sidewalk; filling to be done with earth free from clay, animal and vegetable matter. *Gage v. Chicago*, 203 Ill. 26, 67 N. E. 477.

68. *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989.

of material sufficiently meets a requirement to state the general nature of the improvement and the character of material.⁶⁹ Under some laws only one kind of material may be named.⁷⁰ But an ordinance authorizing the use of either of two classes of rock was adjudged valid where the two classes are of the same rock differing only in density.⁷¹

The details of the material need not be stated.⁷² Thus it is sufficient to employ words and terms in the description that are well understood in the particular locality, without specifying the ingredients thereof, *e. g.*, "stone,"⁷³ or "asphaltum cement,"⁷⁴ or "granolithic,"⁷⁵ or "pitch lake asphaltum."⁷⁶

69. *Emmert v. Elyria*, 74 Ohio St. 185, 78 N. E. 269.

Different kinds of material may be named. § 1210 *ante*, vol. 3.

Ordinance may state different kinds of material for improvement of a street. *Ex parte Paducah*, 28 Ky. L. Rep. 412, 89 S. W. 302.

Specification of two kinds of material for selection by property owners. *Ross v. Kendall*, 183 Mo. 338, 81 S. W. 1107.

Specifying alternative materials where competitive bidding is required. § 1210 *ante*, vol. 3.

70. Must specify only one kind of material; cannot provide for making bids on several kinds. *Oklahoma City v. Shields*, 22 Okla. 265, 100 Pac. 559.

Resolution allowing use of two or more kinds of material for street paving, held valid. *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321.

71. *Lambert v. Marcuse*, 137 Cal. 44, 69 Pac. 620.

72. *Nixon v. Burlington (Ia.)*, 115 N. W. 239.

73. A specification of "stone"

is sufficient where it is understood by the inhabitants and contractors of the village to mean limestone. *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181.

An ordinance was held sufficiently certain which called for "seven parts best quality of broken limestone, or other stone which shall be equal in quality for concrete purposes." *Jones v. Chicago*, 213 Ill. 92, 72 N. E. 798.

Stones, best that can be obtained in vicinity of city. *Sheehan v. Gleeson*, 46 Mo. 100.

74. Where the words "asphaltum cement" have a well known meaning in the paving business its ingredients need not be specified. *Chicago Union Traction Co. v. Chicago*, 222 Ill. 144, 78 N. E. 54.

75. An ordinance specifying "granolithic" walks and referring to a granolithic walk already laid is sufficient though it does not state the ingredients of such sidewalk. *Bluefield v. McClaugherty*, 64 W. Va. 536, 63 S. E. 363.

76. *Gage v. Chicago*, 207 Ill. 56, 69 N. E. 588.

Under a charter requiring the ordinance to specify the "material to be used" in the improvement, a recital to be "paved with Trinidad sheet asphaltum, according to specifications in office of city engineer," in a street paving ordinance, was held sufficient.⁷⁷ So an ordinance requiring the pavement to be what is known as the "Bloomington brick pavement," and the foundation thereof to be laid of cinders, sand, gravel, or "other material equally suitable," at least six inches deep, etc., was sustained against the contention that it was uncertain in description of the material to be used for the brick to rest upon. The words "or other material" were treated as surplusage.⁷⁸

b. *Ordinance or resolution providing for improvement.*

§ 1875. Ordinance, resolution or order.

Under most charters improvements cannot be ordered, nor the contract entered into therefor without formal action, either by ordinance or resolution, adopted by the legislative body. Without such action no liability is created to pay for such work, although done under the direction of the municipal officers.⁷⁹ Thus entries by the

77. Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543, 571, 38 S. W. 458, citing Sheehan v. Gleeson, 46 Mo. 100; Moran v. Lindell, 52 Mo. 229; Carlin v. Cavender, 56 Mo. 286.

78. Jacksonville Ry. Co. v. Jacksonville, 114 Ill. 562, 566, 2 N. E. 478.

79. Ordering improvements. In absence of legal specification a sewer may be ordered to be built by resolution as well as by ordinance. Von Vorst v. Jersey City, 27 N. J. L. (3 Dutch.) 493.

In the absence of such ordinance the property owners cannot be charged with the cost thereof nor

can the proceedings be ratified by a subsequent ordinance authorizing the levy of a tax to pay the debt. Waco v. Prather (Tex. Civ. App., 1896), 35 S. W. 958.

In Kentucky in cities of second class, street improvement must be ordered by council, otherwise it is illegal. Dodd v. Hecter & Sons, 136 Ky. 596, 124 S. W. 860.

Where a city is given power to provide for certain improvements, such power can be exercised only by legislative action. Zalesky v. Cedar Rapids, 118 Ia. 714, 92 N. W. 657; McManus v. Hornaday, 99 Ia. 507, 68 N. W. 812.

An ordinance may authorize the

secretary upon the minutes that the work had been duly ordered by the council and a contract therefor legally made, are insufficient.⁸⁰

construction of sidewalks although its title contains mention of authorization for the grading, macadamizing, and curbing of a street. *Re Beechwood Ave.*, 194 Pa. St. 86, 45 Atl. 127.

The ordinance should furnish directions as to the manner of doing the work. Simply authorizing the macadamizing of a particular street is insufficient. *Haegele v. Mallinckrodt*, 46 Mo. 577.

Under some charters there must be an ordinance declaring that the revenue fund of the city is not in a condition to pay for the grading, otherwise taxbills will be void. *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; *Sedalia v. Abell*, 103 Mo. App. 431, 76 S. W. 497; *Kolkmeier v. Jefferson City*, 75 Mo. App. 678; *Poplar Bluff v. Hoag*, 62 Mo. App. 672.

Where property was sold to pay for a sidewalk for which there had been no order, such sale, held void. *Mitchell v. Titus*, 33 Colo. 385, 80 Pac. 1042.

An assessment made before passage of ordinance is void. *Scranton v. McDonough*, 1 Lack. Leg. N. (Pa.) 177.

A contract for a street improvement, made before the passage of the necessary ordinance, held void. *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853.

Reconstruction work requires ordinance. *Ritterskamp v. Stifel*, 59 Mo. App. 510.

A rule of the street commis-

sioner cannot govern the real character of the work. *Id.*

A city authorized to establish grades by ordinance cannot establish them in any other way. *Themanson v. Kearney*, 35 Neb. 881, 53 N. W. 1009.

And same rule applies to exercise of power to regulate its streets by ordinance. *Cross v. Morristown*, 18 N. J. Eq. (3 C. E. Green), 305.

Particular laws. *Connecticut Mut. Life Ins. Co. v. Chicago*, 185 Ill. 148, 56 N. E. 1071; *Roman Catholic German Church v. Weighaus*, 16 Ky. L. Rep. 446; *Thaler v. West Chicago Park Com'rs*, 174 Ill. 211, 52 N. E. 116.

City may contract for improvement under proper resolution before ordinance authorizing the improvement passed. *Smith v. Westport*, 105 Mo. App. 221, 79 S. W. 725.

Resolution fixing cost of sidewalk, held condition precedent to the levy of a special tax to pay therefor. *Trephagen v. South Omaha*, 69 Neb. 577, 96 N. W. 248.

80. *Waco v. Prather*, 90 Tex. 80, 81, 37 S. W. 312.

Essential steps prescribed to be taken, to validate proceedings. *McEwen v. Gilker*, 38 Ind. 233; *Thatcher v. Powell*, 6 Wheat (U. S.) 119, 5 L. Ed. 221, per Marshall, C. J.

Substantial compliance is sufficient. *Sands v. Hatfield*, 7 Ind. App. 357, 34 N. E. 654.

Under some charters an ordinance or a formal resolution is not required,⁸¹ as for example, where the cost of the work is not charged against the property owners,⁸² or where the improvement is petitioned for by the requisite number of property owners duly qualified,⁸³ or where the whole proceeding is regulated by definite charter or statutory provisions,⁸⁴ or where the work is merely temporary,⁸⁵ or of a minor character and necessary to be done.⁸⁶ Where, however, *an ordinance or*

Although law not followed, if property owners do not object and resort to their legal remedies, but stand by and observe the proceedings they will be denied injunction to stop the work. *De Puy v. Wabash*, 133 Ind. 336, 32 N. E. 1016.

A valid contract made prior to the taking effect of the law relating to estimates and assessments, held to be affected by change in the law. *Ede v. Knight*, 93 Cal. 159, 29 Pac. 860.

Under some laws the contract for the improvement, as for paving, may be made before the assessment on the lots to pay for the same is made. *Lefevre v. Detroit*, 2 Mich. 586.

Under the St. Louis charter, the ordinance need not contain a provision for advertisement for bids for the work, as this is sufficiently prescribed in the charter. *Bambrick v. Campbell*, 37 Mo. App. 460, 465.

81. *Quarles v. Sparta*, 2 Tenn. Ch. App. 714; *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702.

No ordinance necessary for street improvements. *Nelson v. South Omaha*, 84 Neb. 434, 121 N. W. 453; *Allen County Com'rs v. Silvers*, 22 Ind. 491.

Ordinance, held not necessary in particular case. *Strawbridge v. Portland*, 8 Ore. 67.

82. No ordinance necessary for insignificant jobs of street paving and repair not charged against property owners. *Heman v. St. Louis*, 213 Mo. 538, 112 S. W. 259.

83. No ordinance necessary for street improvement petitioned for by majority of property owners. *Paulsen v. El Reno*, 22 Okla. 734, 98 Pac. 958.

84. Where all steps relative to making an improvement and assessing property therefor are provided for by statute, and an assessment is levied in accordance therewith, no ordinance is necessary. *Martin v. Oskaloosa*, 126 Ia. 680, 102 N. W. 529. See also, *Quarles v. Sparta*, 2 Tenn. Ch. App. 714; *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702; *Nelson v. South Omaha*, 84 Neb. 434, 121 N. W. 453; *Hardwick v. Independence*, 136 Ia. 481, 114 N. W. 14.

85. Temporary open sewer may be constructed without ordinance or resolution. *Cooper v. Cedar Rapids*, 112 Ia. 367, 83 N. W. 1050.

86. No ordinance necessary for insignificant repair work. *Heman v. St. Louis*, 213 Mo. 538, 112 S. W. 259.

resolution is made a condition precedent to the exercise of the power, this, of course, is essential to the validity of the proceedings.⁸⁷ In proceedings of special assessment or taxation for improvements if the ordinance or resolution should prove to be invalid for any reason the special assessment made thereunder is also void.⁸⁸

87. *Colorado*. Mitchell v. Titus, 33 Colo. 385, 80 Pac. 1042.

Illinois. Carlyle v. Clinton County, 140 Ill. 512, 30 N. E. 782; East St. Louis v. Albrecht, 150 Ill. 506, 37 N. E. 934; Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675; Alton v. Foster, 74 Ill. App. 511, aff'd Foster v. Allen, 173 Ill. 587, 51 N. E. 76; Pells v. Paxton, 176 Ill. 318, 52 N. E. 64; St. John v. East St. Louis, 136 Ill. 207, 27 N. E. 543.

Indiana. Langohr v. Smith, 81 Ind. 495; State v. Michigan, 138 Ind. 455, 37 N. E. 1041.

Iowa. Zalesky v. Cedar Rapids, 118 Ia. 714, 92 N. W. 657; Eckert v. Walnut, 117 Ia. 629, 91 N. W. 929; Starr v. Burlington, 45 Ia. 87.

Kansas. Sloan v. Beebe, 24 Kan. 343.

Kentucky. Kaye v. Hall, 52 Ky. (13 B. Mon.) 455; Dodd v. Hecter, 136 Ky. 596, 124 S. W. 860.

Maryland. Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686.

Massachusetts. Hitchcock v. Springfield, 121 Mass. 382.

Michigan. Naegely v. Saginaw, 101 Mich. 532, 60 N. W. 46.

Missouri. Nevada v. Eddy, 123 Mo. 546, 588, 589, 27 S. W. 471; Kolkmeier v. Jefferson City, 75 Mo. App. 678; Clay v. Mexico, 92 Mo. App. 611; Wheeler v. Poplar Bluff, 149 Mo. 36, 49 S. W. 1088; Poplar Bluff v. Hoag, 62 Mo. App. 672; Koeppen v. Sedalia, 89 Mo.

App. 648, 652; *Louisiana*. v. Miller, 66 Mo. 467; Whitworth v. Webb City, 204 Mo. 579, 103 S. W. 86; Springfield v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276; Maudlin v. Trenton, 67 Mo. App. 452; Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115; Mulligan v. Lexington, 126 Mo. App. 715, 105 S. W. 1104.

Nebraska. Trephagen v. South Omaha, 69 Neb. 577, 96 N. W. 248, 111 Am. St. Rep. 570.

New Jersey. Taylor v. Lambertville, 43 N. J. Eq. 107, 10 Atl. 809; State v. Brigantine Borough, 54 N. J. L. 476, 24 Atl. 481; Ware v. Rutherford Borough, 55 N. J. L. 450, 26 Atl. 933.

Texas. Waco v. Prather, 90 Tex. 80, 37 S. W. 312; Waco v. Chamberlain, 92 Tex. 207, 47 S. W. 527; Noel v. San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263; Alfred v. Dallas (Tex. Civ. App., 1896), 35 S. W. 816.

When the work is to be paid for by special assessment, the ordinance is the very foundation of the undertaking. And no special tax can be levied to pay for improvements already made. Alton v. Job, 103 Ill. App. 378.

88. Brown v. Denver, 7 Colo. 305, 3 Pac. 455; Jacksonville Ry. Co. v. Jacksonville, 114 Ill. 562, 2 N. E. 478; Alton v. Job, 103 Ill. App. 378.

In many jurisdictions, as in Illinois, when the improvement is to be paid for by special assessment or taxation, the first step is the enactment of an ordinance specifying the nature, character, locality and description of the improvement and the mode in which its cost shall be collected; and no work can be done or expenses incurred which can become a charge on the property of the land owner before such ordinance is passed.⁸⁹ But the sufficiency of the action in providing for a given improvement is to be determined by the local laws. Certain improvements directed by order,⁹⁰ or resolution have been sustained under particular charters.⁹¹ However, if

89. *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354, distinguishing *Carlyle v. Clinton County*, 140 Ill. 512, 30 N. E. 782, and *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934; *Alton v. Job*, 103 Ill. App. 378.

90. *Order sufficient*. To pave street. *Alexandria v. Mandeville*, 2 Cranch, C. C., 224, 1 Fed. Cas. No. 184.

Construction of sidewalk. *State v. Armstrong*, 54 Minn. 457, 56 N. W. 97.

To improve street. *Corry v. Campbell*, 25 Ohio St. 134.

Specified work on street. *Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253.

Ordinary street improvement. *Board of Comrs. of Allen County v. Silvers*, 22 Ind. 491, 502.

Improvement may be ordered by resolution or order and need not be entered of record. *Indianapolis v. Imberry*, 17 Ind. 175.

91. *Resolution sufficient*. *Barber Asphalt Pav. Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436; *Shelby v. Burlington*, 125 Ia. 343, 101 N. W. 101; *Langan v. Bitzer*, 26

Ky. L. Rep. 579, 82 S. W. 280; *Ogden City v. Bear Lake*, etc. *Waterworks, etc. Co.*, 28 Utah 25, 76 Pac. 1069; *Illinois Trust, etc. Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

To grade and improve street. *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52; *Hall v. Racine*, 81 Wis. 72, 50 N. W. 1094.

Widening and extending street. *Re Knaust*, 101 N. Y. 188, 4 N. E. 338.

Opening street. *Sower v. Philadelphia*, 35 Pa. St. 231.

Street improvement. *Indianapolis v. Imberry*, 17 Ind. 175; *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441.

Change in street grade. *State v. Rutherford*, 52 N. J. L. 499, 19 Atl. 972.

Sewer. *Grimmell v. Des Moines*, 57 Iowa 144, 10 N. W. 330; *State (Van Vorst) v. Jersey City*, 27 N. J. L. 493.

Sewer, without previous formal order. *Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690.

Not required to fix bounds of

the act is to be regarded as essentially legislative an ordinance is necessary or a resolution passed with all the formalities of an ordinance, which, then, in effect, becomes an ordinance.⁹²

sewer district. *Strowbridge v. Portland*, 8 Ore. 67.

Contract for lighting streets, requiring no plant, but post and lamps. *Lincoln v. San Vapor Street Light Co.*, 59 Fed. 756, 8 C. C. A. 253.

Plans and specifications may be adopted by resolution. *Santa Cruz Rock Pav. Co. v. Heaton*, 105 Cal. 162, 38 Pac. 693.

Ordinance is not required, to authorize under permit the removal of deposits from the channel of a natural watercourse. *Weber v. Gill*, 98 Cal. 462, 33 Pac. 530.

Waterworks. Where charter does not require, the power to establish a system of waterworks may be exercised prior to the passage of the ordinance. *National Tube Works v. Chamberlain*, 5 Dak. 54, 37 N. W. 761.

Order or resolution sufficient for an election to test sense of voters as to issuing bonds for waterworks, electric light, etc. *State ex rel. v. Allen*, 178 Mo. 555, 77 S. W. 868.

92. *Iowa*. *Eckert v. Walnut*, 117 Ia. 629, 91 N. W. 929.

Missouri. *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86; *Graden v. Parkville*, 114 Mo. App. 527, 90 S. W. 115; *Mulligan v. Lexington*, 126 Mo. App. 715, 105 S. W. 1104.

Nebraska. *Trephagen v. South Omaha*, 69 Neb. 577, 96 N. W. 248, 111 Am. St. Rep. 570.

New Jersey. *Sproul v. Stockton Borough*, 73 N. J. L. 158, 62 Atl. 275; *Bourgeois v. Ocean City*, 70 N. J. L. 622, 57 Atl. 262.

Texas. *Waco v. Prather*, 90 Tex. 80, 37 S. W. 312.

Ordinance required. *Carlyle v. Clinton County*, 140 Ill. 512, 30 N. E. 782; *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934; *Sloan v. Beebe*, 24 Kan. 343; *Indianapolis v. Miller*, 27 Ind. 394; *Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471; *Clay v. Mexico*, 92 Mo. App. 611; *Scranton v. McDonough*, 1 Lack. Leg. N. (Pa.) 177; *Alford v. Dallas* (Tex. Civ. App., 1896), 35 S. W. 816; *Waco v. Prather* (Tex. Civ. App., 1896), 35 S. W. 958.

Ordinance or resolution. *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915; *Los Angeles v. Waldron*, 65 Cal. 283, 3 Pac. 890; *Smith v. Westport*, 105 Mo. App. 221, 79 S. W. 725; *Eckert v. Walnut*, 117 Ia. 629, 91 N. W. 929; *Zalesky v. Cedar Rapids*, 118 Ia. 714, 92 N. W. 657.

Making and approval of an ordinance or resolution, its formal requisites and validity in general. *McLaughlin v. Chicago*, 198 Ill. 518, 64 N. E. 1036; *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217; *Knopf v. Gilsonite Roofing & Paving Co.*, 92 Mo. App. 279.

Open and condemn street. *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686.

Street improvement, involving deferred payments. *Noel v. San*

§ 1876. Sufficiency of order for improvement.

The order for the improvement must be given in clear direct terms, in the manner prescribed and by the proper municipal authorities, whether directed by ordinance, resolution or otherwise. Thus if the charter requires a resolution "ordering" the work to be done, a resolution declaring it to be the "intention" to improve the street is insufficient.⁹³ Likewise an order of the council directing the removal of fences or other encroachments on certain streets is not an order for laying out or widening a street.⁹⁴ So a vote of the council to place the

Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263.

Widening street. *Re Powelton Avenue*, 11 Phila. (Pa.) 447.

Sidewalk construction. *Barron v. Krebs*, 41 Kan. 338, 21 Pac. 235.

Repair of sidewalk. *Louisiana v. Miller*, 66 Mo. 467.

Altering carriage way of sidewalk. *Cross v. Morristown*, 18 N. J. Eq. 305.

Sewer along a public street to be paid for by private persons. *State (Hunt) v. Lambertville*, 45 N. J. L. 279, 282.

Street improvement — directing removal of obstructions. *Hoboken Land & Imp. Co. v. Hoboken*, 35 N. J. L. 205; *Story v. Bayonne*, 35 N. J. L. 335.

Drawbridge construction. *Packard v. Bergen Neck Ry. Co.*, 48 N. J. Eq. 281, 22 Atl. 227.

Reconstruction must be authorized by ordinance but repairs of streets may be made by order of street commissioner. *Ritterskamp v. Stifel*, 59 Mo. App. 510; *Farrell v. Rammelkamp*, 64 Mo. App. 425.

Grading street. *Clay v. Mexico*, 32 Mo. App. 611; *Fulton v. Lincoln*, 9 Neb. 358, 2 N. W. 724; *State*

v. Brigantine Borough, 54 N. J. L. 476, 24 Atl. 481; *State v. Bayonne*, 54 N. J. L. 474, 24 Atl. 448.

Changing street grade. *Kroffe v. Springfield*, 86 Mo. App. 530.

To establish system of street lighting. *Taylor v. Lambertville*, 43 N. J. Eq. 107, 10 Atl. 809.

To make contract for gas. *Ib.*

"An ordinance * * * directing the construction of a work * * * is a judicial act * * * but the prosecution of the work is ministerial in its character." *Logansport v. Wright*, 25 Ind. 512.

Resolution, held to be ordinance. *Springfield v. Knott*, 49 Mo. App. 612.

Commissioners to estimate cost of improvement need not be appointed by ordinance. *Scovill v. Cleveland*, 1 Ohio St. 126.

Distinction between ordinance and resolution and illustrations. §§ 633-637 *ante*, vol. 2.

93. *Kline v. Tacoma*, 11 Wash. 193, 39 Pac. 453, 12 Wash. 657, 40 Pac. 418.

94. *Somerville v. Middlesex County Com'rs*, 122 Mass. 292.

Order laying out a way authorizing assessments for betterments.

grade of a certain street as reported by a committee does not establish such grade.⁹⁵ So a *viva voce* vote directing officers to proceed, notwithstanding a remonstrance, is insufficient. The order should be given by resolution.⁹⁶

The *final order* of the council directing an assessment for street improvements controls notwithstanding an intermediate order declining.⁹⁷

§ 1877. Publication of improvement ordinance or resolution.

Elsewhere are considered the publication of ordinances and resolutions and notice of pendency for passage, the time and frequency and method thereof.⁹⁸ As there

Masonic Bldg. Assn. v. Brownell, 164 Mass. 306, 41 N. E. 306.

Vacating street. Hinchman v. Detroit, 9 Mich. 103.

95. Gardiner v. Johnston, 16 R. I. 94, 12 Atl. 888.

96. Buckley v. Tacoma, 9 Wash. 269, 37 Pac. 446.

97. Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723.

Reconsideration; rights and powers as to, see §§ 612 and 613 *ante*, vol. 2.

98. §§ 697-699 *ante*, vol. 2; Haven v. New York, 73 N. Y. S. 678, 67 App. Div. 90, *aff'd* 173 N. Y. 611, 66 N. E. 1110.

Publication of the ordinance is notice to the property owners that they will have to pay the cost of the improvement. Chesapeake, etc. R. Co. v. Mullins, 94 Ky. 355, 22 S. W. 558, 15 Ky. L. Rep. 815.

Wrong district number in ordinance as published. North Yakima v. Scudder, 41 Wash. 15, 82 Pac. 1022.

An assessment is not rendered invalid by failure to give notice

of the passage of the ordinance for the improvement as required; it is merely non-conclusive. Duquesne v. Keeler, 213 Pa. St. 518, 62 Atl. 1071; Pittsburg v. Coursin, 74 Pa. St. 400; Erie City v. Willis, 26 Pa. Super. Ct. 459.

Street improvements. McLannan v. Chicago, 218 Ill. 62, 75 N. E. 762.

Not applicable to mere resolution. Napa City v. Easterby, 76 Cal. 222, 18 Pac. 253.

An ordinance providing for street improvement the cost to be assessed against property owners is not an ordinance appropriating money and required to be published. Enos v. Springfield, 113 Ill. 65.

An ordinance authorizing construction of a sewer is not an ordinance appropriating money within the meaning of a charter provision requiring ordinances appropriating money to be published. Dumars v. Denver, 16 Colo. App. 375, 65 Pac. 580.

Where ordinances for improve-

stated all mandatory provisions of the law in this respect must be observed, otherwise the proceedings will be invalidated;⁹⁹ and whether the requirement shall be construed as mandatory or directory merely depends on the law involved.¹

§ 1878. Recital of authority to pass improvement ordinance.

As stated in an earlier chapter, unless expressly re-

ments costing more than \$100,000 are required to be published, one continuous street improvement costing more than \$100,000 cannot be divided and provided for by several ordinances in order to evade such requirement. *Nelson v. Chicago*, 196 Ill. 390, 63 N. E. 738; *Kerfoot v. Chicago*, 195 Ill. 229, 63 N. E. 101.

Publication of ordinance and notice of pendency. Publication of ordinance directing improvement to be made upon petition of property owners is only necessary to make the passage of the ordinance conclusive proof that a majority of such owners had petitioned for the improvement, and is not necessary to the validity of the ordinance for the improvement. *Oil City v. Lay*, 164 Pa. 370, 30 Atl. 289.

99. *Kentucky*. *Fox v. Middleborough Town Co.*, 96 Ky. 262, 16 Ky. L. Rep. 455, 28 S. W. 776.

New York. *Re Bassford*, 50 N. Y. 509; *Re Smith*, 52 N. Y. 526, rev'g 65 Barb. 283; *Re Phillips*, 60 N. Y. 16; *Re Durkin*, 10 Hun 269; *Re Burmeister*, 76 N. Y. 174, rev'g 9 Hun 613; *Astor's Petition*, 2 Thomp. & C. 488, aff'd in 56 N. Y. 625.

Ohio. *McGee v. Avondale*, 7 Ohio Cir. Ct. 246.

Oregon. *Grafton v. Sellwood*, 24 Ore. 118; 32 Pac. 1026.

Pennsylvania. *Re petition of Alleghany*, 8 Pa. Super. Ct. 104.

Washington. *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077.

An ordinance not published until after the work is done is void. *Henderson v. Sutton*, 7 Ky. L. Rep. 378.

Where the ordinance is required to be published in the proceedings of the council, a publication of the ordinance without the proceedings renders the ordinance void. *Bellwoods v. Latrobe Steel, etc. Co.*, 238 Ill. 52, 87 N. E. 66.

1. §§ 697-699 *ante*, vol. 2.

Designation of paper. *Re Burmeister*, 76 N. Y. 174, rev'g 9 Hun 613; *Re Phillips*, 60 N. Y. 16.

Publication on Sabbath only is not sufficient. *Preston v. Roberts*, 5 Ky. L. Rep. 57.

Publication in one paper, held sufficient under certain statute. *Conway v. New York*, 4 Hun (N. Y.); 43; *Re Conway*, 62 N. Y. 504.

City clerk's certificate of the publication of an ordinance is sufficient proof of same. *Pierson v. People*, 204 Ill. 456, 68 N. E. 383.

quired the ordinance need not contain a recital of the power to enact it. And a misrecital therein of the source of power to enact is immaterial, if power to pass it existed.² This rule applies to the enactment of improvement ordinances. Thus the recital in an ordinance for a special assessment of certain statutes as authority which had been repealed will be rejected as surplusage and the ordinance sustained, where it appears that any law in force authorized its enactment.³

§ 1879. Ordinance for each distinct improvement.

Generally speaking, each separate and distinct improvement requires a separate proceeding and ordinance.⁴ Thus under authority to lay out "any one street" between certain *termini*, etc., only one street may be included in one proceeding.⁵ So where an ordinance providing for the widening of an alley running north and south through a block, and the opening of a new alley running east and west through the same block, and also the condemnation of two triangular pieces of land at the intersection of these alleys for the purpose of improving the ingress and egress to and from the alleys, two distinct improvements are contemplated and they cannot be united in one proceeding.⁶

The construction of a sewer cannot be included with street improvement, since a sewer is not a necessary

2. § 679 *ante*, vol. 2.

3. *Delamater v. Chicago*, 158 Ill. 575, 42 N. E. 444.

4. *Illinois*. *People v. Latham*, 203 Ill. 9, 67 N. E. 403; *Church v. People*, 179 Ill. 205, 53 N. E. 554.

Kentucky. *Haffey v. Letcher*, 9 Ky. L. Rep. 286.

New York. *Re Locust Ave.*, 87 N. Y. S. 798, 93 App. Div. 416.

Oregon. *Oregon Transfer Co. v. Portland*, 47 Ore. 1, 81 Pac. 575, 82 Pac. 16.

Pennsylvania. *As opening and widening a street*. *Re Powelton Ave.*, 11 Phila. (Pa.) 447.

Improvements may in some instances be properly provided for by one or more ordinances. *Ton v. Chicago*, 216 Ill. 331, 74 N. E. 1044.

5. *Boorman v. Santa Barbara*, 65 Cal. 313, 4 Pac. 31.

6. *Weckler v. Chicago*, 61 Ill. 142.

part of the street.⁷ And a single improvement cannot be divided and provided for by several proceedings in order to evade a statute relative to improvements exceeding a certain cost.⁸ But where an improvement constitutes but a single scheme, and is provided for by two ordinances dependent upon each other, they may be treated as one ordinance and the improvement single.⁹

Under the usual charter power, a single ordinance may provide for the improvement of a single street, or a part thereof, or for several streets.¹⁰ So, under some charters, a resolution to improve a street, may include a declaration of intention to both grade and macadamize.¹¹ And an ordinance for grading a street may properly include filling in; also adjustment of sewers, man-holes, etc.¹² An improvement in which part of a street is ordered widened and extended and the whole graded is single.¹³ An ordinance providing for the laying of water pipes which requires the laying to begin on one street, and, after being laid in that for some distance, to turn by right angle into another street, is not void in that it authorizes in one proceeding two separate and distinct improvements.¹⁴

One ordinance may authorize an improvement consisting of several parts. Thus it has been decided in

7. *Peck v. Grand Rapids*, 125 Mich. 416, 84 N. W. 614, 7 Det. Leg. N. 571.

8. *Nelson v. Chicago*, 196 Ill. 390, 63 N. E. 738; *Kerfoot v. Chicago*, 195 Ill. 229, 63 N. E. 101.

9. *Kerfoot v. Chicago*, 195 Ill. 229, 63 N. E. 101; *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179.

Several ordinances will not necessarily be declared illegal merely because the improvement could have properly been provided for by one. *Ton v. Chicago*, 216 Ill. 331, 74 N. E. 1044.

10. *Savannah v. Weed*, 96 Ga. 670, 23 S. E. 900; *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871; *State v. District Court*, 33 Minn. 295, 23 N. W. 222; *State v. District Court*, 29 Minn. 62, 11 N. W. 133; *Re Walter*, 75 N. Y. 354.

11. *Emery v. San Francisco Gas Co.*, 28 Cal. 345.

12. *Sawyer v. Chicago*, 183 Ill. 57, 55 N. E. 645.

13. *Re Wilmington Ave.*, 213 Pa. St. 238, 62 Atl. 848.

14. *Ricketts v. Hyde Park*, 85 Ill. 110.

Illinois that, inasmuch as grading, draining and sodding of a street combine to produce the improved street, all this work may be projected in one ordinance.¹⁵ And in the same state it has been held that where streets and parts of streets are similarly situated, and are to be paved in the same manner and with the same material, they may be treated as a single improvement, and hence, such improvement may be authorized by one ordinance.¹⁶

15. *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895.

16. *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261.

A jog of one hundred and fifty feet in a street does not render an improvement at such place more than a single one. *Culver v. Chicago*, 171 Ill. 399, 49 N. E. 573.

The improvement of a boulevard, which consisted of two strips of land, there being an intervening space consisting of a parkway between the two, is only one improvement. *Cummings v. West Chicago Park Com'rs*, 181 Ill. 136, 54 N. E. 941; *Lombard v. West Chicago Park Com'rs*, 181 U. S. 33, 21 Sup. Ct. 507, 45 L. Ed. 731.

In Iowa the resolution ordering the improvement embraced parts of several streets, one more expensive than another. It was sustained under the code which provided that if the special tax is such as the city is authorized to make, any irregularity in the proceeding by any officer of the city will not defeat a recovery of the abutter's proportion. *Burlington v. Quick*, 47 Iowa 222.

A street in one subdivision, practically a continuance of a street in another subdivision may

be authorized to be improved by one ordinance. *Cincinnati v. Corry*, 7 Ohio Dec. 415, 2 Wkly. Law Bul. (Ohio) 337.

"The fact that the resolution of intention included work of various kinds upon other streets does not render it invalid." *San Francisco Paving Co. v. Egan*, 146 Cal. 635, 80 Pac. 1076.

May include in one resolution of intention improvements in different parts of city. *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023.

Improvement of street for more than one block is a single improvement. *Lafayette v. Fowler*, 34 Ind. 140.

Improvement of two streets may be provided for in one proceeding. *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071; *Seibert v. Cavender*, 3 Mo. App. 421.

Under charter of Portland, Ore., which requires improvement of each street or part thereof to be provided for in separate proceedings, one proceeding cannot divide a street in two parts and provide for their improvement with different classes of improvements. *Oregon Transfer Co. v. Portland*, 47 Ore. 1, 81 Pac. 575, rehearing denied 47 Ore. 1, 82 Pac. 16.

An ordinance providing for the construction of a sidewalk on both sides of the same street is not invalid as embracing two separate and distinct improvements. In such case, the construction of the sidewalk on one side of the street is of more or less benefit to the property on both sides of the street.¹⁷ But a single ordinance, it has been held, cannot authorize the construction of a number of distinct sidewalks on different streets.¹⁸

In Indiana, a statute conferring authority in one section to order the widening of a street and in another grading and graveling, was construed as contemplating distinct improvements, and therefore one ordinance providing for widening and grading was held unauthorized.¹⁹

A single ordinance may provide for the laying of sewers in several streets, where the streets are so situated that the several sewers constitute one system.²⁰ So an ordinance authorizing the construction of a main sewer, with branches, does not call for more than one improvement.²¹

In an early New York case, it is said that, usually the combination in one proceeding of improvements and assessments so dissimilar in their nature as the grading of a street, the building of a bridge as a part thereof, and the construction of a sewer, would be vicious in principle; but where the sewer is a part of the bridge, serviceable

17. *Watson v. Chicago*, 115 Ill. 78, 83, 3 N. E. 430, where it was said: "To constitute one improvement, it is not necessary that there should be physical connection between different portions of it. The improvement here was upon one and the same street, and being upon its two sides only, by the building of a sidewalk, and not an improvement of the street in its entire width, did not constitute two improvements."

18. *People v. Latham*, 203 Ill. 9, 67 N. E. 403.

19. *Mendenhall v. Clugish*, 84 Ind. 94.

20. *Beach v. People*, 157 Ill. 659, 41 N. E. 1117.

A connected system of sewers and drains may be provided for in one ordinance to cover entire city. It need not be restricted to one street. *Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

21. *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.

only from relieving it from the effect of water collecting upon the street, there is no objection to such union.²²

§ 1880. Preliminary investigation and report.

Sometimes statutes or charters provided for the appointment of a committee or jury to ascertain facts relative to the making or advisability or necessity of making an improvement.²³ This is common in proceedings to

22. *People v. Yonkers*, 39 Barb. (N. Y.) 266.

23. View of proposed street by council committee. *Taintor v. Thurston*, 192 Mass. 522, 78 N. E. 545.

Appointment of standing committee of council as special committee to lay out street, approved. *Hough v. Bridgeport*, 57 Conn. 290, 18 Atl. 102.

The appointment of commissioners to take charge of the building of a municipal building as the city hall in a manner not authorized by law, does not confer upon such commission power to act. *State v. Kirkley*, 29 Md. 85.

Power of committee of town constituted to take charge of the erection of a hall. *Shea v. Milford*, 145 Mass. 528, 14 N. E. 764.

Appointment of commissioners, held valid. *Re Mt. Vernon*, 72 N. Y. S. 1097, 64 App. Div. 619, aff'g 68 N. Y. S. 823, 34 Misc. Rep. 225.

Proceedings upheld. *Re Street Opening, etc. Board*, 36 N. Y. S. 311, 91 Hun 477.

Charter provisions, held void. *Lumsden v. Milwaukee*, 8 Wis. 485.

Removal of members of board of improvement. *Board of Improvement v. Earl*, 71 Ark. 4, 71 S. W. 666.

Commissioners officers *de facto*, when. *Caskey v. Greensburgh*, 78 Ind. 233.

The fact that a board of improvement for a district was appointed by the council by the ballot on which a board of improvement for a sewer district was appointed, does not render the appointment invalid. *Boles v. Kelley*, 90 Ark. 29, 117 S. W. 1073.

In appointing commissioners the court's power is limited to ascertaining their qualifications, and that the proceedings, are regular. *Re Opening of Albany St.*, 6 Abb. Pr. (N. Y.) 273.

In some instances if a view is demanded by either party to the controversy in laying out a street, showers are appointed to show the premises under the direction of the sheriff. *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47.

Where a charter required a committee to be appointed to lay out a street, the council cannot act instead of such committee, nor is it sufficient to refer the same to a standing committee. *Gregory v. Bridgeport*, 52 Conn. 40.

Return of officer must show that the jurors are non-resident freeholders, otherwise the proceedings are void. *People v. Brighton*, 20 Mich. 57.

open or make streets, and strict observance of such provisions is usually required.²⁴ Likewise where it is required that the question of the advisability, necessity, benefit, or cost of a proposed improvement be referred to a particular or special board or committee for determination, the requirement must be followed as it is held to be mandatory.²⁵ The powers of such board or commit-

Where a commission is invested by statute with power to employ an architect to prepare plans for a building, without more detail as to the building, the commission held authorized to use its judgment in determining the quality and character of same. It will be presumed that the commission will act in good faith. *Hightower v. Raleigh*, 150 N. C. 569, 65 S. E. 279.

Compensation of commissioners appointed for purpose not authorized by statute. *People v. Green*, 52 How. Pr. (N. Y.) 440.

24. *Martin v. Louisville*, 97 Ky. 30, 29 S. W. 864; *Gregory v. Bridgeport*, 52 Conn. 40; *People v. Brighton*, 20 Mich. 57; *Lumsden v. Milwaukee*, 8 Wis. 485; *Re Road in Lancaster City*, 68 Pa. St. 396.

25. *Illinois*. *Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686.

Maine. *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380.

Michigan. *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

New Jersey. *Semon v. Trenton*, 47 N. J. L. 489, 4 Atl. 312; *Van Anglen v. Bayonne*, 56 N. J. L. 463, 29 Atl. 168; *Onderdonk v. Plainfield*, 42 N. J. L. 480.

New York. *Havermans v. Troy*, 50 How. Pr. (N. Y.) 510.

Pennsylvania. *Re Greenleaf Court*, 4 Whart. (Pa.) 514.

Jury must ascertain how much benefit the public will derive from the proposed improvement. *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

And jury must ascertain whether the proposed improvement is necessary. *People v. Brighton*, 20 Mich. 57.

The commissioners are relieved from determining whether the improvement will benefit the whole corporation, when it is so alleged in the petition. *Re Barrack St.*, 2 Rob. (La.) 491.

Where the same reports are required in change of grade as in the original establishment of an alley, paving an alley, though it raises it somewhat, is not such a change of grade. *Bogard v. O'Brien*, 14 Ky. L. Rep. 648, 20 S. W. 1097.

Where the jury in a proceeding to condemn land is required to view the property to be taken and assessed and that interested persons may submit proof to the jury, the jury may be guided by their own judgment in assessing the damages and improvements as well as by evidence they get from the witnesses. *Kansas City v. Baird*, 98 Mo. 215, 11 S. W. 243, 532.

tee, the time within which they are required to act, the method of procedure, the nature of the report and its rejection or acceptance by the designated municipal authorities, and subsequent action relating to the proposed improvement are all matters to be ascertained from a proper construction of the particular law.

It is not regarded as a delegation of legislative or public authority²⁶ for statutes or charters to provide that propositions to make public improvements be re-

The commissioners' report must show that the assessment was not in excess of the benefits when such is a fact. *Hutton v. West Orange*, 39 N. J. L. 453.

Authority to appoint commissioners to lay out and establish streets carries authority to make survey and plats which were indispensable in the work. *Onderdonk v. Plainfield*, 42 N. J. L. 480.

Where there is nothing to show the contrary it will be presumed that all the commissioners met and consulted even though their report was not signed by all of them. *Doughty v. Hope*, 3 Denio (N. Y.) 249.

A statute requiring commissioners appointed in the matter of widening a street to report within six months is merely directory, and jurisdiction is not lost by delay. *Re Broadway*, 63 Barb. (N. Y.) 572.

Majority of commissioners may adjourn from day to day. *Re Newland Ave.*, 15 N. Y. S. 63, 60 Hun 581, 38 N. Y. St. Rep. 796.

Swearing jurors. *Re Greenleaf Court*, 4 Whart. (Pa.) 514.

A jury appointed to report on the necessity of opening a street

must report on the matter as a whole, and where it reports on the necessity of only part of the proposed street, the report will be set aside. *Re Twenty-eighth St.*, 11 Phila. (Pa.) 436.

Certifying to proceedings. *Re Locust St.*, 153 Pa. St. 276, 25 Atl. 816.

Certificate or report of engineer, held sufficient. *San Francisco Pav. Co. v. Egan*, 146 Cal. 635, 80 Pac. 1076.

Action of committee upheld. *Walsh v. Ansonia*, 69 Conn. 558, 37 Atl. 1096.

Resolution appointing committee upheld. *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

Act of council in accepting report of committee for laying out street, held to amount to an adoption of the committee's findings. *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380.

26. Authorizing a board of public works to investigate and make recommendation as to material to be used in an improvement, is not a delegation of legislative authority. *Ex parte Paducah*, 28 Ky. L. Rep. 412, 89 S. W. 302.

ferred to named officers or a designated board, for investigating estimates and recommendation.²⁷

27. *Illinois*. Midaugh v. Chicago, 187 Ill. 230, 58 N. E. 459.

Indiana. Alley v. Lebanon, 146 Ind. 125, 44 N. E. 1003; Anderson v. Bain, 120 Ind. 254, 22 N. E. 323.

Michigan. Butler v. Detroit, 43 Mich. 552, 5 N. W. 1078.

Minnesota. Althen v. Kelley, 32 Minn. 280, 20 N. W. 188.

Missouri. Shoenberg v. Field, 95 Mo. App. 241, 68 S. W. 945,

New Jersey. White v. Bayonne, 49 N. J. L. 311, 8 Atl. 295.

Oregon. Ladd v. East Portland, 18 Ore. 87, 22 Pac. 533.

Council may order improvement with report of board that an assessment will be required and the proper amount to be assessed. Hubbard v. Norton, 28 Ohio St. 116, 125, 126.

Resolution of council referring petition for improvement to a committee, does not have to be signed by the mayor. Piard v. Jersey City, 30 N. J. L. 148.

Where there is a requirement to appoint three members of the council or other competent person to estimate the cost of an improvement, a member of the council is not disqualified because he owns property that will be affected by such improvement. White v. Alton, 149 Ill. 626, 37 N. E. 96.

Validity of proceedings. Bay City Traction, etc. Co. v. Bay City, 155 Mich. 393, 119 N. W. 440, 15 Det. Leg. N. 1039; Cuming v. Gleason, 140 Mich. 195, 103 N. W. 537, 12 Det. Leg. N. 127; Dollar Sav. Bank v. Ridge, 183 Mo. 506, 82

S. W. 56; Shoenberg v. Field, 95 Mo. App. 241, 68 S. W. 945; People v. Board of Contract, etc. of Albany, 56 N. Y. S. 334, 39 App. Div. 30; People v. Haverstraw, 137 N. Y. 88, 32 N. E. 1111.

A majority of the members of a board may act—two of three members being sufficient. Gage v. Chicago, 192 Ill. 586, 61 N. E. 849. See § 595 *ante*, vol. 2.

A recommendation signed with the individual names of a majority of the board followed by the words "Board of Local Improvement of the City of Chicago," held sufficient. Dodge v. Chicago, 201 Ill. 68, 66 N. E. 367.

The omission of the signature of the city attorney from a report of the law committee on the validity of an improvement may be cured by amendment of the records of the city council. Woods v. Eilers, 7 Ky. L. Rep. 824.

Where a city is authorized to build a sewer and charge to owners of property benefited against the will of such owners, if the board of health unanimously resolve that it is necessary for the public health, a unanimous vote of all the members is not necessary if all present vote for it. Coxon v. Trenton, 78 N. J. L. 26, 73 Atl. 253.

But such opinion of the board is judicial, and the property owners who objected to the improvement must have notice and the resolution made only after giving such notice. Coxon v. Trenton, 78 N. J. L. 26, 73 Atl. 253.

§ 1881. Recommendation of ordinance by board.

Some charters require that the ordinance for the improvement shall be recommended by a designated municipal board, as the board of public works or improvements, before the council or legislative body is authorized to pass such ordinance.²⁸ Provisions of this character are usually construed as mandatory.²⁹ So sometimes all ordinances resulting in contracts for public work or improvements are required to originate in such board. The requirement of such recommendation is not regarded as a delegation of legislative authority.³⁰

28. St. Louis Charter, art. VI, § 14; Municipal Code of St. Louis, p. 260; Amended Charter of St. Louis (Annotated), p. 322; Charter, San Francisco, art. VI, ch. 2, § 2; Stat. and Codes of California 1901, p. 293; Charter, Kansas City, Mo., art. IX, § 2; Rawson v. Chicago, 185 Ill. 87, 57 N. E. 35; Barber Asphalt P. Co. v. Gaar, 24 Ky. L. Rep. 2227, 73 S. W. 1106; Dodge v. Chicago, 201 Ill. 68, 66 N. E. 367.

The recommendation of the ordinance for passage is *prima facie* evidence that all the preliminary requirements, including the giving of notice of public hearings, have been performed. Chicago Union Traction Co. v. Chicago, 202 Ill. 576, 581, 67 N. E. 383.

Ordinance based on recommendation of board, held valid. Chicago Union Traction Co. v. Chicago, 202 Ill. 576, 67 N. E. 383.

It is immaterial that the board had formerly made a different recommendation as to the material. Gilsonite Const. Co. v. Arkansas McAlester Coal Co., 205 Mo. 49, 103 S. W. 93.

29. Reynolds v. Schweinefus, 27 Ohio St. 311, reversing 1 Cin. Rep.

215; Stephan v. Daniels, 27 Ohio St. 527; Brophy v. Landman, 28 Ohio St. 542; Toledo v. Lake Shore & M. S. Ry. Co., 2 Ohio Cir. Dec. 450; Longworth v. Cincinnati, 23 Wkly. Law Bul. (Ohio), 100.

Sewer; board of health need not recommend. St. Louis v. Oeters, 36 Mo. 456.

Boulevard; board of park and boulevard commissioners need not recommend. Re Independence Avenue Boulevard, 128 Mo. 272, 30 S. W. 773.

Amendment. An ordinance is not invalid, although board amended it upon suggestion of assembly and then returned it and recommended its passage, without changing indorsement of estimated cost made on original draft. Bambrick v. Campbell, 37 Mo. App. 460.

30. Kansas City v. Bacon, 147 Mo. 259, 283, 48 S. W. 860; Kansas City v. Mastin, 169 Mo. 80, 91, 68 S. W. 1037.

An ordinance providing for the erection of litter boxes in the streets, having originated in the municipal assembly and not by the board, was held void. State ex rel.

§ 1882. Procedure in passage of improvement ordinance.

The procedure in the passage of ordinances is treated elsewhere.³¹ These rules are equally applicable to the enactment of improvement ordinances. Therefore, to be valid the improvement ordinance must be in form sufficient,³² passed at the time³³ and in the manner by charter or statutory provision prescribed,³⁴ received the vote

v. Belt, 161 Mo. 371, 375, 61 S. W. 658.

Proceedings for improvement. Welker v. Potter, 18 Ohio St. 85.

31. Chapters 13, 14 and 16 *ante*, vol. 2.

32. §§ 677, 678 *ante*, vol. 2.

33. Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125; Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52.

Time. A general ordinance provided that the council may "at any time hereafter," direct, by resolution, street guttering. It took effect August 17th. On August 9th and 14th, resolutions were adopted authorizing a street to be guttered. The resolutions were sustained, the word "hereafter" being construed to refer to the time of the passage of the general ordinance, and not to the date it took effect. Kendig v. Knight, 60 Iowa 29, 14 N. W. 78.

Time allowed for filing claims. Where no claims are presented, an ordinance passed prior to the expiration of the time, is not rendered void. Toledo v. Lake Shore & M. S. Ry. Co., 2 Ohio Cir. Dec. 450.

Time of introduction and passage, §§ 688, 689 *ante*, vol. 2.

Where steps are taken as required by charter, the council may advertise for bids and contract for paving a street before the formal

passage of an ordinance ordering the work to be done. Springfield v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276, overruling Keane v. Cushing, 15 Mo. App. 96.

Contract made before the enactment of the necessary ordinance, held void. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853.

Passed at special meeting. See § 601 *ante*, vol. 2. Smith v. Tobener, 32 Mo. App. 601; Dollar Sav. Bank v. Ridge, 62 Mo. App. 324; Aurora Water Co. v. Aurora, 129 Mo. 540, 31 S. W. 946.

Requirement that two weeks must intervene between the passage of an ordinance in the two branches of the council is mandatory. Thomas v. Woods, 32 Ky. L. Rep. 1405, 108 S. W. 878.

But under some charters the ordinance may be passed at one meeting if there is a petition of a majority of the property owners for the improvement. Latonia v. Hedger, 30 Ky. L. Rep. 1091, 100 S. W. 267.

An ordinance is not rendered void by the lapse of more than a year between its introduction and passage. McLaughlin v. Chicago, 198 Ill. 518, 64 N. E. 1036.

34. Trenton v. Coyle, 107 Mo. 193, 17 S. W. 643; Saxton v. St. Joseph, 60 Mo. 153; Stewart v. Clinton, 79 Mo. 603; Werth v.

designated, whether a majority of a quorum, or a majority of the members duly elected or appointed and qualified, or a two-thirds, or three-fourths, or some other proportionate, vote³⁵ (sometimes directed by express enact-

Springfield, 78 Mo. 107; State ex rel. v. Barlow, 48 Mo. 17; State ex rel. v. St. Louis, 56 Mo. 277; Perkinson v. Partridge, 3 Mo. App. 60.

Reference to and report by committee. § 690 *ante*, vol. 2.

Failure to refer to committee of council and report, invalidates street improvement proceedings. *Worthington v. Covington*, 6 Ky. L. Rep. 237; *Gilman v. Milwaukee*, 61 Wis. 588, 21 N. W. 640.

All steps to be observed. *Murphy v. Louisville*, 9 Bush. (Ky.) 189.

Reading on different days. § 610 *ante*, vol. 2.

Improvement ordinance, held to be of a permanent nature, within the meaning of a charter requiring reading on three different days. *Campbell v. Cincinnati*, 49 Ohio St. 463, 31 N. E. 606; *Tyler v. Columbus*, 6 Ohio Cir. Ct. Rep. 224.

Ordinance for improvement must be passed as required by statute or charter. *Altman v. DuBuque*, 111 Ia. 105, 82 N. W. 461; *Marion Water Co. v. Marion*, 121 Ia. 306, 96 N. W. 883; *Kansas Town Co. v. Argentine*, 59 Kan. 779, 54 Pac. 1131, aff'g 5 Kan. App. 50, 47 Pac. 542; *McGuire v. East Cleveland*, 25 Ohio Cir. Ct. 497; *Gore v. Tacoma*, 34 Wash. 434, 76 Pac. 73.

An ordinance for an improvement is not rendered invalid because voted on at same time as

another ordinance. *Weatherhead v. Cody*, 27 Ky. L. Rep. 631, 85 S. W. 1099.

Vote on several at one time. *Cincinnati v. Anderson*, 52 Ohio St. 600, 43 N. W. 1040; *Bode v. Cincinnati*, 9 Ohio Cir. Ct. Rep. 382, 6 Ohio Cir. Dec. 131; *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52.

Two propositions; separate vote. *State v. Armstrong*, 54 Minn. 457, 56 N. W. 97.

Minor irregularities. *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 34 N. E. 473; *Pickford v. Lynn*, 98 Mass. 491; *Cornell v. New Bedford*, 138 Mass. 588; *Simpson v. McGonegal*, 52 Mo. App. 540; *Astor v. New York*, 62 N. Y. 567.

35. *California*. Charter of San Francisco, Art. VI, ch. 2, § 2; Statutes and Amend. to Codes of Cal. (1899), p. 293.

Indiana. *McEneney v. Sullivan*, 125 Ind. 407, 25 N. E. 540; *Logansport v. Legg*, 20 Ind. 315.

Kentucky. *Covington v. Casey*, 3 Bush. (66 Ky.) 698; *Kaye v. Hall*, 13 B. Mon. (52 Ky.) 455.

Michigan. *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577.

Pennsylvania. *Bradford v. Fox*, 171 Pa. St. 343, 33 Atl. 85.

Washington. *Buckley v. Tacoma*, 9 Wash. 269, 37 Pac. 446.

Wisconsin. *Dieckmann v. Sheboygan County*, 89 Wis. 571, 62 N. W. 410.

ment to be taken by yeas and nays,³⁶ and so recorded),³⁷ signed by the presiding officer of the acting body,³⁸ mayor³⁹ and other officer when required,⁴⁰ recorded in

Definite vote required. § 596 *ante*, vol. 2.

Vote in ordering improvement. Laws often require when not on petition of property owners the improvement is to be ordered by a two-thirds vote of the council. Yeakel v. Lafayette, 48 Ind. 116.

The fact must affirmatively appear in the proceedings. Moberry v. Jeffersonville, 38 Ind. 198, 203.

The record must show that two-thirds of all the persons that compose the council, and not merely two-thirds of the members present at the time the vote was taken, voted for the order. Baker v. Tobin, 40 Ind. 310.

A court will not take judicial notice of the number of wards, or the number of councilmen in a city. Baker v. Tobin, 40 Ind. 310.

Where the vote of the council in determining necessity of an improvement is required to be by vote of all the members, it does not mean all present or a quorum, but means all the members constituting the council. Crickenberger v. Westfield, 71 N. J. L. 467, 58 Atl. 1097.

And a vote of a majority of a council is not obtained by a vote of three to two of five members present where the council is composed of six. Reed v. Woodcliff Borough (N. J. Sup., 1905), 60 Atl. 1128.

The fact that a member of the council signed the petition for the improvement, does not render the ordinance invalid when voted for

by him. Erie v. Grant, 24 Pa. Super. Ct. 109.

Final resolution for improvement may be passed by majority of board. Gage v. Chicago, 196 Ill. 512, 63 N. E. 1031; McChesney v. Chicago, 201 Ill. 344, 66 N. E. 217.

36. §§ 608, 609 *ante*, vol. 2.

Directory. Wiggin v. New York, 9 Paige (N. Y.) 16; Striker v. Kelly, 7 Hill (N. Y.) 9.

37. § 620 *ante*, vol. 2.

38. § 587 *ante*, vol. 2; Creighton v. Manson, 27 Cal. 613; Thompson v. Hoge, 30 Cal. 179.

39. §§ 588, 589, 691 *ante*, vol. 2.

Ordinance, to be signed by mayor. Doty v. Lyman, 166 Mass. 318, 44 N. E. 337; Saxton v. Beach, 50 Mo. 488; Irvin v. Devors, 65 Mo. 625, 627.

Resolution to be signed by mayor. Kinsella v. Auburn, 54 Hun (N. Y.) 634, 7 N. Y. S. 317.

Ordinance need not be signed by mayor. Martindale v. Palmer, 52 Ind. 411.

Resolution need not be approved by mayor. Taylor v. Palmer, 31 Cal. 241; Hendrick v. Crowley, 31 Cal. 471; Beaudry v. Valdez, 32 Cal. 269; McDonald v. Dodge, 97 Cal. 112, 31 Pac. 909; Clark v. Jennings (Cal., 1893), 32 Pac. 1049; Hall v. Racine, 81 Wis. 72, 50 N. W. 1094.

Order for street improvement need not be signed by mayor. State v. Armstrong, 54 Minn. 457, 56 N. W. 97.

40. Clerk to sign resolutions

the proper municipal records if the law so exacts,⁴¹ deposited with the named custodian when so provided,⁴² and, if so prescribed, published at the time and in the manner directed.⁴³ The record of the proceedings should be kept properly and show that all mandatory and jurisdictional steps have been taken.⁴⁴

The legislative body may reconsider a vote whereby a proposition for improving streets was lost.⁴⁵ Thus where notice of a proposed improvement has been given in accordance with legal requirements and a hearing had of the property owners interested a negative vote upon the ordinance authorizing the improvement may be reconsidered and the ordinance passed at a subsequent meeting, without granting to those persons an opportunity for a new hearing.⁴⁶

§ 1883. Description of the improvement.

The cases differ materially respecting the construction of laws relative to the description of the proposed improvement. But this difference is due mainly to the fact

for improvement; held printed signatures sufficient. *Williams v. McDonald*, 58 Cal. 527.

41. § 695 *ante*, vol. 2.

42. § 696 *ante*, vol. 2.

43. §§ 697 to 699 *ante*, vol. 2.

44. **Records**; manner of keeping; sufficiency; evidence amendment, etc. § 619 *et seq.*, *ante*, vol. 2.

Indiana. *New Albany v. Endres*, 143 Ind. 192, 42 N. E. 683.

Kentucky. *Lexington v. Headley*, 5 Bush. (Ky.), 508; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

Massachusetts. *Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690; *Chase v. Springfield*, 119 Mass. 556.

New Jersey. *Hand v. Elizabeth*, 30 N. J. L. 365,

New York. *Re Buffalo*, 78 N. Y. 362; *People v. Whitney's Point*, 32 Hun (N. Y.) 508; *Re Schreiber*, 53 How. Pr. (N. Y.) 359.

Pennsylvania. *Darlington v. Com.*, 41 Pa. St. 68.

Contingency in taking effect. § 668 *ante*, vol. 2.

Ordinance for construction of waterworks, to take effect when proposition accepted by popular vote, held void. *Thompson v. Sumner*, 9 Wash. 310, 37 Pac. 450.

45. *Jersey City v. Howeth*, 30 N. J. L. (1 Vroom.) 521.

Reconsideration, held valid in *Hough v. Bridgeport*, 57 Conn. 290, 18 Atl. 102.

See §§ 612 and 613 *ante*, vol. 2.

46. *People v. Rochester*, 5 Lans. (N. Y.) 11.

that the laws are different. Where it is to be paid for by special assessment or taxation closer adherence to charter provisions is usually enforced. The proceedings should clearly indicate the nature, extent, cost and method of apportionment that the property owners may know what they will be called upon to pay and the probable benefits to them. Simple justice demands this. Where notice and hearing are provided all these matters may be considered. But notwithstanding, under most charters as they are construed by the courts in view of the constitutional provision of due process of law, etc., the order, resolution or ordinance directing the improvement should contain specific information.⁴⁷ Thus by statute in Illinois, where the expense of the improvement is collected, in whole or in part, by special assessments upon abutting property, the ordinance "must specify the nature, character, locality and description" of the proposed improvement;⁴⁸ and, according to the decisions of

47. *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33; *Joyes v. Shadurn*, 11 Ky. L. Rep. 892, 13 S. W. 361.

Description, held sufficient. *Beechwood Park Land Co. v. Summit*, 78 N. J. 182, 73 Atl. 57.

Ordinance, held sufficiently certain. *People v. Grand Trunk, etc. R. Co.*, 232 Ill. 292, 83 N. E. 839.

Ordinances held to insufficiently describe the proposed improvement. *Jackson v. Williams*, 92 Miss. 301, 46 So. 551; *Gault v. Glen Ellyn*, 226 Ill. 520, 80 N. E. 1046.

A resolution for an improvement need not contain the details necessary in an ordinance. It is sufficient if it reasonably apprises the property owner of the nature of the improvement. *McLannan v. Chicago*, 218 Ill. 62, 75 N. E. 762.

Resolution must describe generally the nature and extent of the improvement. If a sewer, the diameter should be given. If a curbing, the height, length and thickness must be given. *Whittaker v. Deadwood*, 23 S. D. 538, 122 N. W. 590.

A description which clearly identifies the premises directing the filling and drainage of certain lots, held sufficient. Where the wrong township is named the false part of the description will be rejected. *Poland v. Connolly*, 16 Ohio St. 64.

48. Description of improvement and specification of material. *Field v. Chicago*, 198 Ill. 224, 64 N. E. 840; *Duane v. Chicago*, 198 Ill. 471, 64 N. E. 1033; *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217; *People v. Birch*, 201 Ill. 81, 66 N. E. 358; *Gage v. Chicago*,

that state, this must be done with reasonable certainty. This provision is mandatory. It is clear, therefore, that an ordinance which does not substantially conform to the requirement of the statute in this respect will confer no power on the corporate authorities to make the assessment.⁴⁹

Some charters require the ordinance to "specify the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, the fund out of which it shall be paid * * * and shall be indorsed with the estimate of the cost thereof."⁵⁰ To comply substantially with such provision, an

201 Ill. 93, 66 N. E. 374; DeWitt County v. Clinton, 194 Ill. 521, 62 N. E. 780.

An ordinance specifying pipes, fire hydrants, crosses, and tees of "city of Chicago standard" does not comply with such statute, it not appearing that there was any such standard well known or its meaning generally accepted. Washburn v. Chicago, 202 Ill. 210, 66 N. E. 1033.

And an ordinance specifying such standard was held void for uncertainty of material to be used. McChesney v. Chicago, 213 Ill. 592, 73 N. E. 368.

49. Cass v. People, 166 Ill. 126, 46 N. E. 729; Otis v. Chicago, 161 Ill. 199, 43 N. E. 715; Delamater v. Chicago, 158 Ill. 575, 42 N. E. 444; Stanton v. Chicago, 154 Ill. 23, 39 N. E. 987; Gage v. Chicago, 143 Ill. 157, 32 N. E. 264; Kimble v. Peoria, 140 Ill. 157, 29 N. E. 723; Woods v. Chicago, 135 Ill. 582, 26 N. E. 608; Adams County v. Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; Pearce v. Hyde Park, 126 Ill. 287, 18 N. E. 824; Jacksonville Ry. Co. v. Jackson-

ville, 114 Ill. 562, 564, 2 N. E. 478; Sterling v. Galt, 117 Ill. 11, 7 N. E. 471; Lake v. Decatur, 91 Ill. 596, 600; Andrews v. Chicago, 57 Ill. 239; Lake Shore & M. S. Ry. Co. v. Chicago, 56 Ill. 454; Foss v. Chicago, 56 Ill. 354.

These must be described with such definiteness and certainty as to furnish data for the intelligent estimate of the cost of the work. Kankakee v. Potter, 119 Ill. 324, 10 N. E. 212; Sterling v. Galt, 117 Ill. 11, 7 N. E. 471; Levy v. Chicago, 113 Ill. 650.

A description of the same exactness as the law will be sufficient. Harney v. Heller, 47 Cal. 15.

Illustrations of sufficient descriptions. Chytraus v. Chicago, 160 Ill. 18, 43 N. E. 335; Chicago v. Habar, 62 Ill. 283.

Insufficient descriptions. Lake Shore & M. S. Ry. Co. v. Chicago, 144 Ill. 391, 33 N. E. 602; Illinois Cent. R. R. Co. v. Chicago, 144 Ill. 392, 33 N. E. 602; Andrews v. Chicago, 57 Ill. 239.

50. St. Louis Charter, art. VI, § 15; The Revised Code of St. Louis (1907, Woerner), p. 401.

ordinance providing for the improvement of streets, and as a part thereof for the construction of sidewalks, must prescribe the width of the sidewalks and the material of which they are to be constructed, unless a general ordinance, sufficiently covers these matters, for they cannot be left to the discretion of an officer, as the street commissioner.⁵¹ In other words, the extent of the work must be specified in the ordinance, for it is clear that this cannot be delegated to an executive and administrative officer. But where under a particular charter a railroad company is liable for the cost of reconstructing so much of the street as it included between the rails of the company's tracks,⁵² the ordinance to improve the street need not specify such liability, since it is fixed by the charter and it will be presumed that the municipal authorities will observe all legal requirements.⁵³

As the presumption is that the municipal authorities kept within their powers, the ordinance need not recite in express terms that the contemplated improvement is within the corporate boundaries.⁵⁴

§ 1884. Same—street improvement ordinance.

The cases respecting the sufficiency of street improvement ordinances and resolutions are numerous, but for

51. *Heman Const. Co. v. Loevy*, 42 N. E. 444; *Beach v. People*, 157 Ill. 659, 41 N. E. 1117; *Chicago v. Silverman*, 156 Ill. 601, 41 N. E. 162; *Bliss v. Chicago*, 156 Ill. 584, 41 N. E. 160; *Ziegler v. People*, 156 Ill. 133, 40 N. E. 607; *Young v. People*, 155 Ill. 247, 40 N. E. 604; *Browning v. Chicago*, 155 Ill. 314, 40 N. E. 565; *West Chicago St. R. R. Co. v. People*, 155 Ill. 299, 40 N. E. 599; *Wisner v. People*, 156 Ill. 180, 40 N. E. 574; *Meadowcroft v. People*, 154 Ill. 416, 40 N. E. 442; *Stanton v. Chicago*, 154 Ill. 23, 39 N. E. 987; *Wheeler v. People*, 153 Ill. 480, 39 N. E. 123.

52. Estimate, map and plan to be attached. *Reading v. O'Reilly*, 169 Pa. St. 366, 32 Atl. 420.

53. *St. Louis v. St. Louis R. R. Co.*, 50 Mo. 94.

54. *Farrar v. St. Louis*, 80 Mo. 379, 393; *Stifel v. McManus*, 74 Mo. App. 558; *Neenan v. Smith*, 60 Mo. 292; *Springfield v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

54. *Chytraus v. Chicago*, 160 Ill. 18, 43 N. E. 335; *Andrews v. People*, 158 Ill. 477, 41 N. E. 1021; *Delamater v. Chicago*, 158 Ill. 575,

the most part they are constructions of particular legal provisions; therefore, many general rules are not readily deducible from them. The judicial view can be best understood by diligent study of the individual cases, especially of those in the home jurisdiction. However, the illustrative cases referred to herein, in text and notes, may serve as guides to such investigation.⁵⁵

55. Sufficient description. That street will be graded and macadamized from one named point to another. *Emery v. San Francisco Gas Co.*, 28 Cal. 345.

That the crossing of designated streets be planked and that the angular corners thereof be reconstructed. *Deady v. Townsend*, 57 Cal. 298.

Ordering a change of grade by lowering it a few inches, leaving courses, distances and width unchanged, and that property owners interested "curb and pave gutters, and concrete the sidewalks * * * to the established grade." *Durand v. Ansonia*, 57 Conn. 70, 17 Atl. 283.

Width of improvement on intersecting streets. *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181.

As to specifications in ordinance for street work in particular case, see *Morley v. Weakley*, 86 Mo. 451.

Sufficiency of description. *Gage v. Chicago*, 225 Ill. 135, 80 N. E. 86; *Beers v. Chicago*, 225 Ill. 376, 80 N. E. 288; *Uhlich v. Chicago*, 224 Ill. 402, 79 N. E. 598; *McChesney v. Chicago*, 205 Ill. 611, 69 N. E. 82; *Field v. Chicago*, 198 Ill. 224, 64 N. E. 840; *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107; *Chicago v. Wilshire*, 243 Ill. 123, 90 N. E. 245; *Sedalia v. Smith*, 206 Mo. 346, 104 S. W. 15; *Sedalia*

v. Dogherty, 206 Mo. 372, 104 S. W. 22.

Sufficiency of description of part of street to be improved. *Gage v. Chicago*, 203 Ill. 26, 67 N. E. 477; *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217; *Atty. Gen. v. Collins*, 186 Mass. 209, 71 N. E. 574; *Chicago v. LeMoyne*, 243 Ill. 379, 90 N. E. 746.

The following ordinances relating to street and alley improvements, held valid under the St. Louis charter, prior to amendments of 1901: *Adams v. Lindell*, 72 Mo. 198, 5 Mo. App. 197, 213; *Crone v. Mallinckrodt*, 9 Mo. App. 316; *Steffen v. Fox*, 124 Mo. 630, 28 S. W. 70, 56 Mo. App. 9; *Farrar v. St. Louis*, 80 Mo. 379, 382, 383; *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026; *Heman v. Ring*, 85 Mo. App. 231; *Seaboard Nat. Bank v. Woesten*, 147 Mo. 467, 48 S. W. 939; *Barber Asphalt Paving Co. v. Hezel*, 155 Mo. 391, 56 S. W. 449, aff'g 76 Mo. App. 135; *Stifel v. McManus*, 74 Mo. App. 558.

Grading. *State v. New Brunswick*, 30 N. J. L. 395; *Kearney v. Andrews*, 2 Stock (10 N. J. Eq.) 70.

Filling street. *Mann v. Jersey City*, 24 N. J. L. 662.

Opening street. *Danville v. McAdams*, 153 Ill. 216, 38 N. E. 632;

Certain general requirements as to the description of the several kinds of street improvements, more or less

Newman v. Chicago, 153 Ill. 469, 38 N. E. 1053.

Opening street through a pond and across a river. Washington Ice Co. v. Chicago, 147 Ill. 327, 35 N. E. 378.

Extension of street. Pearson v. Chicago, 162 Ill. 383, 44 N. E. 739.

Widening street. Hayes v. Vincennes, 82 Ind. 178.

Where the opening of a street and widening of the same was recognized in the municipal legislature as separate and distinct acts, an order or resolution authorizing the opening of a street of a greater width than as originally laid out should state that it is opened as of the increased width. Re Powelton Ave., 33 Leg. Int. (Pa.) 82; Re Story St., 33 Leg. Int. (Pa.) 108, 11 Phila. 456.

Description of street to be paved. Rawson v. Chicago, 185 Ill. 87, 57 N. E. 35; C. B. & Q. R. R. Co. v. Quincy, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192.

Width of pavement. Harrison Bros. v. Chicago, 163 Ill. 129, 44 N. E. 395; Woods v. Chicago, 135 Ill. 582, 26 N. E. 608; Adams County v. Quincy, 130 Ill. 566, 22 N. E. 624; Topliff v. Chicago, 196 Ill. 215, 63 N. E. 692.

New assessment ordinance to complete improvement need not give detailed description. Hull v. West Chicago Park Com'rs, 185 Ill. 150, 57 N. E. 1.

Resolution failing to include description of work of bringing the street to grade renders tax bills including charge for cost of

such work void. Kansas City v. Askew, 105 Mo. App. 84, 79 S. W. 483; Smith v. Westport, 105 Mo. App. 221, 79 S. W. 725.

If the location of the alley to be improved is given, its width need not be stated. Jones v. Chicago, 213 Ill. 92, 72 N. E. 798.

A provision for grading a street "full width to the curb grade," held not rendered insufficient by failure to state what part should be reserved for sidewalk and what part for carriageway, where the making of sidewalks was not contemplated. Burghard v. Fitch, 24 Ky. L. Rep. 1983, 72 S. W. 778.

Location of street. State (Woodruff) v. Orange, 32 N. J. L. 49.

Locating improvement. Sargent v. Evanston, 154 Ill. 268, 40 N. E. 440.

The location of the improvement must be given, else tax for same is invalid. People v. Willison, 237 Ill. 584, 86 N. E. 1094.

Ordinance, held to sufficiently show location of street. Presumption. Kansas City v. Block, 175 Mo. 433, 74 S. W. 993.

Insufficient description. Gage v. Chicago, 227 Ill. 137, 81 N. E. 11; Hull v. Chicago, 156 Ill. 381, 40 N. E. 937; Merrill v. Abbott, 62 Ind. 549; Smith v. Duncan, 77 Ind. 92; Copcutt v. Yonkers, 83 Hun 178, 31 N. Y. S. 659.

Rule "*falsa demonstratio non nocet*," applied. State (Woodruff) v. Orange, 32 N. J. L. 49.

Catch basin. An ordinance specifying a case iron cover weighing 470 pounds for catch basins

applicable under the numerous laws although variant, may be stated and illustrated. It is obvious that the description of the improvement and of the materials to be used therein must be sufficiently clear and definite so as to enable one experienced in construction work of the character involved to fully understand it and thus comply with the ordinance.⁵⁶ The ordinance may want precision and be not as full and complete as it should be, yet it will not be declared void for uncertainty, if it can be ascertained with reasonable accuracy the character and extent of the improvement intended.⁵⁷ Thus, words "not less than" used in a paving ordinance in describing measurements and dimensions, as "not less than seven inches of sand," "a finishing coat not less than one-half inch thick," will not render the ordinance void for uncertainty of description.⁵⁸ So a street improvement ordinance is not rendered void for vagueness because of the fact that it is necessary to take together the title and the body of the ordinance referring to its title, to ascertain with certainty what street or parts thereof is to be improved.⁵⁹

In one case the paving ordinance did not provide for manholes and catch-basins, to convey from the pavement the surface water, dirt, etc. But it was held sufficient, since it appeared that a sewer had already been con-

"of the same size and pattern as those used in new work by the city in the year 1902" is sufficiently certain. *Gage v. Chicago*, 216 Ill. 107, 74 N. E. 726; *Lanphere v. Chicago*, 212 Ill. 440, 72 N. E. 426.

56. *Chicago Union Traction Co. v. Chicago*, 223 Ill. 37, 79 N. E. 67.

It should be sufficient to enable one to make an intelligent estimate of its cost. *Lindblad v. Normal*, 224 Ill. 362, 79 N. E. 675.

Mere inaccuracies in the description do not render the ordinance

void, but defective. *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

57. *Sheehan v. Gleason*, 46 Mo. 100.

58. *Latham v. Wilmette*, 168 Ill. 153, 157, 48 N. E. 311; to same effect *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181; distinguishing *Mansfield v. People*, 164 Ill. 611, 45 N. E. 976.

59. *Martindale v. Palmer*, 52 Ind. 411, 414.

Title in construction. § 812 *ante*, vol. 2.

structed in the street of ample capacity for this purpose.⁶⁰

The fact that an ordinance for the laying of a brick pavement provides that the brick shall be firmly settled by a roller of a certain weight, or a paving ram, at the engineer's discretion, does not render uncertain the description of the nature of the improvement.⁶¹

A paving ordinance which provides that the excavation of the street at the center be a certain number of inches "below the established grade," the excavation at the side lines being similarly described but of greater depth, is sufficient in its specification of the grade.⁶² So an ordinance adopting the grade lines by reference to a map on file (the map when produced not being marked filed) is not void for uncertainty, where the map had been adopted by ordinance and was sufficiently identified by proof.⁶³

60. *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901.

61. "The specification is that the brick shall be firmly settled, and the means by which it is to be done are pointed out, either by a roller or a pavement ram. There is no uncertainty as to the character of the work, but simply as to the manner in which it shall be accomplished. It might be, and doubtless is, true, that particular parts of the pavement could not be rolled, and yet the same purpose—namely, to bring the surface of the pavement to a proper level and firmly settle the brick—be accomplished by the use of the ram." *Trimble v. Chicago*, 168 Ill. 567, 569, 48 N. E. 416.

62. *Cramer v. Charleston*, 176 Ill. 507, 509, 52 N. E. 73.

Where ordinance provides for paving and curbing a street, such changes may be made in grade as

are necessary to do the paving. *Deer v. Sheraden Borough*, 220 Pa. St. 307, 69 Atl. 814.

Under particular statute, held unnecessary for resolution for street improvement to describe the work of bringing street to grade. *Lexington v. Commercial Bank*, 130 Mo. App. 687, 108 S. W. 1095.

An ordinance providing that excavation for a sidewalk shall be made four inches below established grade, except where it will be better for drainage to excavate more or less, is insufficient for uncertainty. *McDowell v. People*, 204 Ill. 499, 68 N. E. 379.

63. *State (Vanatta) v. Morris-town*, 34 N. J. L. 445.

Ordinance may be aided by maps. *State (Bolce) v. Plainfield*, 38 N. J. L. 95.

Description by reference. § 1886 *post*.

In some jurisdictions a street improvement ordinance which fails to specify the height, width and thickness of the curbing provided for will be declared insufficient in description⁶⁴ unless proper reference is made to the plans and specifications on file which contain proper description.⁶⁵ Ordinances for the construction of sidewalks should be clear and definite in description; give the precise location and observe in substance all mandatory legal requirements.⁶⁶

64. *Mills v. Chicago*, 182 Ill. 249, 54 N. E. 987; *Jarrett v. Chicago*, 181 Ill. 242, 54 N. E. 946; *Dickey v. Chicago*, 179 Ill. 184, 53 N. E. 395; *Lingle v. Chicago*, 178 Ill. 628, 53 N. E. 366; *Cruickshank v. Chicago*, 181 Ill. 415, 54 N. E. 997; *Holden v. Chicago*, 172 Ill. 263, 50 N. E. 181.

Examine *Mead v. Chicago*, 186 Ill. 54, 57 N. E. 824

65. *Whittaker v. Deadwood*, 23 S. D. 538, 122 N. W. 590.

See § 1886 *post*.

An ordinance providing for street improvements which describes the stones on which the curb stones are to be bedded merely as "flat stones" without specifying their size or character, is invalid because of insufficient description. *Lusk v. Chicago*, 176 Ill. 207, 52 N. E. 54; *Beach v. Chicago*, 193 Ill. 369, 61 N. E. 1015; *Moll v. Chicago*, 194 Ill. 28, 61 N. E. 1012; *Kelly v. Chicago*, 193 Ill. 324, 61 N. E. 1009; *Nichols v. Chicago*, 192 Ill. 290, 61 N. E. 435; *Walker v. Chicago*, 188 Ill. 311, 58 N. E. 959; *Rose v. Chicago*, 188 Ill. 347, 58 N. E. 933; *Kuester v. Chicago*, 187 Ill. 21, 58 N. E. 307.

Curb walls. *Wells v. Chicago*, 202 Ill. 448, 66 N. E. 1056.

Description of curb, held sufficient. *Chicago Union Traction Co. v. Chicago*, 207 Ill. 544, 69 N. E. 849.

Ordinance construed as to requirement of curb stones. *Wells v. Chicago*, 202 Ill. 448, 66 N. E. 1056.

Curbing and guttering are included in a resolution to pave a street without express mention. *Owens v. Marion*, 127 Ia. 469, 103 N. W. 381.

66. *Gage v. Chicago*, 196 Ill. 512, 63 N. E. 1031; *People v. Burke*, 206 Ill. 358, 69 N. E. 45; *Gage v. Chicago*, 203 Ill. 26, 67 N. E. 477; *People v. Field*, 197 Ill. 568, 64 N. E. 544; *Chariton v. Halliday*, 60 Iowa 391, 14 N. W. 775; *Frankfort v. Murray*, 99 Ky. 422, 36 S. W. 180; *Browne v. Boston*, 166 Mass. 229, 44 N. E. 127.

To be sufficient the description for the construction of a sidewalk should specify the place where it is to be laid. *Cincinnati v. Blymyer Mfg. Co.*, 8 Ohio Dec. 288, 7 Wkly. Law Bul. 30.

Description of location and "intersections." *Gage v. Chicago*, 203 Ill. 26, 67 N. E. 477.

Street grading; failure to designate what part to be sidewalk and

§ 1885. Same—sewer construction ordinance.

Ordinances providing for the construction of sewers are required to describe with reasonable accuracy the general nature, location, and dimensions—length and diameter—of the proposed sewer, with definite specification of the location and number of connections, manholes, and catch basins, and the material of construction.⁶⁷ The

what part to be roadway; held not fatal. *Burghard v. Fitch*, 24 Ky. L. Rep. 1983, 72 S. W. 778.

An ordinance directing the paving of a street need not state the width of the proposed pavement. *Hedenberg v. Chicago*, 163 Ill. 129, 44 N. E. 395.

Sufficiency of ordinance for construction of sidewalk on one side of the street under a law which authorized the assessment for the cost of the same on property on both sides of the street. *Mills v. Norwood*, 11 Ohio Dec. 416, 26 Wkly. Law Bul. 348; *Mills v. Norwood*, 6 Ohio Cir. Ct. Rep. 305, 3 Ohio Cir. Dec. 465.

A provision in a sidewalk ordinance for "proper crossings for the use of property owners" was held sufficient without stating their number, method of construction or number. *People v. Burke*, 206 Ill. 358, 69 N. E. 45.

A resolution directing a sidewalk to be built "upon the north-east side of a street from B street to C street" sufficiently describes the property along which the walk is to be constructed. *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624.

An ordinance providing for the construction of a sidewalk on a street "except where good walks now exist," held sufficient where the plans showed exactly where

the walk would be constructed. *People v. Board of Assessors*, 63 N. Y. S. 445, 50 App. Div. 54.

67. *Duane v. Chicago*, 198 Ill. 471, 64 N. E. 1033; *Brickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096; *Gage v. Wilmette*, 230 Ill. 428, 82 N. E. 656.

See chapter 31, Sewers and Drains, *ante*.

Ordinance held to sufficiently describe sewer improvement. *Joplin v. Hollingshead*, 123 Mo. App. 602, 100 S. W. 506.

Ordinance need not provide for obtaining outlet on private property. *Payne v. Springfield*, 161 Ill. 285, 44 N. E. 105.

Outlet for sewer indispensable. *South Highland Land & Imp. Co. v. Kansas City*, 172 Mo. 523, 72 S. W. 944.

See § 1434 *ante*, this volume.

Under a law prescribing that sewers shall be constructed conformably to the plan adopted by the board of aldermen, an ordinance prescribing that sewers shall be constructed in accordance with the plan adopted by a specified ordinance as amended by the city engineer is void. *Skirm v. Board of Public Works of Trenton* (N. J., 1894), 29 Atl. 158.

Particular provisions relating to paving street, held not to apply to the construction of sewers. *Atchi-*

detailed requirements fully appear from the numerous cases set out in the notes.

son v. Price, 45 Kan. 296, 25 Pac. 605.

Sewer district. State ex rel. v. St. Louis, 56 Mo. 277.

Provision that sewage be discharged into a river does not render assessment void. Walker v. Aurora, 140 Ill. 402, 29 N. E. 741.

As to particular ordinance for the construction of sewers, under charter of St. Joseph, see St. Joseph to use, etc. v. Landis, 54 Mo. App. 315.

Sewer, location. Stanton v. Chicago, 154 Ill. 23, 39 N. E. 987; Bennett v. New Bedford, 110 Mass. 433.

Location of, need not be specified. Springfield v. Sale, 127 Ill. 359, 20 N. E. 86.

Location and length. Pearce v. Hyde Park, 126 Ill. 287, 18 N. E. 824.

Extending sewer. Com. v. Abbott, 160 Mass. 282, 35 N. E. 782.

An order that "the sewer on Bates street continued to Walnut street" is sufficiently definite as to the *termini* of the sewer. Goggin v. Lewiston, 103 Me. 119, 68 Atl. 694.

The *termini* of a sewer may be located by parol evidence. Goggin v. Lewiston, 103 Me. 119, 68 Atl. 694.

Size of sewer; failure to specify, held not to destroy jurisdiction, under Indiana law. Rickcords v. Hammond, 67 Fed. 380.

Sewer, depth to be specified. Alton v. Middleton's Heirs, 158 Ill. 442, 41 N. E. 926; St. Louis v. Oeters, 36 Mo. 456.

Ordinance, held invalid for failure to show length of drains. Wetmore v. Chicago, 206 Ill. 367, 69 N. E. 234.

Where an ordinance specifies only the internal diameter of house slants for a sewer pipe it will be taken to intend the same thickness as the sewer pipe. Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539.

Ordinance must prescribe dimensions of sewer and character of manholes, etc., so as to enable contractors to make an intelligent bid for the work. McCormick v. Moore, 134 Mo. App. 669, 114 S. W. 40.

Culvert, dimensions of, need not be prescribed. Young v. Kansas City, 27 Mo. App. 101.

Drain; location. Steele v. River Forest, 141 Ill. 302, 30 N. E. 1034.

Box drain. Hyde Park v. Carleton, 132 Ill. 100, 23 N. E. 590.

Single ring of sewer brick laid edgewise, held sufficient. Peters v. Chicago, 192 Ill. 437, 61 N. E. 438.

Description of curves. Hyde Park v. Borden, 94 Ill. 26.

Manholes, location. Cochran v. Park Ridge, 138 Ill. 295, 27 N. E. 939; Barber v. Chicago, 152 Ill. 37, 38 N. E. 253; St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713.

Catch basins, location. Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; Hinsdale v. Shannon, 182 Ill. 312, 55 N. E. 327.

Ordinance providing in one part for one catch basin and in another for such catch basins as are neces-

In an Illinois case an ordinance for a sewer which failed to specify the nature, character and location of the manholes, etc., was held bad.⁶⁸ But in another case in the same state, where the ordinance referred to "necessary man-holes" in such manner as to be intelligible to a civil engineer, it was declared good.⁶⁹ So an ordinance was held sufficient in description which specified the number of man-holes and catch basins, their dimensions and constituent material, and provided that they should be located at necessary points on the improvement, without further specification of location or of the manner of connecting them with the sewer.⁷⁰

An ordinance for a sewer which gives the internal diameter, etc., need not specify the thickness of vitrified tile pipe, the material for construction, as the description of the material will be understood to call for the ordinary and usual vitrified tile pipe of a standard thickness recognized by manufacturers as necessary for a pipe of the internal diameter of the sewer.⁷¹

In one case the ordinance provided that a sewer through an alley in a given block be reconstructed and

sary, held ambiguous and uncertain. *Gardner v. Chicago*, 224 Ill. 254, 79 N. E. 624.

Connection. *Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824.

Providing for connection of sewer not constructed, held did not invalidate. *Ryder Estate v. Alton*, 175 Ill. 94, 51 N. E. 821.

Ordinance requiring house slants every twenty-five feet, held not unreasonable. *East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674.

A provision for house connection slants every twenty-five feet, held valid, even though the lots are wider than twenty-five feet, where it appears that the property is assessed by its correct description. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 639.

Material. *St. Joseph v. Landis*, 54 Mo. App. 315.

Description of fire hydrants, crosses, tees and supply-pipes as "City of Chicago standard," held insufficient, in absence of proof. *Washburn v. Chicago*, 202 Ill. 210, 66 N. E. 1033.

"City of Chicago standard," held sufficient where such phrase has a well understood meaning. *McChesney v. Chicago*, 226 Ill. 238, 80 N. E. 770.

68. *Ogden v. Lake View*, 121 Ill. 422, 13 N. E. 159.

69. *Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92.

70. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

71. *Hynes v. Chicago*, 175 Ill. 56, 51 N. E. 705.

deepened to as great a depth as its connection with another sewer named would admit, the grade of bottom to be as thereafter established by the city surveyor, and after fixing its locality, provided that the character of the work should be the same as the then present sewer, and that the material in the old sewer should be used in the new as far as possible. It was held void.⁷²

§ 1886. Same—description by reference.

Description by reference to documents, maps, plans, specifications, etc., on file, or in official custody, has received judicial indorsement. Such reference, however, should be confined to mere details. The ordinance or resolution itself should contain a substantial description of everything relating to the proposed improvement required by charter.⁷³ However, in the absence of restriction, the nature, character and locality of the improvement and the material to be used in the construction thereof may be stated by reference to a former ordinance which fully specifies these matters.⁷⁴

72. *Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846.

73. *California*. *Stockton v. Skinner*, 53 Cal. 85.

Illinois. *Brewster v. Peru*, 180 Ill. 124, 54 N. E. 233; *Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926; *Cunningham v. Peoria*, 157 Ill. 499, 41 N. E. 1014; *Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169; *Callon v. Jacksonville*, 147 Ill. 113, 35 N. E. 223; *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034; *Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824; *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 560, 2 N. E. 478; *Lake v. Decatur*, 91 Ill. 596; *Lake Shore & M. S. Ry. Co. v. Chicago*, 56 Ill. 454; *Foss v. Chicago*, 56 Ill. 354.

Kentucky. *Barber Asphalt P. Co. v. Gaar*, 24 Ky. L. Rep. 2227, 73 S. W. 1106.

Maryland. *Burk v. Baltimore*, 77 Md. 469, 26 Atl. 868.

Massachusetts. *Stone v. Cambridge*, 6 Cush. (60 Mass.), 270.

Michigan. *Boehme v. Monroe*, 106 Mich. 401, 64 N. W. 204.

Missouri. *Barber Asphalt Pav. Co. v. Ullman*, 137 Mo. 543, 571, 38 S. W. 458; *Becker v. Washington*, 94 Mo. 375, 7 S. W. 291.

74. *McManus v. People ex rel.*, 183 Ill. 391, 393, 55 N. E. 886; *West Chicago Park Com'rs v. Farber*, 171 Ill. 146, 49 N. E. 429; *Ogden v. Lake View*, 121 Ill. 422, 13 N. E. 159; *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181.

Material for sidewalk may be described by reference to certain

§ 1887. Same—details unnecessary.

It is a well-settled rule and constantly enforced that mere matters of detail in description, in material to be

section of a general ordinance. *Gallagher v. Smith*, 55 Mo. App. 116.

Ordinance may refer for details of materials to specifications on file. *Gilsonite Constr. Co. v. Arkansas McAlister Coal Co.*, 205 Mo. 49, 103 S. W. 93.

By reference to other sewers, etc., as to material and manner of construction. *Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824.

Reference to public building, to locate improvement. *Ewart v. Western Springs*, 180 Ill. 318, 54 N. E. 478.

Specification on file made a part of improvement ordinance by reference. *Independence v. Nagle*, 134 Mo. App. 601, 114 S. W. 1129.

Incorporation of general ordinance providing for construction of sidewalks in special ordinance for certain sidewalk improvements, by reference. *Pierson v. People*, 204 Ill. 456, 68 N. E. 383.

Resolution for street paving may refer to ordinance by number for manner of doing work. *Williams v. Bisagno* (Cal., 1893), 34 Pac. 640.

A resolution directing street improvements and establishing in general terms the character of improvements, grades, etc., was held good against the objection that it was indefinite, where it appeared that it was capable of being reduced to a certainty by reference to other sources. *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723.

Grade of street established by reference. *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794; *Chicago, etc. R. Co. v. Chicago*, 172 Ill. 66, 49 N. E. 1006; *Whaples v. Waukegan*, 95 Ill. App. 29; *People v. Burke*, 206 Ill. 358, 69 N. E. 45; *Givins v. Chicago*, 186 Ill. 399, 57 N. E. 1045; *Hardin v. Chicago*, 186 Ill. 424, 57 N. E. 1048; *Chicago, etc. R. Co. v. Chicago*, 174 Ill. 439, 51 N. E. 596; *Aurora v. Fox*, 78 Ind. 1; *Horne v. Mehler*, 23 Ky. L. Rep. 1176, 64 S. W. 918; *Moran v. Lindell*, 52 Mo. 229; *Dickey v. Porter*, 203 Mo. 1, 101 S. W. 586; *Excelsior Springs v. Ettenson*, 120 Mo. App. 215, 96 S. W. 701; *Roth v. Hax*, 68 Mo. App. 283.

A datum may be established by ordinance and thereafter mere reference to such datum as so established will be sufficient in improvement ordinance. *Kunst v. People*, 173 Ill. 79, 50 N. E. 168.

But proper reference to the ordinance plan or specification must be made, and when not so made the ordinance cannot be cured by reference to any other ordinance. *Job v. People*, 193 Ill. 609, 61 N. E. 1079.

And where the width of all sidewalks is fixed by general ordinance, a sidewalk ordinance specifying that the walk shall be of proper width is insufficient. *People v. Hills*, 193 Ill. 281, 61 N. E. 1061.

When the ordinance or resolution properly refers to plans on

used, or in manner of construction need not be specified in the improvement ordinance,⁷⁵ especially where these are provided for by general ordinance.⁷⁶ "It is not to be expected that an ordinance of this kind," remarked the Supreme Court of Illinois, "should set forth the details and all the particulars of the work. Indeed, this is not contemplated and the statute requires nothing of the kind. A substantial compliance with its provisions is all that is required."⁷⁷ Usually general directions as to manner and plan of the work will be held sufficient.⁷⁸

file at a certain place for details of the improvement, such plans become a part thereof and it is not necessary to repeat the details in the ordinance or resolution. *Greensburg v. Zoller*, 28 Ind. App. 126, 60 N. E. 1007.

But an ordinance which referred to specifications and no such specifications were in existence at the time the ordinance was passed, was held insufficient under a charter requirement that the ordinance prescribe the dimensions, material and character of the improvement. *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982.

Reference to plans not yet on file, held sufficient where property owners have access to same in time to examine and make protest. *Bridewell v. Cockerell*, 122 Mo. App. 196, 99 S. W. 22.

75. *Haghawout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078; *St. Joseph to use Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713; *Becker v. Washington*, 94 Mo. 375, 7 S. W. 291.

76. *St. Joseph to use, etc. v. Landis*, 54 Mo. App. 315.

77. *Kankakee v. Potter*, 119 Ill.

324, 10 N. E. 212, approved and quoted in *Delamater v. Chicago*, 158 Ill. 575, 578, 42 N. E. 444.

"It would be difficult for ordinances to specify every particular of a work; but they must be more or less general, and must take many things for granted in the history, geography and topography of the place, and in the arts called into requisition by the improvements ordered. * * * An ordinance may lack desirable precision, and still may so provide for the manner in which an improvement shall be made, and be such a compliance with the law, although a loose one, that the courts would not be authorized to invalidate the action of the city officers under it. It is not every irregularity or omission that goes to the substance of a proceeding." *Sheehan v. Gleeson*, 46 Mo. 100, 104, per Bliss, J.

78. General direction as to plan of work, held sufficient. *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721; *Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112.

The ordinance need not specify the method of work in minute de-

§ 1888. Variance between notice or petition or preliminary resolution or estimate and ordinance or order.

When an improvement is made on petition or notice it should conform substantially to the provisions of such petition or notice.⁷⁹ But, of course, a slight variance will not be fatal to the ordinance.⁸⁰ And one cannot complain of a variance when he is in no way injured.⁸¹ Where a petition and notice call for the grading and paving of a street the ordinance may provide in detail for the work to be done without being open to the objection of variance.⁸² Nor can property owners complain where the ordinance substituted a cheaper and more serviceable

tail. *Beechwood Park Land Co. v. Summit*, 78 N. J. L. 182, 73 Atl. 57.

An ordinance for filling a street to establish grade need not state the time or manner of doing the work. *Mann v. Jersey City*, 24 N. J. L. 662.

An ordinance merely authorizing the macadamizing of a street without stating manner of doing the work is insufficient. And a taxbill against property owner for such work cannot be collected. *Haegele v. Mallinckrodt*, 46 Mo. 577.

79. *California*. *Perine v. Erzgraber*, 102 Cal. 234, 36 Pac. 585.

Illinois. *Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874; *Whaples v. Waukegan*, 179 Ill. 310, 53 N. E. 618.

Maryland. *Baltimore v. Grand Lodge I. O. O. F.*, 44 Md. 436.

Massachusetts. *Dwight v. Springfield*, 4 Gray (Mass.) 107.

New York. *People v. Whitneys Point*, 102 N. Y. 81, 6 N. E. 895;

Re Drake, 69 Hun 95, 23 N. Y. 264, 69 Hun 95, 52 N. Y. St. Rep. 606.

Ohio. *Minor v. Hamilton*, 11 Ohio Cir. Dec. 16, 20 Ohio Cir. Ct. 4; *Fenner v. Cincinnati*, 4 Ohio N. P. 182.

Assessment invalid if published notices are different from the ordinance and resolution. *Gallagher v. Garland*, 126 Ia. 206, 101 N. W. 867.

Variance between resolution and ordinance. *Chicago v. Gage*, 237 Ill. 328, 86 N. E. 633.

An ordinance providing for a cinder, cement, concrete, torpedo sand, and limestone walk, sufficiently conformed to a recommendation and estimate which described the walk as a "cement sidewalk." *Storrs v. Chicago*, 208 Ill. 364, 70 N. E. 347.

80. *State v. Orange*, 32 N. J. L. 49; *Jersey City v. State*, 30 N. J. L. 521.

81. *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

82. *State v. Jersey City*, 28 N. J. L. 500.

material. Thus where a notice called for crushed rock as a top covering for a street a substitution by the ordinance of gravel was sustained.⁸³

Likewise the resolution of intention must be substantially followed in subsequent proceedings relative to the improvement.⁸⁴ Hence a contract for less work than that proposed in the resolution of intention is void.⁸⁵ Where a city has power to originate a scheme for improvements either with or without a petition, it may lay a different kind of paving from that petitioned for.⁸⁶ But the contrary is true if the power to make the improvement is founded on a petition of property owners.⁸⁷

Where it is necessary for the ordinance to describe the improvement in more or less detail, such description is not a variance from the resolution which describes the improvement in general terms.⁸⁸ The ordinance may

83. *Barkley v. Oregon City*, 24 Ore. 515, 33 Pac. 978.

84. *Piedmont Paving Co. v. Allman*, 136 Cal. 88, 68 Pac. 493; *Smith v. Chicago*, 214 Ill. 155, 73 N. E. 346; *Whittaker v. Deadwood*, 12 S. D. 608, 82 N. W. 202.

85. *Kutchin v. Engelbret*, 129 Cal. 635, 62 Pac. 214. See also, *Trenton v. Collier*, 68 Mo. App. 483.

86. *Rawson v. Chicago*, 185 Ill. 87, 57 N. E. 35.

87. *Hutchinson v. Omaha*, 52 Neb. 345, 72 N. W. 218.

A petition for laying out a road is no authority for widening a road or street in a village. *Norton v. Truitt*, 70 N. J. L. 611, 57 Atl. 130.

Change of grade. *Saunderson v. Herman*, 108 Wis. 662, 84 N. W. 890.

Variance, held immaterial. *Washington Park Club v. Chicago*, 219 Ill. 323, 76 N. E. 383; *Field*

v. Chicago, 198 Ill. 224, 64 N. E. 840; *Chicago v. Wilshire*, 243 Ill. 123, 90 N. E. 245.

Where a resolution provided for the improvement of a roadway and paving of all intersections, and the ordinance provided that certain intersections should not be paved, the variance was willful and material, and the ordinance invalid. *Smith v. Chicago*, 214 Ill. 155, 73 N. E. 346.

88. *Lamphere v. Chicago*, 212 Ill. 440, 72 N. E. 426.

Variance held to invalidate assessment in particular case. *Gardner v. Chicago*, 224 Ill. 254, 79 N. E. 624.

No variance. *Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874.

An assessment will not be enjoined merely because the ordinance provided for improvements slightly in excess of that provided for in the resolution, both the quantity and cost of such excess

describe more specifically than the resolution the details of the work and materials, but it cannot be inconsistent with the resolution, or change the nature, locality, or character of the work.⁸⁹

§ 1889. Certainty and validity of improvement ordinance.

As explained elsewhere, all ordinances must be precise, definite and certain in expression,⁹⁰ and this rule has been frequently applied to improvement ordinances. Such ordinances should not only be precise, definite and certain but they should also be full and complete and capable of clear application.⁹¹ Uncertainty in essential parts will render such parts void.⁹² But a recital in the ordinance that the proceedings are to be as provided in a particular law, so far as applicable, has been held in Maryland not to render the ordinance uncertain or inconsistent.⁹³

being easily separable from the legally authorized work. *Kansas Town Co. v. Argentine*, 59 Kan. 779, 54 Pac. 1131.

Where the ordinance omitted to state one necessary item of the improvement required by the resolution, it being actually made, and being shown on the specifications on file in the office of the city engineer, and the ordinance referring to the resolution, such variance did not defeat the assessment. *Schroeder v. Overman*, 18 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 113.

Held, no variance between resolutions and ordinance. *Lyman v. Cicero*, 222 Ill. 379, 78 N. E. 830.

Ordinance held to vary from a profile which it attempted to adopt as a part thereof, and to render ordinance invalid. *Lindblad v. Normal*, 224 Ill. 362, 79 N. E. 675.

A resolution provided for the construction of a sewer from 71st

St. to 73d St., and the ordinance described it as from 71st St. to the main sewer in 73d St., which street was sixty-six feet wide. Held, no variance as the word "to" in the resolution could be taken to mean a point in 73d St. *Chicago v. McChesney*, 240 Ill. 174, 88 N. E. 560.

89. *Chicago v. Gage*, 237 Ill. 328, 86 N. E. 633.

90. §§ 645, 651 *ante*, vol. 2.

91. *Title Guarantee, etc. Co. v. Chicago*, 162 Ill. 505, 44 N. E. 832.

92. *Davidson v. Chicago*, 178 Ill. 582, 53 N. E. 367; *Lusk v. Chicago*, 176 Ill. 207, 52 N. E. 54; *Hull v. Chicago*, 156 Ill. 381, 40 N. E. 937.

93. *Alberger v. Baltimore*, 64 Md. 1, 20 Atl. 938.

Carriageway and sidewalk, designating. *Burgehard v. Fitch*, 24 Ky. L. Rep. 1983, 72 S. W. 778.

Resolution called for such catch-basins as are necessary and an

It is within the province of the court to determine the validity of improvement ordinances in like manner as other ordinances, as mentioned in a former chapter where the whole subject of the validity and procedure to test is fully considered.⁹⁴ The legal presumption will be indulged that the ordinance is valid,⁹⁵ but this may be rebutted.⁹⁶ Void parts will not affect valid parts, provided the latter are not dependent upon and are separable from the latter. This general rule, defined and illustrated in a former chapter,⁹⁷ has often been applied in the construction of improvement ordinances.⁹⁸ In con-

ordinance provided for one catch-basin, held to be so uncertain as to invalidate the assessment. *Gage v. Chicago*, 227 Ill. 127, 81 N. E. 11.

An ordinance which recites the pavement therein provided for may be settled and leveled by either a roller or a pavement rammer, is not uncertain. *Trimble v. Chicago*, 168 Ill. 567, 48 N. E. 416.

94. § 794 *et seq.*, *ante*, vol. 2.

Fact that an improvement was not constructed according to an ordinance providing for same, cannot be considered in determining the validity of the ordinance. *Beckett v. Chicago*, 218 Ill. 97, 75 N. E. 747.

95. *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *St. Louis v. Gleason*, 15 Mo. App. 25.

An ordinance providing for a cinder, cement, concrete, torpedo sand, and limestone walk is not invalid because the estimate and recommendation of the board called for a "cement sidewalk." *Storrs v. Chicago*, 208 Ill. 364, 70 N. E. 347.

Ordinance consisting of separate

papers. *Keating v. Skies*, 72 Mo. 97.

96. *Fruin-Bambrick Const. Co. v. Geist*, 37 Mo. App. 509, 514.

97. § 816 *ante*, vol. 2.

98. *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181; *Chytraus v. Chicago*, 160 Ill. 18, 43 N. E. 335; *Johnson v. People*, 202 Ill. 306, 66 N. E. 1081.

An erroneous assessment under an ordinance authorizing a street to be paved does not render the ordinance itself void. *Chicago v. Cummings*, 144 Ill. 446, 33 N. E. 34.

The ordinance contains three sections, the first for the making of a local improvement, the second describing the improvement and the third, the mode of raising the money therefor. Where latter section is illegal, the balance of the ordinance held not thereby invalidated but it might be made the basis of a proceeding for a re-assessment after the first assessment had been declared illegal. *Freeport St. Ry. Co. v. Freeport*, 151 Ill. 451, 38 N. E. 137.

If the ordinance stands complete in itself in providing for the

testing the validity of the ordinance fraud may be shown, but where power to enact the ordinance is undoubted, the single fact that many improvement ordinances are enacted about the same time, in view of an impending change in the charter, does not tend to prove fraud.⁹⁹

As stated in a prior volume the rule is rigidly enforced that corporate authorities cannot surrender or barter away public powers, in whole or in part,¹ but the fact that an ordinance for an outfall sewer provides that the use and benefit of such sewer shall be available to all property owners, obtaining permission to make connection therewith, is not a surrender of the corporation's police powers, for the power remains to regulate the manner of making such connections and to abate any nuisance that might be created thereby.²

§ 1890. Improvement ordinance must be reasonable.

The rule elsewhere announced and explained that all ordinances must be reasonable,³ is often applied in test-

improvement after objectionable and illegal provisions are eliminated therefrom the whole ordinance will not be declared void. *Cole v. People*, 161 Ill. 16, 43 N. E. 607.

An ordinance provided for the construction of a sewer which is illegal in part in that it provides for the laying of a sewer through private land will not affect the valid parts. *Commonwealth v. Abbott*, 160 Mass. 282, 35 N. E. 782.

A void clause in an ordinance providing for the grading of a street does not render the other parts void where it is still possible to enforce it in accordance with the provisions of the charter. *State v. Portage*, 12 Wis. 562.

99. *Morse v. Westport*, 136 Mo. 276, 37 S. W. 932.

Facts justifying the raising of an inference that the contract was the result of fraud and collusion in that the estimate was made so as to deceive. *Re Anderson*, 109 N. Y. 554, 17 N. E. 209.

Legislative motives; how far courts will inquire into, see §§ 703, 704 *ante*, vol. 2.

Statement of members of council will not affect validity. *Chester v. Eyre*, 181 Pa. St. 642, 37 Atl. 837. See § 813 *ante*, vol. 2.

The ordinance must be enacted in good faith, § 650 *ante*, vol. 2.

1. § 382 *ante*, vol. 1.

2. *Gray v. Cicero*, 177 Ill. 459, 53 N. E. 91.

3. § 724 *et seq.*, *ante*, vol. 2.

The fact that the ordinance provides that the outlet for a system of sewers shall pass over private property does not render such

ing the validity of improvement ordinances.⁴ Considering all the circumstances, courts having the authority to determine whether a particular power has been reasonably exercised, may declare improvement ordinances void for unreasonableness, notwithstanding the broad discretion usually conceded to be vested in the municipal authorities. This judicial power is most frequently invoked in proceedings for improvements by special assessment or taxation in cases where, in the opinion of the court, *unjust discrimination* has been exercised; or positive *legal provisions* have been *violated*, as where the method of laying the tax as prescribed is not observed; or where *improvements* are ordered *without necessity or reason* whatever, as in a sparsely settled and uninhabited section, or directing the tearing up of a good sidewalk or pavement and replacing it with an expensive one, according to the caprice or whim of municipal officers or to favor some contractor; or exercising the power in such *arbitrary* and *unreasonable* manner as to constitute *extortion*, *confiscation* or the taking of private property without just compensation or due process of

ordinance void. *Burhaus v. Norwood Park*, 138 Ill. 147, 27 N. E. 1088.

That there may be possible injury to vested rights under a prior grant from the city by reason of making a street improvement does not invalidate the ordinance providing therefor. *Chicago, B. & Q. R. Co. v. Quincy*, 139 Ill. 355, 28 N. E. 1069.

An ordinance for an improvement will not be held void because oppressive. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, *aff'd* *Shumate v. Heman*, 181 U. S. 402, 21 Sup. Ct. 645, 45 L. Ed. 916, 922; *Heman v. Shumate*, 157 Mo. 291, 57 S. W. 1134.

"If, however, it should be made

to appear that the ordinance is unreasonable or oppressive, or if, from evidence *aliunde* or otherwise, it appears that the ordinance was passed in a particular manner for the evasion of the law, the courts will look beyond the mere face of the ordinance to its effect and operation and judge it accordingly." *Ton v. Chicago*, 216 Ill. 331, 74 N. E. 1044.

Burden of proof is on the person asserting the unreasonableness of the improvement ordinance. *Marshall v. People*, 219 Ill. 99, 76 N. E. 70.

4. *Morse v. Westport*, 136 Mo. 276, 37 S. W. 932; *Field v. Barber Asphalt Pav. Co.*, 117 Fed. 925.

law.⁵ "A local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become *extortion* and *confiscation*. In that case it would be the duty of the court to protect the citizen from *robbery* under color of a better name."⁶

The reasonableness of an ordinance providing for a system of sewerage is to be determined on a consideration of the situation and condition of the entire territory to be reached by the system, and not merely that part of the property of persons objecting.⁷ An ordinance intending to change the grade of a street so as to carry the way over an intersecting railroad by means of a bridge and approaches, contained a clause vacating a part of the street on which the approach is to rest, and, therefore, it thereby defeats its main object and is unreasonable. Vacating the part of the street upon which the approach to the bridge is to rest surrenders all the public rights therein and deprives the public of the right to use this approach, and thus destroys the public utility

5. *Corrigan v. Gage*, 68 Mo. 541; *Wistar v. Philadelphia*, 111 Pa. St. 604, 4 Atl. 511; *Wistar v. Philadelphia*, 80 Pa. St. 505; *Norwood v. Baker*, 172 U. S. 269, 19 Supt. Ct. 187, 43 L. Ed. 443, 74 Fed. 997.

Ordinance for the construction of a cement sidewalk along an unimproved street to take the place of a substantial plank sidewalk in good repair built less than six months prior, held to be unreasonable and oppressive. *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225.

See § 1834 *et seq.*, *ante*.

Ordinance, held void as unreasonable and oppressive. *Chicago Union Traction Co. v. Chicago*, 208 Ill. 187, 70 N. E. 234.

An ordinance which required

existing sidewalks to be reconstructed whenever out of repair, was held to be unreasonable and oppressive. *Skinker v. Heman*, 64 Mo. App. 441.

An ordinance which provides that a city shall do the work and furnish the materials for making a sewer connection up to within three feet of the building to be connected is void as an unreasonable invasion of the rights of property, although such work is done under the supervision of the city. *Slaughter v. O'Berry*, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

6. Per Redfield, J., in *Allen v. Drew*, 44 Vt. 174, 188.

See chapter 28, *post*, vol. 5.

7. *Washburn v. Chicago*, 198 Ill. 506, 64 N. E. 1064.

of the entire structure.⁸ A provision in a paving ordinance requiring bidders to submit specimen brick which must withstand specified "absorption" and "abrasion" tests by the board of local improvements, and providing for rejection of all specimens not sustaining the test, does not render the ordinance void. The requirement is not an unreasonable restraint upon competitive bidding.⁹

§ 1891. Sufficiency respecting basis of apportionment of tax.

When the cost of the improvement is charged against private property assumed to be benefited by reason thereof, obviously the ordinance must follow the provisions of the law relating to the basis of apportionment of the local assessment or special tax.

An ordinance providing that a certain street shall be paved a designated distance on each side of the center between specified points constituting the termini, and that the improvement be paid for by special taxation upon contiguous property, except at street crossings and opposite property owned by the city, was held in Illinois to show sufficiently that the tax is to be apportioned on the basis of frontage.¹⁰

§ 1892. Ordinances providing for maintenance of street for a term of years.

The cost of construction or re-construction is usually charged to the abutting owners or those owning property in the benefit or taxing district, and the expense of keeping the street in repair to the general municipal revenue. Ordinances which impose the cost of repairs

8. *Read v. Camden*, 54 N. J. L. 347, 374, 24 Atl. 549, rev'g 53 N. J. L. 322, 21 Atl. 565.

9. *Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874.

10. *Cramer v. Charlestown*, 176 Ill. 507, 52 N. E. 73.

Method of apportionment of special tax. *Gleason v. Barnett*, 106 Ky. 125, 20 Ky. L. Rep. 1694, 50 S. W. 67.

Examine *Ryder Estate v. Alton*, 175 Ill. 94, 51 N. E. 821.

upon the property, therefore, are void.¹¹ The validity of an ordinance authorizing the letting in one contract the work of construction or re-construction and maintenance of the street for a definite period of years will depend upon the provisions of the particular charter.¹² Such ordinances have been sustained.¹³ On the other

11. *Kansas*. *Kansas City v. Hanson*, 8 Kan. App. 290, 55 Pac. 513.

Kentucky. *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125.

Missouri. *St. Louis Quarry & Const. Co. v. Frost*, 90 Mo. App. 677.

Nebraska. *Robertson v. Omaha*, 55 Neb. 718, 76 N. W. 442, 44 L. R. A. 534.

New York. *People v. Maher*, 9 N. Y. S. 94, 56 Hun 81, 29 N. Y. St. Rep. 629.

Wisconsin. *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

12. *California*. *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701.

Kentucky. *Bullitt v. Selvage*, 20 Ky. L. Rep. 599, 47 S. W. 255.

Missouri. *Barber A. P. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Gibson v. Owens*, 115 Mo. 258, 270, 21 S. W. 1107; *Warren v. Barber A. P. Co.*, 115 Mo. 572, 22 S. W. 490; *Morse v. Westport*, 110 Mo. 502, 509, 19 S. W. 831.

New York. *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841.

Oregon. *Portland v. Portland Bituminous P. & I. Co.*, 33 Ore. 307, 44 L. R. A. 527, 52 Pac. 28.

Under a law providing that no error in the proceedings shall exempt from payment after the work has been done, where the contract-

or guarantees that he will keep the pavement in repair for five years, the assessment is not absolutely void since such provision is separable and the assessments may be enforced to the extent of the actual cost. *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *Dickson v. Gleason*, 99 Ky. 380, 35 S. W. 1125.

13. *Illinois*. *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311; *Cole v. People*, 161 Ill. 16, 43 N. E. 607.

Iowa. *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532; *Osburn v. Lyons*, 104 Iowa 160, 73 N. W. 650.

Kentucky. *Covington v. Dressman*, 6 Bush. (Ky.) 210; *Louisville v. Henderson*, 5 Bush. (Ky.) 515; *Gosnell v. Louisville*, 14 Ky. L. Rep. 719.

Missouri. *Seaboard Nat. Bank v. Woesten*, 147 Mo. 467, 48 S. W. 939; *Barber A. P. Co. v. Hezel*, 76 Mo. App. 135, aff'd 155 Mo. 391, 56 S. W. 449.

New Jersey. *State (Wilson) v. Trenton*, 60 N. J. L. 394, 38 Atl. 635; *State (Wilson) v. Trenton*, 61 N. J. L. 599, 44 L. R. A. 540, 40 Atl. 575.

New York. *Schenectady v. Union College*, 21 N. Y. S. 147, 66 Hun 179, rev'd in 144 N. Y. 241, 39 N. E. 67, 26 L. R. A. 614; *People v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768;

hand they have been declared void.¹⁴

§ 1893. Validating void improvement ordinances.

The general authority to ratify irregular and void acts¹⁵ and to validate void ordinances by municipal action and the method of doing so are treated elsewhere.¹⁶ It has been decided in Illinois that, where the original ordinance directing a special assessment proves defective and insufficient to support the assessment (as a defective description of the work to be done), if not absolutely void, it may be amended or the defect cured by a supplemental ordinance and a re-assessment.¹⁷

O'Keeffe v. New York, 173 N. Y. 474, 66 N. E. 194.

Pennsylvania. *Leake v. Philadelphia*, 150 Pa. St. 643, 24 Atl. 351, aff'g 10 Pa. Co. Ct. 263; *Williamsport v. Hughes*, 21 Pa. Super. Ct. Rep. 443.

The requirement on the part of the city that the contractor shall guarantee the work done under the contract for a period of five years is not unreasonable, nor does it stifle competition. *Barber Asphalt Pav. Co. v. Gaar*, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227.

Requirement that the contractor shall maintain a permanent plant in the city during such period to enable him to make necessary repairs promptly and properly is reasonable. *Ib.*

When not required by the resolution, a bond cannot be exacted from the contractor providing that the pavement will last for five years. *McAlister v. Tacoma*, 9 Wash. 272, 37 Pac. 447.

14. *Excelsior Paving Co. v. Leach* (Cal., 1893), 34 Pac. 116;

McAllister v. Tacoma, 9 Wash. 272, 37 Pac. 447, 658.

See note in 44 L. R. A. 527-540; also § 1912 *post*.

15. § 611 *ante*, vol. 2.

16. § 706 *ante*, vol. 2.

Defects and irregularities in the proceedings for public improvements may be subsequently validated. *Re Peugnet*, 67 N. Y. 441, aff'g 5 Hun (N. Y.) 434; *Re Hyde*, 15 Hun (N. Y.) 477.

In a proceeding to construct sewers where the original location of the sewers is invalid by reason of uncertainty, held certain proceedings did not cure defect. *Sheehan v. Fitchburg*, 131 Mass. 523.

Irregularities cured by acceptance of work by city authorities. *Harton v. Avondale*, 147 Ala. 458, 41 So. 934.

Laws sometimes authorize courts to modify assessments. *Re Eager*, 46 N. Y. 100, aff'g 58 Barb. (N. Y.) 557.

17. *Alton v. Foster*, 74 Ill. App. 511.

If the improvement is completed, it is unnecessary for the latter ordinance to describe the

On the other hand if the defect is jurisdictional,¹⁸ as for example, non-observance of mandatory legal requirements it cannot be cured by a subsequent ordinance.¹⁹ Thus where the charter requires that prior to the commencement of any improvement the council shall pass a resolution directing the same to be made the council cannot after the improvement has been completed pass an ordinance ordering the same to be done so as to render an assessment therefor against the property owners

same. *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

The latter ordinance is defective if it includes interest on the amount due for the work. *Id.*

Work for the construction of a sewer was commenced under a defective ordinance and during its progress another ordinance was passed curing the defect and the sewer completed under the latter ordinance, held valid. *St. Louis v. Schoenemann*, 52 Mo. 348.

Amendment of improvement ordinances. § 824 *ante*, vol. 2; § 1895 *post*.

Repeal of improvement ordinances. § 828 *ante*, vol. 2; § 1896 *post*.

Effect of such appeal. § 836 *ante*, vol. 2.

18. Where the defect is jurisdictional the proceedings cannot be confirmed subsequently. *People v. Brooklyn, Supervisors, etc.*, 89 Hun (N. Y.) 241, 35 N. Y. S. 91.

19. *Scranton v. Barnes*, 147 Pa. St. 461, 23 Atl. 777; *Norwood v. Gonzales County*, 79 Tex. 218, 14 S. W. 1057; *Page v. Belvin*, 88 Va. 985, 14 S. E. 843.

Void proceedings for opening a street cannot be validated by any subsequent action. *Busenbark v.*

Clements, 22 Ind. App. 557, 53 N. E. 665.

Street grading proceedings rendered void by reason of failure to comply with legal requirements cannot be ratified by the subsequent passage of an ordinance directing the work to be done. *Baltimore v. Porter*, 8 Md. 284, 79 Am. Dec. 686.

Where an improvement ordinance refers to specifications on file and is void because there are no specifications, it cannot be confirmed and ratified by an ordinance passed after the letting of the work. *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982.

An ordinance for a sidewalk improvement failing to designate the material as required by ordinance cannot be made effective by a subsequent ordinance limiting the designation by the council of one or more of three materials. *Pueblo v. Winters*, 47 Colo. 255, 107 Pac. 224.

A city of third class in Missouri cannot ratify the unauthorized acts of its street committee and commissioner in grading up a street so as to render itself liable for damages in changing the grade. *Clay v. Mexico*, 92 Mo. App. 611.

valid.²⁰ So under a law authorizing the construction of waterworks when directed by resolution of the qualified electors, the acts of a municipal corporation in constructing waterworks without such a previous resolution being totally void cannot be ratified by a subsequent non-retroactive resolution voted at a special meeting or by acceptance and use of the work.²¹ But where the council possessed the original authority to provide for the procurement of plans and specifications for a building it may ratify the unauthorized act of another in procuring such plans and provide for paying the reasonable cost of obtaining them.²²

A statute providing that where special assessments for improvements are irregular or void for any cause, the mayor and council may make a relevy, it has been held, covers proceedings void because the petition for the improvement did not contain the requisite number of signatures.²³ A charter amendment declaring that all ordinances theretofore enacted shall remain in force, does not validate invalid ordinances, but refers only to valid enactments.²⁴

§ 1894. Same—curative power of the legislature.

The general curative power of the legislature over void municipal ordinances, considered in prior sections²⁵ has been extended frequently to void improvement ordinances.²⁶

20. *Buckley v. Tacoma*, 9 Wash. 253, 57 Pac. 441.

21. *Dullanty v. Vaughn*, 77 Wis. 38, 45 N. W. 1128.

22. *Koch v. Milwaukee*, 89 Wis. 220, 62 N. W. 918.

23. *Kansas City v. Silver*, 74 Kan. 851, 85 Pac. 805.

24. *Red Wing v. Chicago*, etc. R. Co., 72 Minn. 240, 75 N. W. 223, 71 Am. St. Rep. 482.

25. §§ 707-709 *ante*, vol. 2.

26. *California*. *Himmelman v. Hoadley*, 44 Cal. 213; *San Fran-*

cisco v. Certain Real Estate, 42 Cal. 513.

Iowa. *Marion Water Co. v. Marion*, 121 Ia. 306, 96 N. W. 883.

New Jersey. *State (Boice) v. Plainfield*, 38 N. J. L. 95; *State v. Newark*, 34 N. J. L. 236; *State v. Union*, 33 N. J. L. 350; *Bergen v. State*, 32 N. J. L. 490.

New York. *Tift v. Buffalo*, 82 N. Y. 204.

Pennsylvania. *Re Queen St.*, 18 Pa. Super. Ct. 241; *Re Marshall Ave.*, 213 Pa. St. 516, 62 Atl. 1085;

ment ordinances.²⁶ Irregularities and defects in ordinances and the proceedings for public improvements made by a municipality, which render the assessments for the payment of the work void, may be cured and legalized by a subsequent act of the legislature, where the defect, omission or want of compliance with the law is such as the legislature might have dispensed with by a prior statute.^{26a}

If in consequence of a defect which consists in some irregularity in the proceedings, or in some oversight in

Morton v. Homestead Borough, 15 Pa. Co. St. Rep. 646; *Donley v. Pittsburg*, 147 Pa. St. 348, 30 Am. St. Rep. 738, 23 Atl. 394; *Gray v. Pittsburg*, 147 Pa. St. 354, 23 Atl. 395; *Rubright v. Pittsburg*, 147 Pa. St. 355, 23 Atl. 579.

Rhode Island. Cleveland v. Tripp, 13 R. I. 50.

Wisconsin. Blount v. Janesville, 31 Wis. 648; *May v. Holdridge*, 23 Wis. 93.

General statutes contain curative provisions for omissions or irregularities as by failure to file plans and profiles for the improvement. *Becher v. McCloud*, 4 Ohio Cir. Ct. Rep. 305.

26a. *Clinton v. Walliker*, 98 Ia. 655, 68 N. W. 431; *Lockhart v. Troy*, 48 Ala. 579; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402; *Emporia v. Norton*, 13 Kan. 569; *O'Hara v. State*, 112 N. Y. 146, 19 N. E. 659.

A special assessment invalid for insufficiency of the petition may be cured by act of the legislature. *People v. Wilson*, 50 Hun 606, 3 N. Y. S. 326; *Nottage v. Portland*, 85 Ore. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

Where improvements were made

by a board of public works, created by an act of congress, congress had authority and power after the work was completed to pass a curative act and ratify the work that had been done. "It may," the court said, "therefore, cure irregularities and confirm proceedings, which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights." *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098.

Where the initiatory steps taken by commissioners for the construction of gravel road were invalid, an act of the legislature passed to legalize the action of the commissioners and declaring valid the assessments and charges for the work was held valid. *Johnson v. Board of Comrs. of Wells County*, 107 Ind. 15, 8 N. E. 1.

An act of the legislature may validate an ordinance for the grading and paving of streets which is void because not having been recorded. *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 359; *Com. v. Marshall*, 69 Pa. 328.

the law itself, a just and equitable claim has failed to be legally imposed, there is no reason why the legislature should not retrospectively supply the oversight or cure the irregularity.²⁷ Thus where property owners have received the benefits of a street improvement, made under a void ordinance, the legislature has power to legalize what it might previously have ordered.²⁸ And the legislature may under its original power to have authorized the act, ratify an act of a municipal corporation which is *ultra vires*. Thus in a case where authority conferred upon the commission of public works was limited to contracts for regulating and grading an avenue, and did not include the power to contract for setting curb and gutter stones, and flagging the sidewalks, in holding a curative act of the legislature valid the court said: "The power of the legislature to ratify a contract entered into by a municipal corporation for a public purpose, which is *ultra vires*, results from its power to have originally authorized the very contract which was made. Municipal corporations are agencies of the state, through which the sovereign power acts in matters of local concern."²⁹

But where the legislature, as in California, cannot exercise the power of assessment for the purpose of improving a street within the limits of an incorporated city, and, therefore, could not originally have levied the assessment, it is powerless to validate it by a subsequent act.³⁰ So the legislature cannot by a curative act validate a defective assessment unless the tax is for a purpose for which the legislature had power in the first instance to authorize the municipality to impose.³¹

27. *Brevoort v. Detroit*, 24 Mich. 322.

28. *Donly v. Pittsburg*, 147 Pa. St. 348, 30 Am. St. Rep. 738, 23 Atl. 394; *Whitney v. Pittsburgh*, 147 Pa. St. 351, 23 Atl. 395; *Mills v. Charleton*, 29 Wis. 400; *Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43.

29. *Brown v. New York*, 63 N. Y. 239.

See §§ 234-242 *ante*, vol. 1.

30. *People v. Lynch*, 51 Cal. 15; *Schumaker v. Toberman*, 56 Cal. 508; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 427.

31. *Dill v. Roberts*, 30 Wis. 178; *Shattuck v. Smith*, 6 N. D. 56, 69 N. W. 5.

In one case, a town, believing that its charter conferred the power, entered into a contract for street improvements the cost to be paid by the abutting owner. The work was done, and upon the refusal of some of the abutting owners to pay the assessments, the court held

An act of the legislature providing for paying for work done without proper authority, held valid. *Re Cullen*, 53 Hun. (N. Y.) 534, 6 N. Y. S. 625.

Where property is not liable to special assessments when the work is ordered the legislature cannot ratify such illegal acts. *Kelly v. Luning*, 76 Cal. 309, 18 Pac. 335.

Act authorizing a new assessment for the construction of a sewer where there was no such liability at the time of the construction, held unconstitutional as being retroactive. *Holliday v. Atlanta*, 96 Ga. 377, 23 S. E. 407.

A sewer improvement ordinance void for want of jurisdiction in the council to pass it, cannot be validated by subsequent legislation. *Groel v. Newark*, 78 N. J. L. 142, 73 Atl. 522.

Where the error is fundamental and void for want of jurisdiction as where no notice is given to persons affected in a proceeding to widen, lay out, etc., streets, the defect cannot be subsequently cured by a legislative act. *Boice v. Plainfield*, 38 N. J. L. (9 Vroom.) 95.

Where an assessment has been declared void by the supreme court of the state, the legislature cannot legalize it by a subsequent act. As where an assessment against the abutting property owners was held void, for failure to observe a pro-

vision of an act which requires that the mayor and city council should first determine that the improvement was "consistent with the public good." *Baltimore v. Porter*, 18 Md. 284, 300.

An act of the legislature passed after the decision to authorize the city authorities to proceed and collect the assessments, held void, as being an assumption of judicial power by the legislature. *Baltimore v. Horn*, 26 Md. 194, 206.

An assessment of water rates upon lots without giving to the owners or occupants an opportunity for a hearing, is repugnant to the constitution and a curative act of the legislature cannot make valid an act that is void because unconstitutional. *Re Trustees of Union College*, 129 N. Y. 308, 29 N. E. 460, rev'g 55 Hun 605, 7 N. Y. S. 866.

Where an act provided that no assessment "for any local improvement or other public work shall be vacated for any irregularity save in case of fraud," it was held that the opening or enlarging a street was within the meaning of the provision, and that it applied as well to an assessment for that purpose as to an assessment after a street is actually opened. *Astor v. New York*, 62 N. Y. 580. To same effect *Re Delaware & Hud. Canal Co.*, 60 Hun (N. Y.) 204, 14 N. Y. S. 585.

that the charter did not confer the power to improve its streets at the cost of the abutting owner. The legislature then attempted by a healing act to validate the contract and give the town a lien upon the property of the abutting owner, but the act was held void because there was no pre-existing right to require the abutting owner to pay for the improvement, and therefore none could be created by a curative act.³² So where the legislature under constitutional inhibition against class legislation, is without power to pass a law referring to a special class, a curative act intended to validate all assessments for improvements made in cities of certain classes, within five years preceding the approval of the act, was held void.³³

A curative act of the legislature takes effect only from the time of the passage of the act. Thus an assessment originally void for want of publication of the resolution or ordinance authorizing the work, was held to be validated by a subsequent act of the legislature, but that it became valid only from the time of the passage of the act, and that a sale before the act of the legislature passed, made when no valid assessment existed, was void and was not rendered valid by the act.³⁴

§ 1895. Amendment of improvement ordinance.

As mentioned in a former chapter where the amendment of ordinances is considered,³⁵ subject to the constitutional provision forbidding the impairment of the obligation of contracts, as explained elsewhere,³⁶ improvement ordinances which are not wholly void may be amended,³⁷ even after the contract is let and the work

32. *Bellevue v. Peacock*, 89 Ky. 495, 12 S. W. 1042, 25 Am. St. Rep. 552.

33. *Reading v. Savage*, 120 Pa. St. 198, 13 Atl. 919; *Meadville v. Dickson*, 129 Pa. St. 1, 18 Atl. 513; *Kimball v. Rosendale*, 42 Wis. 407, 24 Am. Rep. 421.

34. *Lennon v. N. Y. City*, 55 N. Y. 361.

35. § 824 *ante*, vol. 2.

36. § 753 *et seq.*, *ante*, vol. 2.

37. *People v. Burke*, 206 Ill. 358, 69 N. E. 45.

Under a charter requiring all improvement ordinances to origi-

begun,³⁸ in like manner in obedience to the same restrictions relating to the protection of private property rights and vested interests.³⁹ as other ordinances. The power to amend the improvement ordinance on its passage in the legislative body and the limitations thereon,⁴⁰ and the necessity of notice of such amendments by publication or otherwise, are considered in a prior volume.⁴¹

nate with the board of public improvements an ordinance may be amended by such board after its submission to the legislative body and returned to such body. In such case it is not necessary to prepare a new ordinance. *Bambrick v. Campbell*, 37 Mo. App. 460.

Under a charter forbidding amendments changing the original purpose of a bill, an amendment to an ordinance for paving extending the length of the streets to be paved, held to be germane and not forbidden. *Merrifield v. Scranton*, 5 Pa. Co. Ct. Rep. 388.

Vote necessary to pass an amended ordinance for paving and grading streets under particular charter. *Sands v. Richmond*, 31 Grat. (Va.) 571, 31 Am. Rep. 742.

Cannot be amended by resolution. *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853.

After the introduction of an ordinance for the paving of one street with the estimate of cost of the work indorsed as required by law, it cannot be amended so as to include the paving of other streets at an increased cost with no indorsements of the cost thereof made thereon. Taxbills issued under such ordinance, held void. *Kinealy v. Gay*, 7 Mo. App. 203.

An ordinance cannot be so

amended as to change method of assessment. Thus where the ordinance provides that the cost of the improvement shall be assessed upon the abutting property according to frontage after the completion of the improvement the city cannot provide that the cost shall be assessed according to benefits. *Dick v. Toledo*, 11 Ohio Cir. Ct. Rep. 349, 1 Ohio Cir. Ct. Dec. 157.

38. An ordinance was duly enacted for the regulation and grading of a street to 135th street; a contract for the work was duly made and the contractor began its performance. Subsequently the ordinance was amended so as to provide for grading the street to 134th street. Here it was held that the amending of the ordinance did not abrogate the contract or affect its obligation and until the city acted on the ordinance and forbade the contractor going on under the contract he had a right to pursue the work. *Ottendorfer v. Fortunato*, 24 Jones & S. (56 N. Y. Super. Ct.), 495, 4 N. Y. S. 629, 22 N. Y. St. Rep. 427.

39. §§ 764-770 *ante*, vol. 2.

40. § 700 *ante*, vol. 2.

41. § 701 *ante*, vol. 2.

After hearing, where an ordinance is materially modified be-

§ 1896. Repeal of improvement ordinance.

The subject of the repeal of improvement ordinances is treated in a former chapter.⁴² As there stated, such

fore passage to validate it, there should be a new notice and hearing to property owners who will be required to bear the expense. *Schenectady v. Furman*, 61 Hun (N. Y.) 171, 15 N. Y. S. 724.

The fact that the property owner suggested a modification will not estop him from objecting to the improvement. *Schenectady v. Furman*, 78 Hun (N. Y.) 87, 29 N. Y. S. 269, *aff'd* 145 N. Y. 482, 40 N. E. 221, 45 Am. St. Rep. 624.

A change in an ordinance for paving an alley which called for certain stones to be set in order to protect certain brick-work, from six inches square to eight inches square, held not to be sufficiently material to require republication, etc. *Bogard v. O'Brien*, 14 Ky. L. Rep. 648, 20 S. W. 1097.

42. An ordinance authorizing the improvement of a street may be repealed before the contract has been awarded for the work. *Ashton v. Rochester*, 14 N. Y. S. 855, 60 Hun 372, *aff'd* 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619.

See § 828 *ante*, vol. 2.

After the passage of an ordinance for regulating several streets above and below a street named and when the contract for constructing them are also complete a second ordinance may be enacted changing the location of the street above the street designated, although the expense was much increased. *Manice v. New York*, 8 N. Y. 120.

In particular case, held a subsequent ordinance attempting to repeal an ordinance providing for the vacation of streets ineffectual. *Belleville v. Hallowell*, 41 Kan. 192, 21 Pac. 105.

An ordinance directing notice of intention to improve, held to be a continuing offer which after implied acceptance by the property owners by silence during the time limited for objections cannot be withdrawn. *Lucas v. San Francisco*, 7 Cal. 463.

Held under particular circumstances, that after a municipal board had once designated the mode of contracting for specified public work, it could not thereafter change this conclusion as where it had directed piers to be built by day's work and the material furnished by contract, it could not thereafter dispense with the contract as to materials. *Bigler v. New York*, 5 Abb. N. C. (N. Y.) 51.

After the passage of several ordinances for the regulation and grading of a street and before the work is commenced and without a new petition or notice or advertisement the council may pass a general ordinance making provision for the regulation of the whole avenue between the limits fixed in the previous proceedings, although such general ordinance thereby repeals the former ordinance on the subject. *Ogden v. Hudson*, 29 N. J. L. (5 Dutch.) 104.

ordinances may be repealed under like conditions and

City cannot substitute one ordinance for another, change the improvement, and allow the cost to stand as apportioned among the property owners by the first ordinance. *Columbus v. Storey*, 35 Ind. 97.

A special ordinance relative to a particular street repeals to that extent a general ordinance relative to streets generally. *Budd v. Camden Horse R. Co.*, 63 N. J. Eq. 804, 52 Atl. 1120, aff'g 61 N. J. Eq. 543, 48 Atl. 1028.

See § 833 *ante*, vol. 2.

Improvement ordinance may be repealed in part without affecting the remainder. *Noonan v. People*, 183 Ill. 52, 55 N. E. 679; *Pardridge v. Hyde Park*, 131 Ill. 537, 23 N. E. 345. See *St. John v. East St. Louis*, 136 Ill. 207, 27 N. E. 543.

An ordinance for the construction of a public sewer was duly enacted and the sewer was constructed part of the way, under a subsequent charter another ordinance was passed establishing a sewer taxing district in territory embracing that portion of the old public sewer district in which the public sewer had not been completed. Held, that the latter ordinance repealed the former *pro tanto* and was a proper exercise of legislative power. *St. Joseph v. Farrell*, 106 Mo. 437, 17 S. W. 497.

Construction of particular ordinances repealing in part ordinances providing for the erection of streets. *Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238; *Slee v.*

Hyde Park (Ill., 1888), 14 N. E. 697.

Right of board to revoke its acceptance of a public highway under particular circumstances. *New Bedford v. Bristol County Comrs.*, 9 Gray (75 Mass.) 346.

A charter provision conferring upon the council the right to reconsider a vote ordering a change of street grade after the filing of claims by abutting owners for damages, held to be a privilege to be exercised by the council and consequently the property owners assessed cannot complain that the council has put it out of its power to reconsider its vote. *Kelly v. Minneapolis*, 57 Minn. 294, 59 N. E. 304, 47 Am. St. Rep. 605, 26 L. R. A. 92.

An ordinance cannot be abrogated by the declaration of the members of any of the committees of the council. *Chester v. Eyre*, 181 Pa. St. 642, 37 Atl. 837.

The repeal of such an ordinance may be by express provision. See chapter 21, § 825 *et seq.*, *ante*, vol. 2; *Stewart v. Police Jury*, 14 La. Ann. 69; *New Bedford v. County Com'rs*, 75 Mass. (9 Gray) 346; *Kelly v. Minneapolis*, 57 Minn. 294, 59 N. W. 304, 26 L. R. A. 92, 47 Am. St. Rep. 605; *Kaime v. Harty*, 4 Mo. App. 357; *Ogden v. Hudson*, 29 N. J. L. 104; *Ashton v. Rochester*, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619.

It may be by implication. *Thompson v. Highland Park*, 187 Ill. 265, 58 N. E. 328; *McPike v. Alton*, 187 Ill. 52, 58 N. E. 301;

restrictions as other municipal legislation,⁴³ but in doing so private property rights cannot be invaded,⁴⁴ nor can the obligation of contracts be impaired,⁴⁵ nor vested interests destroyed.⁴⁶

§ 1897. Construction of improvement ordinances.

The rules relating to the construction of ordinances in general are treated in an earlier chapter,⁴⁷ and these rules are to be invoked when applicable to the construction of improvement ordinances. Ordinances relating to public improvements to be paid for by special assessment or taxation are to be construed in favor of the property owner.⁴⁸ An ordinance reciting that the improvement is to be made in accordance with a named

Belleville v. Hallowell, 41 Kan. 192, 21 Pac. 105; *St. Joseph v. Farrell*, 106 Mo. 437, 17 S. W. 497.

43. § 828, *ante*, vol. 2.

44. § 823 *ante*, vol. 2.

45. §§ 764-770 *ante*, vol. 2.

46. *Arkansas. Board of Improvement v. Earl*, 71 Ark. 4, 69 S. W. 577.

Connecticut. Staples v. Bridgeport, 75 Conn. 509, 54 Atl. 194.

Illinois. Gormley v. Day, 114 Ill. 185, 28 N. E. 693.

Kansas. Carey Salt Co. v. Hutchinson, 72 Kan. 99, 82 Pac. 721.

Pennsylvania. Re Seventieth St., 7 Pa. Dist. 113.

An ordinance vacating certain streets which under the law does not take effect until ten days after it has been posted, may be repealed before that time without affecting vested rights, *Gormley v. Day*, 114 Ill. 185, 28 N. E. 693.

Resolution providing for the building of bridges on public roads in a particular manner may

be subsequently duly revoked. Inhabitants of the locality incurred no vested interest or right in a public highway. *Stewart v. Police Jury Pointe Coupee*, 14 La. Ann. 69.

An act by ordinance authorizing the opening of a street cannot be recklessly rescinded thereafter especially where persons have in consequence of following such ordinance surrendered or acquired valuable rights, the effect of which would be to greatly damage them. *Strader v. Cincinnati*, 1 Handy (Ohio) 446.

Effect of repeal of improvement ordinance. § 836 *ante*, vol. 2.

47. §§ 810-820 *ante*, vol. 2.

48. *Slaughter v. O'Berry*, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442; *Edgerton v. Goldsboro Water Co.*, 126 N. C. 93, 35 S. E. 243.

Ordinance for street improvement construed. *Chicago Consol. Traction Co. v. Oak Park*, 225 Ill. 9, 80 N. E. 42; *Gage v. Chicago*, 201 Ill. 93, 66 N. E. 374.

law will be construed to mean the law as amended.⁴⁹ A special ordinance directing the construction of a sidewalk ordered it to be constructed in the manner and of the material named in a certain section of a general ordinance relating to sidewalks. Here it was held that such section of the general ordinance was thereby made a part of a special ordinance.⁵⁰ Mere clerical errors will not invalidate the ordinance. Thus the word "fall," used in a drainage ordinance, will be construed to read "rise," where a clerical mistake is manifest.⁵¹

In one case the specifications called for granite blocks, ranging from seven to eight inches deep; they were written out in full in the contract for the improvement. The ordinance provided for eight inch blocks. In view of the fact that for two years, under similar ordinances, the plans and specifications had always called for blocks ranging from seven to eight inches deep, the ordinance was sustained, the variance not being regarded fatal.⁵²

It has been decided that improvement ordinances may be construed in the light of a custom or usage prevailing at the time of their adoption.⁵³ Settled meaning of words used among engineers and contractors will be adopted.⁵⁴ Where a literal construction renders the ex-

49. *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

50. *Gallagher v. Smith*, 55 Mo. App. 116. See *St. Joseph to use v. Landis*, 54 Mo. App. 315; *Heman Const. Co. v. Loevy*, 64 Mo. App. 430, 434.

51. *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

Construction of words and terms. § 815 *ante*, vol. 2; § 1899 *post*.

False recital in preamble will not render ordinance void. *Bohle v. Stannard*, 7 Mo. App. 51.

52. *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491, 37 Mo. App. 427.

In determining whether a sewer was constructed within the terms of an ordinance, the ordinance will be considered in connection with the plans and specifications prepared by the municipal authorities. *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86.

53. *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491, 37 Mo. App. 427; *Kimball v. Brawner*, 47 Mo. 398.

Usage and custom. §§ 369, 370 *ante*, vol. 2.

Rules of construction. § 810 *et seq.*, *ante*, vol. 2.

54. *Levy v. Chicago*, 113 Ill. 650.

execution of an ordinance impracticable, or leads to manifest contradiction of its apparent purpose, such interpretation will be rejected and a construction given which modifies the literal meaning of the words.⁵⁵

Ordinarily strict compliance with improvement ordinances is not required.⁵⁶ Where the ordinance under which public street improvements are made is general in its application, it would be unreasonable to require literal compliance therewith under every exceptional circumstance, as instances might arise where such a rule would work great hardship or injustice upon a contractor or property owner, or both.⁵⁷

§ 1898. Same—time and manner of doing the work.

An ordinance is not void for failure to specify a time within which the work is to be completed,⁵⁸ It will be construed as requiring completion within a reasonable time.⁵⁹ All provisions relating to the time and manner

Construction of words and terms. § 815 *ante*, vol. 2; § 1899 *post*.

55. *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491, 37 Mo. App. 427; *Connor v. C. R. I. & P. R. R.*, 59 Mo. 285, 295.

56. *Steffen v. Fox*, 124 Mo. 630, 28 S. W. 70, 56 Mo. App. 9.

57. *Steffen v. Fox*, 124 Mo. 630, 28 S. W. 70, 56 Mo. App. 9.

58. *Allen v. LaForce*, 95 Mo. App. 324, 68 S. W. 1057; *Carlin v. Cavender*, 56 Mo. 286; see also, *Hilgert v. Barber Asphalt Pav. Co.*, 107 Mo. App. 385, 81 S. W. 496; *Strassheim v. Jerman*, 56 Mo. 104; *St. Louis v. Bressler*, 56 Mo. 350.

Ordinance authorizing the filling of a street to the established grade need not specify the time or manner of filling. *Mann v. Jersey City*, 24 N. J. L. (4 Zab.) 662.

59. *Halsey v. Richardson*, 139 Mo. App. 157, 122 S. W. 326.

Proceedings under an ordinance between date of passage and date it takes effect are void. *Heman Const. Co. v. Loevy*, 64 Mo. App. 430, 437; *Keane v. Cushing*, 15 Mo. App. 96; but the last case is overruled in *Springfield v. Weaver*, 137 Mo. 650, 668, 37 S. W. 509, 39 S. W. 276, which holds that advertising for bids may be made and the contract let for the work, prior to the formal passage of the ordinance.

Time. In a statute requiring ordinances for public improvements to fix the time for completion of the work, the word "fix" means a rule by which the time is to be determined. *Gist v. Rackliffe-Gibson Const. Co.*, 224 Mo. 369, 123 S. W. 921.

of doing the work are to be construed reasonably⁶⁰ and followed substantially⁶¹ whether specified in the improvement ordinance or resolution or order.⁶²

A direction to make improvements is no authority for making only a part thereof.⁶³ Under a resolution authorizing a street to be paved and cross walks to be laid and relaid at intersecting streets, it is not necessary that cross walks should be laid at all the intersecting streets but only at such intersections as may be determined

60. Ordinances construed. *Louisville v. Western Bank*, 21 Ky. L. Rep. 1075, 54 S. W. 15; *Springfield v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

61. *Sawyer v. Chicago*, 183 Ill. 57, 55 N. E. 645; *Kansas City v. Mastin*, 169 Mo. 80, 68 S. W. 1037.

The contract specified the kind of blocks required in the pavement. A considerable number of the blocks did not meet the specification. Where the contractor stands ready to furnish proper blocks in place of those that should be rejected the fact that a considerable part of the blocks are defective will not justify the rejection of the whole lot. It appeared to be the custom in such cases to furnish good blocks in places of defective ones. *Loftus v. Riley*, 83 Iowa 503, 50 N. W. 17.

The work may be subdivided and sublet in parts to different persons, but whenever the construction of a street is provided for by ordinance, the entire work must be completed before adjoining property can be taxed for any of its cost. *Heman Const. Co. v. Loevy*, 64 Mo. App. 430, 437. "The reason is that the property owners might be willing to bear the ex-

pense of a completed street, and unwilling to pay for its partial improvement. In the one case the benefits conferred on the property might justify the outlay, whereas in the other the improvement might be a decided detriment." *Heman Const. Co. v. Loevy*, 64 Mo. App. 430, 437. The decisions were made prior to charter amendments of 1901.

62. *Illinois*. *O'Neil v. People*, 166 Ill. 561, 46 N. E. 1096; *St. John v. East St. Louis*, 136 Ill. 207, 27 N. E. 543; *Smith v. Chicago*, 169 Ill. 257, 48 N. E. 445.

Maryland. *Smyrk v. Sharp*, 82 Md. 97, 33 Atl. 411.

Massachusetts. *Atty. General v. Old Colony, etc. R. Co.*, 12 Allen. (Mass.) 404.

New York. *People v. Brooklyn*, 35 N. Y. S. 91, 89 Hun 241.

Pennsylvania. *Hershberger v. Pittsburgh*, 115 Pa. St. 78, 8 Atl. 381.

63. *Stockton v. Witmore*, 50 Cal. 554. See also *Illinois Cent. R. Co. v. Effingham*, 172 Ill. 607, 50 N. E. 103.

Sewer as necessary part of street. *Gates v. Grand Rapids*, 134 Mich. 96, 95 N. W. 998, 10 Det. Leg. N. 402.

upon by the corporate authorities.⁶⁴ A resolution providing for the "grading and macadamizing" a street is authority for regarding and re-macadamizing parts of the street that had been graded and macadamized before.⁶⁵ So authority to establish grades for streets includes those parts used for sidewalks.⁶⁶

An ordinance to grade, pave and curb a street does not confer power to change its lines or straighten it.⁶⁷ An ordinance providing that a street shall be graded authorizes the "grading, grubbing, guttering and curbing" of such street.⁶⁸ A resolution of intention to "pave" a street does not include curbing and sidewalks.⁶⁹ An

64. *Re Eager*, 46 N. Y. 100, 12 Abb. Pr. N. S. 151.

65. *Wills v. Wood*, 114 Cal. 255, 46 Pac. 96.

66. *Gallagher v. Jefferson*, 125 Ia. 324, 101 N. W. 124.

The word street includes sidewalks. *Morton v. Sullivan*, 29 Ky. L. Rep. 943, 96 S. W. 807; § 1286 *ante*, vol. 3.

A by-law conferring power upon the surveyor of highways to make, retain and repair all highways and streets, held to extend such powers and duties to sidewalks. *Noyes v. Ward*, 19 Conn. 250.

"Repair" of street, what is. *Milford v. Cincinnati, etc. Traction Co.*, 26 Ohio Cir. Ct. 271.

67. *Hershberger v. Pittsburg*, 115 Pa. St. 78, 8 Atl. 381.

68. *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26.

69. *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447.

An ordinance to pave a street includes the gutters which have not been previously paved. *Scranton v. Blair*, 2 C. P. (Pa.) 231.

Particular resolution construed as authorizing that the whole

street as designated was to be paved and graded in one proceeding. *People v. Brooklyn Supervisors of 31st Ward*, 35 N. Y. S. 91, 89 Hun (N. Y.) 241.

The resolution for the street improvement, held broad enough to cover a retaining wall. The improvement was contracted for and partly finished when it was determined that such wall was necessary. Held, it could be constructed by a separate contract and a separate assessment levied for it on the property without the passage of another resolution. *Cincinnati v. Shaw* (Ohio), 3 Wkly. Law Bul. 556.

The ordinance authorized the grading, etc., of a street from one street to another. Held, that the words "from a street" do not necessarily mean from its nearest line but may mean from any part of the street according to existing circumstances. *Pittsburg v. Cluney*, 74 Pa. St. 259.

Under a resolution authorizing that a street be paved "from" F Street "to" E Street and cross walks to be laid; E street may be

ordinance authorizing the paving of a street may include paving with asphalt, or with vitrified brick, or with macadam, or the like. "The term 'pave,' in its generic sense, means to place some substance on a street, so as to form an artificial roadway, or wearing surface, which shall change the natural condition of the street."⁷⁰

An ordinance providing that the culvert is to be constructed of "sewer brick," with a block of masonry at each end, means masonry composed of sewer brick and not other material.⁷¹ A paving ordinance providing that, the surface of the concrete base upon which the pavement is to rest shall be parallel with the surface of the finished pavement, means that such base shall be on a level with such surface.⁷²

§ 1899. Parol evidence of terms used in improvement ordinances.

The rule is well established that parol evidence is admissible to explain the meaning of words and terms employed in improvement ordinances. It may be shown that the words and terms used have a well known and settled meaning in the city among engineers and street contractors.⁷³ Thus the word "filled," employed in a street improvement ordinance, may be proved to mean to raise the surface of the street by using clay, earth, sand or other suitable material, free from animal or vegetable substances, etc.⁷⁴

The circumstances under which a custom or usage may be received to explain the meaning of words and terms

paved as one of the intersecting streets. *Re Murphy*, 20 Hun (N. Y.) 346.

70. *Ross v. Kendall*, 183 Mo. 338, 81 S. W. 1107.

71. *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181.

72. *Cunningham v. Peoria*, 157 Ill. 499, 41 N. E. 1014.

73. *Kuester v. Chicago*, 187 Ill. 21, 58 N. E. 307; *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181; *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327; *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311; *Danville v. McAdams*, 153 Ill. 216, 38 N. E. 632.

74. *Levy v. Chicago*, 113 Ill. 650.

used in improvement ordinances and contracts are treated elsewhere.⁷⁵

4. CONTRACT.

§ 1900. Scope of subdivision.

In an earlier chapter were considered the fundamental requisites of the usual municipal corporation contracts, excluding among other particular contracts those for public improvements except such as are let by competitive bidding which were there fully treated.⁷⁶ This subdivision will be limited to a consideration of those features of contracts relating strictly, and which are peculiar, to public improvements. Certain preliminary proceedings including the order for the improvement, the declaration, ordinance or resolution before the advertisement for the bids, and the ordinance or resolution providing for the improvements were considered in a prior subdivision of this chapter.⁷⁷ The actual execution, form, contents and validity of the public improvement contract (excluding those let on competitive bids, as mentioned) and matters incident thereto, as performance,⁷⁸ payment for the work,⁷⁹ liens for labor and material,⁸⁰ and the bond for the performance of the work and the bond to secure laborers, materialmen and subcontractors⁸¹ will be treated here.

a. Execution and validity.

§ 1901. Power to make contract.

Without authority, corporate officers cannot bind the municipality to pay for a public improvement.⁸² This authority, however, need not be expressly conferred but

75. §§ 369, 370 *ante*, vol. 1.

See § 1897 *ante*.

76. § 1163 *et seq.*, *ante*, vol. 3.

Competitive bidding, § 1183 *et seq.*, *ante*, vol. 3.

77. §§ 1842 to 1899 *ante*.

78. §§ 1925 to 1941 *ante*.

79. §§ 1942 to 1953 *ante*.

80. §§ 1954 to 1958 *ante*.

81. §§ 1959 to 1966 *ante*.

82. *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841; *Rens v. Grand Rapids*, 73 Mich. 237, 41 N. W. 263.

may be implied, as, for example, power to make an improvement, it is usually held, carries with it the implied power to make a general contract therefor unless the statute or charter provides otherwise.⁸³ Accordingly power to provide drainage, in the absence of restrictions, is implied power to contract for a sewer outlet.⁸⁴ But power to establish sewers and drains, it has been held, does not confer power to provide a sewage system by contract.⁸⁵

The power of the municipality to contract for public improvements, like the exercise of all other corporate powers, will depend largely on the constitution of the state, its charter and the general laws applicable.⁸⁶ Legal provisions limiting the power of the municipality to incur debts and liabilities, of course, should be observed in making contracts for public improvements.⁸⁷ In view of the confusion sometimes existing, and the frequent amendment and repeal of laws, the determination of the controlling provisions can be known only by construction.⁸⁸

83. *Iowa*. Fort Dodge, etc. Co. v. Fort Dodge, 115 Iowa 568, 89 N. W. 7; Clark v. Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Kansas. Atchison v. Leu, 48 Kan. 138, 29 Pac. 467.

Kentucky. Louisville v. Leatherman, 18 Ky. L. Rep. 124, 35 S. W. 625.

North Dakota. Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357.

Oklahoma. Jones v. Holzapfel, 11 Okla. 405, 68 P. 511.

United States. District of Columbia v. Lyon, 161 U. S. 200, 16 Sup. Ct. 450, 40 L. Ed. 670; Cunningham v. Cleveland, 98 Fed. 657, 39 C. C. A. 211; Barber Asphalt Pav. Co. v. Harrisburg, 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401.

See § 1167 *ante*, vol. 3.

84. Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; § 1434 *ante*.

85. § 1431 *ante*.

86. § 1167 *et seq.*, *ante*, vol. 3.

87. § 1171 *ante*, vol. 3.

Charter provision limiting the power of the council to incur debts and liabilities, held not to cover contract for the construction of a sewer, but applies only to the ordinary expenses of the city. Winona v. Jackson, 92 Minn. 453, 100 N. W. 368.

See chapter on Municipal Indebtedness, *post*, vol. 5.

88. **Repeal.** A statute authorizing municipalities to contract for street lighting with an individual for a term of years is not repealed by a subsequent statute

Under proper authority the letting of a contract for public improvements is within the discretion of the municipal council, or other designated corporate authorities, and in the absence of collusion or fraud is binding on owners of property assessed therefor.⁸⁹

§ 1902. Notice of power to contract.

All who contract with a municipal corporation are charged with notice of the extent of its powers and of the powers of its officers and agents with whom they contract.⁹⁰ If the contract is required to be let on com-

giving a like right to contract with a private company. *Smith v. Boro. of Avon-by-the-Sea*, 68 N. J. L. 243, 52 Atl. 226.

A statutory provision empowering the board of public works to make contracts for public improvements subject to the order and approval of the council, repeals an earlier statute giving the council power to construct and repair bridges, etc., and to purchase, construct and manage system of waterworks. *Nelden v. Clark*, 20 Utah 382, 59 Pac. 524, 77 Am. St. Rep. 917.

Later law governs. Where one statute required contracts for public work to be approved by the council and a later statute passed at the same session, but which took effect before the first, did not require such approval, the later statute governed. *Dewey v. Des Moines*, 101 Ia. 416, 70 N. W. 605, rev'd in 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665.

See § 1903 *post*.

89. *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022.

See § 1834 *et seq.*, *ante*.

90. §§ 1164, 1166 *ante*, vol. 3.

California. McBean v. San

Bernardino, 96 Cal. 83, 187, 31 Pac. 49.

Indiana. Martindale v. Rochester, 171 Ind. 250, 86 N. E. 321; *State ex rel. v. Michigan City*, 138 Ind. 455, 464, 37 N. E. 1041; *Jeffersonville v. Louisville & J. Steam Ferry Co.*, 27 Ind. 100, 89 Am. Dec. 495.

Missouri. Perkinson v. St. Louis, 4 Mo. App. 322.

New York. Swift v. Williamsburgh, 24 Barb. (N. Y.) 427; *Donovan v. New York*, 33 N. Y. 291, rev'g 41 Barb. 180, 19 Abb. Pr. 58. Compare *Nelson v. New York*, 63 N. Y. 535, rev'g 5 Hun 190.

Wisconsin. Rork v. Smith, 55 Wis. 67, 12 N. W. 408.

In a suit for work done in grading and graveling a certain street, the action failed because of the absence of a petition of two-thirds of the property owners as required by law. The court abserved: "Of this the contractor was bound to take notice; and, hence, the duty devolved upon him, before he took the contract, of ascertaining whether the council had so conducted the letting as to render the property holder liable. It was also his duty to satisfy

petitive bids and is so let, the contractor must see to it that all mandatory provisions of the controlling law have been followed.⁹¹ The contractor must see, also, that all essential preliminaries have been observed in substance anterior to the advertisement for bids; also that mandatory requirements as to the contents of the advertisement or proposal, the publication (and posting, if required) of the advertisement, the opening of the bids, the awarding of the contract, and the contents of the contract itself have been followed at least in essential particulars.⁹²

Sometimes a contract otherwise void may be ratified by the municipal corporation or its conduct may be such as to estop it from denying the validity of the contract.⁹³

§ 1903. Contract must be authorized.

The contract must be duly authorized by the proper corporate authorities in the manner prescribed by law before it can be made.⁹⁴ If authority from the municipal council is necessary, a contract can not be made without such authority has been duly given.⁹⁵ The mere vote

himself as to their ability to pay." *Johnson v. Indianapolis*, 16 Ind. 227, 228.

In *Clements v. Lee*, 114 Ind. 397, 298, 16 N. E. 799, it is said, "A person about to enter into a contract with a city council must examine the records so far as to see that the common council has taken, or attempted to take, the steps necessary to acquire jurisdiction to enter into a contract. If the record fails to show that such steps were taken, a contractor, or one about to contract, has no right to rely upon it."

But it has been held that a contractor who contracts to grade a street to be paid for by assessments is not bound to see if the street was legally opened. *Brun-*

dage v. Portchester, 31 Hun (N. Y.) 129, *aff'd* in 102 N. Y. 494, 7 N. E. 398.

91. § 1183 *ante*, vol. 3.

92. § 1183 *et seq.*, *ante*, vol. 3.

93. §§ 1255 to 1261 *ante*, vol. 3; §§ 1916, 1920 *post*.

94. *Branch v. Pointe Coupee Police Jury*, 26 La. Ann. 150; § 1181 *ante*, vol. 3.

95. § 1181 *ante*, vol. 3.

Where authority from the council is necessary before contract can be awarded, the board of public works can not bind the city by an agreement with the contractor to increase the contract price without such authority. *Chittenden v. Lansing*, 120 Mich. 539, 79 N. W. 797, 6 Det. Leg. N. 261.

of a municipal council that a contract shall be made does not authorize the mayor to make such contract.⁹⁶ So an order for widening a street is of itself insufficient to authorize an officer to enter into a contract to have the work performed.⁹⁷ But it is sometimes held that corporate officers may make contracts by virtue of a practice or custom long prevailing adopted by the municipality.⁹⁸

The power to make such contracts must be exercised by the municipal authorities upon whom it has been conferred, and cannot be delegated by them to others.⁹⁹ They may, however, require the performance of mere ministerial duties by others.¹ Under a sufficient grant of power a municipality may by resolution authorize a majority of property owners fronting on the street to be improved to select the contractor and enter into contract with him to pave the street. The contractor is the agent of the city, and may recover if he does work.²

Municipal officer has no authority to bind the city to pay for materials furnished to a municipal contractor to be used under the contract, where contractor was bound to furnish such materials at his own expense. *Willoughby v. City Council of Florence*, 51 S. C. 462, 29 S. E. 242.

96. *Marion Water Co. v. Marion*, 121 Ia. 306, 96 N. W. 883.

97. *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841.

98. *Blanchard v. Ayer*, 148 Mass. 174, 19 N. E. 209; *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841.

See §§ 369 and 370 *ante*, vol. 1.

99. § 383 *ante*, vol. 1.

Charter conferred power on council to cause streets to be graded and let contract therefor. Contract made by council com-

mittee, held void. *Stockton v. Creanor*, 45 Cal. 643, 646.

Where a contract can be made only by ordinance, authority to make the contract can not be delegated. *Unionville v. Martin*, 95 Mo. App. 28, 68 S. W. 605.

1. § 387 *ante*, vol. 1.

City council may direct a committee to advertise for bids. *Fayette v. Rich*, 122 Mo. App. 145, 99 S. W. 8.

§ 615 *ante*, vol. 2.

2. *Philadelphia v. Wistar*, 35 Pa. St. 427. Compare *Philadelphia v. Burgin*, 50 Pa. St. 539.

Such selection may be revoked at any time before contract is awarded. *Dickerson v. Peters*, 71 Pa. St. 53, per *Sharswood, J.*

Subsequent nomination to do paving, held not to revoke first nomination. *Long v. O'Rourke*,

Where there is no authority for making a contract for improvements the contract is void, although the work contemplated is not to be performed until after the taking effect of a law authorizing such contracts.³ A contract made prior to the adoption of an act regulating the making of contracts for public improvements is controlled by the law in force when it was made, although no part of it could have been performed before the later act took effect.⁴

§ 1904. Mode of making contract.

If the law applicable points out the manner of making the contract, such mode should be observed, otherwise the contract may be void or at least defective.⁵ When the

10 Phila (Pa.) 129, 6 Leg. Gaz. 118, 31 Leg. Int. 116.

A contract cannot be lawfully entered into after the selection is legally revoked by a majority of the property owners. *Philadelphia v. Philadelphia & Reading R. Co.*, 88 Pa. St. 314, aff'g 12 Phila. 479.

A majority of the property owners may be denied the power of selecting the contractor. *Appeal of Ferree*, 88 Pa. St. 440; *Appeal of Ritter*, 88 Pa. St. 440.

3. **Ordinance before improvement.** A city council has no right to make an improvement and after the improvement is made, pass an ordinance providing for the improvement. The ordinance must precede the improvement. *Paxton v. Bogardus*, 188 Ill. 72, 58 N. E. 675.

During the pendency of a constitutional amendment authorizing cities to create indebtedness for waterworks purposes an ordinance directing the execution of a contract for the erection of a

waterworks system was adopted. Held, that such ordinance was void, and the contract based upon it was likewise void, notwithstanding it was not delivered until after the constitutional amendment became operative. *Ellis v. Cleburne* (Tex. Civ. App., 1895), 35 S. W. 495.

4. *Hubbard v. Norton*, 28 Ohio St. 116.

Under a law directing specific cities forthwith to pass ordinances regulating the manner in which contracts shall be awarded for public work, held that until the city has exercised its power to pass ordinance regulating contracts a prior law regulating such matters must be regarded as in force. *McCafferty v. Steel*, 12 Phila. (Pa.) 236.

See §§ 1823, 1901 *ante*.

5. *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29.

All the substantial requirements of a statute empowering the council to contract for public improvements must be strictly complied

law authorizes a contract to be made by the corporate body in a certain mode, whereby the power of such body is intended to be limited, its officers and agents cannot bind it in any other manner. In such case only a limited power is granted, and consequently an act done beyond the scope of such power is void.⁶ But if no mode is prescribed by charter or statute, any convenient mode may be adopted⁷.

with; otherwise no liability for the improvements can be imposed upon the property owners. *Barker v. Southern Construction Co.*, 20 Ky. L. Rep. 796, 47 S. W. 608.

Controlling law. If the law authorizing a specific public improvement does not provide for the manner of letting the contract therefor, the letting is controlled by the laws in force. *Brown v. New York*, 3 Thomp. & C. (N. Y.) 155. Compare *Guidet v. New York*, 12 Hun (N. Y.) 566.

See §§ 1823, 1901, 1903 *ante*.

6. *Louisiana.* *Branch v. Police Jury, Pointe Coupee*, 26 La. Ann. 150.

Minnesota. *Starkey v. Minneapolis*, 19 Minn. 203; *State ex rel. v. Ramsey District Court*, 32 Minn. 181, 19 N. W. 732.

New Jersey. *Cory v. Freeholders of Somerset*, 44 N. J. L. (15 Vroom.) 445, 455, approved in *State (Keeney) v. Jersey City*, 47 N. J. L. (18 Vroom.) 449, 453.

New York. *Haughwont v. New York*, 2 Keyes (N. Y.) 419, 2 Abb. Dec. (N. Y.) 344; *Leverich v. New York*, 66 Barb. (N. Y.) 623.

Pennsylvania. *Reilly v. Philadelphia*, 60 Pa. St. 467, distinguishing *Philadelphia v. Wistar*, 35

Pa. St. 427 and *Philadelphia v. Burgin*, 50 Pa. St. 539.

Texas. *Ellis v. Cleburne* (Tex. Civ. App., 1896), 35 S. W. 495.

Wisconsin. *Hanrahan v. Janesville*, 145 Wis. 457, 130 N. W. 482.

In denying the authority of a street commissioner to make a contract for the construction of a stone wall along the sides of a street, it was aptly said: "The street commissioner who, in some respects may be regarded as the agent of the corporation is not, however, such an agent as can bind his principal generally. He is an independent public officer, acting under special statutory authority, but controlled by the ordinances of the corporation. Therefore like one acting under special instructions from which he cannot depart, and of which parties dealing with him are presumed and bound to have knowledge, he cannot bind the corporation except in respect to those acts which fall within his limited duties and authority." *Ellis v. New York*, 1 Daly (N. Y.) 102, 106.

7. *Beers v. Dallas City*, 16 Ore. 334, 18 Pac. 835.

See §§ 371 and 372 *ante*, vol. 1; § 1179 *ante*, vol. 3.

The power of a municipal council to contract for a public improvement is generally required to be exercised by ordinance or resolution.⁸

§ 1905. Competitive bidding.

The duties usually imposed on municipalities by charter or statute relative to letting contracts only after submitting them to competitive bidding are exhaustively treated in another part of this work.⁹ Such provisions generally apply to contracts for public improvements, and when applicable, if the contract is not so let, or if so let and the law in the letting has not been obeyed in substance, the contract is void.¹⁰

8. *Keator v. Dalton*, 62 N. Y. S. 878, 29 Misc. Rep. 692.

See § 373 *ante*, vol. 1.

9. §§ 1185 to 1195 *ante*, vol. 3.

10. §§ 1164, 1181, 1196 *ante*, vol. 3.

California. *Hewes v. Reis*, 40 Cal. 255.*

Iowa. *Dubbert v. Cedar Falls*, 149 Ia. 489, 128 N. W. 947.

Louisiana. *Fox v. New Orleans*, 12 La. Ann. 154, 68 Am. Dec. 766.

Michigan. *Brevoort v. Detroit*, 24 Mich. 322.

Montana. *O'Brien v. Vrinkenberg*, 41 Mont. 538, 111 Pac. 137.

New Jersey. *State v. Kern*, 51 N. J. L. (22 Vroom.) 259, 17 Atl. 114; *Hampson v. Paterson*, 36 N. J. L. (7 Vroom.) 159.

New York. *Mutual Life Ins. Co. of New York v. New York*, 144 N. Y. 494, 39 N. E. 386; *Kingsley v. Brooklyn*, 78 N. Y. 200, 7 Abb. N. C. 28, aff'g 5 Abb. N. C. 1; *Re Weil*, 83 N. Y. 543; *Re Rosenbaum*, 6 N. Y. S. 184, 53 Hun 478, 119 N. Y. 24, 23 N. E. 172; *People v. Stout*, 23 Barb. (N. Y.) 338; *Re Raymond*, 21 Hun (N. Y.) 229;

Smith v. Buffalo, 1 Shel. (N. Y.) 493.

Ohio. *Cincinnati v. Wewell*, 44 Ohio St. 243, 7 N. E. 11; *Cincinnati v. Anchor White Lead Co.*, 6 Ohio Dec. 1188; *Cincinnati v. Newell*, 6 Ohio Dec. 1188; *Cincinnati v. Eggleston, Wilson & Co.*, 6 Ohio Dec. 1188; *Cincinnati v. Anchor White Lead Co.*, 8 Ohio Dec. 578, 9 Wkly. Law Bul. 34; *Miller v. Pierce*, 2 Cin. R. 44.

Texas. *Ardrey v. Dallas*, 13 Tex. Civ. App. 442, 35 S. W. 726.

Washington. *Graff v. Tacoma*, 61 Wash. 186, 112 Pac. 250; *Stern v. Spokane*, 60 Wash. 325, 111 Pac. 231.

Wisconsin. *Mitchell v. Milwaukee*, 18 Wis. 92.

United States. *Hitchcock v. Galveston*, 3 Woods (U. S.) 287, Fed. Cas. No. 6,534.

Where law applies to patented articles or materials, §§ 1197 and 1198 *ante*, vol. 3.

Applicable only on specified expenditure. * *Olive Hill v. Tabor*, 143 Ky. 336, 136 S. W. 649.

Where statute requires that

§ 1906. Contract should be in writing.

Generally contracts for public improvements are required to be in writing,¹¹ and when so required parol contracts are invalid; but in the absence of legislation on the subject contracts of municipalities, it has been held, need not be in writing unless within the *Statute of Frauds*.¹² However, whether expressly so required or not they should be so drawn merely as a matter of prudence and good business.

It has been held that a written contract (in this instance for the removal of snow and ice), could be extended by verbal agreement.¹³ Likewise, a contract made in response to duly advertised proposals therefor was held valid where the work done thereunder was accepted, although the contract was not reduced to writing and duly executed.¹⁴

contract for public improvements shall be let on competitive bids, the expenditure of the proceeds of bonds to pay for work not so let will be restrained at the suit of a taxpayer. *Clouse v. San Diego*, 159 Cal. 434, 114 Pac. 573.

11. *Logansport v. Blakemore*, 17 Ind. 318; *Overshriner v. Jones*, 66 Ind. 452; *Starkey v. Minneapolis*, 19 Minn. 203; *California v. Bunce-ton Telephone Co.*, 112 Mo. App. 722, 87 S. W. 604.

12. § 1179 *ante*, pp. 2615 and 2616, vol. 3; § 1181 *ante*, vol. 3.

13. *Leverick v. New York*, 66 Barb. (N. Y.) 623.

14. *Argenti v. San Francisco*, 16 Cal. 255.

The parol acceptance of a written bid for street improvements is not sufficient as a contract under a statute requiring such contracts to be in writing. *Overshriner v. Jones*, 66 Ind. 452.

No specifications. Under a law

requiring contracts to be in writing and signed by the contractor, a contract reciting that the contractor would construct curbing and gutterways in accordance with the specifications thereto annexed, but to which no specifications were annexed, is not a substantial compliance. *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065.

The complaint in an action to foreclose a statutory lien against property for public improvements need not state that the contract was in writing; the contract in such case not being the foundation of the action. *Drew v. Geneva*, 159 Ind. 364, 65 N. E. 9.

Where the complaint by a contractor against a property owner to recover an assessment for an improvement does not allege that the contract was in writing it will be presumed to have been made by parol. *Budd v. Kraus*, 79 Ind. 137; *Overshriner v. Jones*, 66 Ind. 452.

Sometimes the work may be ordered to be done without a contract by a specific vote of the council.¹⁵ The ordinance authorizing the improvement, the bid for the work duly signed, and the resolution of the council duly passed and recorded accepting the bid, have been held sufficient to constitute a written contract for the work within the meaning of a statute requiring such contracts to be in writing and subscribed by the parties thereto.¹⁶

§ 1907. Formal defects and irregularities.

The neglect of merely *formal and ministerial acts* in the execution of a contract will not invalidate it.¹⁷ But

15. *Haughwout v. New York*, 2 Abb. Dec. (N. Y.) 344.

16. *Platte City v. Paxton*, 141 Mo. App. 175, 124 S. W. 531.

Where the municipality advertised for bids for sewer pipe and awarded a contract thereon, it could not, after laying the pipe defend against an action for the price on the ground that the contract was not drawn as required by statute. *Carey v. East Saginaw*, 79 Mich. 73, 44 N. W. 168.

17. *Minor defects illustrated*. A contract for the grading and paving of streets, held binding on the town though without the corporate seal. *Guffield v. Bowling Green*, 6 B. Mon. (45 Ky.) 224.

See § 256 *ante*, vol. 1; § 1179 *ante*, vol. 3.

Contract not signed by the mayor though formally executed, held binding. *Gibson v. O'Brien*, 9 Ky. L. Rep. 639, 6 S. W. 28.

A concurrence of the mayor need not be evidenced by writing. *Sheehan v. Owen*, 82 Mo. 458.

Contracts signed by commissioners who failed to take the prescribed oath of office before enter-

ing on the performance of their duties, held valid, as they were at least officers *de facto*. *Re Kendall*, 85 N. Y. 802.

Name of one of the commissioners, signed by another with his knowledge and consent, is sufficient. *Boots v. Washburn*, 79 N. Y. 207.

Signing contract, see § 1179 *ante*, pp. 2613 to 2615, vol. 3.

A written contract made by the committee on streets must be signed by at least a majority of the committee. Authority given the chairman to execute it is not binding. *Curtis v. Portland*, 59 Me. 483.

A law authorizing the contract to be executed by the board of public works, countersigned by the comptroller. Where the contract is duly executed the comptroller can have no discretion in the premises, his countersigning is a clerical duty, the performance of which can be compelled by the contractor or the board. *State v. Ramsey*, County District Court, 32 Minn. 181, 19 N. W. 732.

The formal requisites for the

the contract must be actually executed on behalf of the municipality, and not in the names of the officers whose duty it is to execute it for the local corporation.¹⁸ However, if it appears that the contract is the contract of the municipality it will be so treated, although defective concerning the form of signature.¹⁹

Mere irregularities and formal defects in a contract for public work between the municipality and the contractor cannot be urged by third parties to invalidate the contract,²⁰ as failure of designated officer to counter-

execution of contracts do not apply in all cases. Thus under one charter it was held that they did not apply to a contract of a street commissioner for labor performed in laying down a certain sewer. *Beers v. Dalles*, 16 Ore. 334, 18 Pac. 835.

Where a construction company submitted a proposal to construct a public work and gave a bond for the performance of the work in which reference was made to "the foregoing contract" and the proposal, contract and bond were so attached, and by references in each were so connected, as to constitute practically one transaction, held there was a valid contract, although it was not formally executed by the construction company. *Kuennan v. United States Fid. Co.*, 159 Mich. 122, 123 N. W. 799.

The execution of a municipal contract by only one member of a municipal board in pursuance of authority conferred upon him by the board does not render the contract invalid. *Paul v. New York*, 61 N. Y. S. 570, 46 App. Div. 69.

18. Where the intendant and members of a town council sign

their individual names and affix their several seals to a contract for service in repairing streets, held not binding on the corporation. *Hall v. Cockerell*, 28 Ala. 507.

19. Contract signed by the mayor in his own name with the corporate seal, affixed, held binding where the contract recited that the name of the City of L is hereto subscribed. *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *Dickson v. Gleason*, 99 Ky. 380, 35 S. W. 1125.

Where the inspector of the fire department had power to contract for repairs to engine houses, a contract made by him as inspector, but not in the name of the municipality, is binding on the latter. *Robinson v. St. Louis*, 28 Mo. 488.

A board of water commissioners can make a contract binding on the village whether executed in their names as such water commissioners, or in the name of the village. *Fleming v. Suspension Bridge*, 92 N. Y. 368.

20. *Philadelphia v. Gorgas*, 180 Pa. St. 296, 36 Atl. 868; *Fell v. Philadelphia*, 81 Pa. St. 58; *State*

sign the contract,²¹ or failure to certify the contract before the commencement of the work,²² or failure to record the plans and specifications,²³ or failure to file the contract prior to entering on the work.²⁴ But failure to certify the appropriation when expressly required has been held a substantial defect which invalidates the contract.²⁵

§ 1908. Contract for benefit of another.

The fact that at the time of making a contract for public work the contractor made the contract for the

v. District Court of Ramsey County, 32 Minn. 181, 19 N. W. 732.

21. State v. Ramsey County District Court, 32 Minn. 181, 19 N. W. 732.

See § 1179 *ante*, pp. 2613 to 2615, vol. 3.

22. The failure of the city controller to certify a municipal contract before the work thereunder was commenced, held not to invalidate the contract where the work was ratified by the city, and the certification was made after the completion of the work. Harrisburg v. Shepler, 7 Pa. Super. Ct. 491, 43 W. N. C. 170.

23. Howard v. Olyphant, 181 Pa. St. 191, 37 Atl. 258.

24. It is at most only an error or irregularity which might be made the basis of an objection before the council. Collins v. Keokuk, 147 Ia. 233, 124 N. W. 601.

25. Defects and irregularities. Under a charter providing that every contract involving an appropriation of money shall designate the item of apportionment on which it is founded and the estimated amount of the expenditures thereunder shall be charged

against such item and so "certified by the controller on the contract before it shall take effect as a contract" failure of a paving contract to certify that the controller had charged the amount of expenditure for the paving against the appropriation made for its payment renders the contract void. Erie v. Land on Eighteenth St., 176 Pa. St. 478, 35 Atl. 136.

A contract entered into by the board of mayor and aldermen at a special meeting, of which some of the members were not legally notified, and at which they were not present, is invalid. London & New York Land Co. v. Jellico, 103 Tenn. 320, 52 S. W. 995.

A contract entered into by a city's board of aldermen with a street railway company for the paving of portions of a street is not rendered illegal by an agreement of the mayor and the street commissioner with the street railway company providing for a departure from the order of the board of aldermen. Worcester v. Worcester & H. Con. St. Ry. Co., 194 Mass. 228, 80 N. E. 232.

See §§ 1180 and 1181 *ante*, vol. 3.

benefit of another is immaterial in an action thereon.²⁶ Public work may be obtained in the name of another and the one so obtaining it may become surety on the contract. This is not a fraud on the municipality.²⁷

§ 1909. Defects in preliminary proceedings.

Failure to observe the mandatory provisions of the charter or statute applicable in proceedings preliminary to the making of a contract may render the contract unenforceable.²⁸ Where a statute requires a municipal body before making an improvement to pass a resolution of its intention so to do, a substantial compliance with the statute is essential to the jurisdiction of the municipal authorities to contract for the improvement.²⁹ But mere irregularities in such proceedings will not usually invalidate the contract.³⁰ And it is held that when a municipal body acting within the scope of its chartered powers, has entered into a contract for a public improvement, in pursuance of proceedings regular on their face, and such contract has been performed by the other party,

26. *Herman v. Oconto*, 100 Wis. 391, 76 S. W. 364.

27. *Cummings v. Ruckert*, 14 Mo. App. 557.

28. *Indiana. Case v. Johnson*, 91 Ind. 477.

Iowa. Citizens Bank, etc. v. Spencer, 126 Iowa 101, 101 N. W. 643.

Michigan. Larned v. Briscoe, 62 Mich. 393, 29 N. W. 22.

Ohio. Lancaster v. Miller, 58 Ohio St. 558, 51 N. E. 52.

Wisconsin. Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685.

Conditions precedent or subsequent to making contract. See §§ 1180 and 1181 *ante*, vol. 3.

Effect of irregularities in entering into contract, or in the form of the contract. See § 1907 *ante*.

29. *Pacific Pav. Co. v. Verso*, 12 Cal. App. 362, 107 Pac. 590; *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082; *San Jose Improvement Co. v. Auzeais*, 106 Cal. 498, 39 Pac. 859.

The failure of municipal authorities to give notice of the adoption of a street grade, as required by statute, gives a lot owner whose property is injured by the improvement of the street an action for damages against the contractor. *Meyer v. Fromm*, 108 Ind. 208, 9 N. E. 84.

30. *Martinsdale v. Rochester*, 171 Ind. 250, 86 N. E. 321.

the fact that the preliminary proceedings were irregular constitutes no legal defense to a suit upon the contract against the municipality.³¹ So where an improvement is constructed without an ordinance or resolution authorizing it, the acceptance of the work by the municipality is a ratification of the act and supplies the want of previous authority.³²

Where it affirmatively appears that the council has taken the jurisdictional steps upon which its power to make the contract depends, the contractor may rely on the record, even though the jurisdictional facts may appear imperfect and irregular. After he has entered upon the work and expended money and labor for the benefit of property owners such owners will not be permitted, by proof of extraneous facts, to impair or break down the jurisdiction upon which the contractor may have relied, unless fraud or collusion be shown.³³

Sometimes the necessary fund to pay for the work must be provided by ordinance prior to the making of the contract.³⁴ The requirement that an estimate of the cost of an improvement shall be made and submitted before a contract for such improvement is let is held to be mandatory, and a contract made without complying therewith is void.³⁵

§ 1910. Validity in général.

The rules of law applicable to municipal contracts generally are applicable to contracts by municipal corpora-

31. *Tappan v. Long Branch Police, etc. Commission*, 59 N. J. L. 371, 35 Atl. 1070.

32. *Cooper v. Cedar Rapids*, 112 Ia. 367, 83 N. W. 1050.

Where a contract for building a bridge was void for failure to comply with the statute as to the letting, but the work was accepted by the city and paid for, held the city could not recover from the contractor the money thus paid.

Pillager v. Hewitt, 98 Minn. 265, 107 N. W. 815.

33. *Brownell Improvement Co. v. Nixon* (Ind. App., 1910), 92 N. E. 693; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501.

See §§ 1180 and 1181 *ante*, vol. 3.

34. *Branch v. Pointe Coupee Police Jury*, 26 La. Ann. 150.

See §§ 1867, 1868, 1869 *ante*.

35. *Murphy v. Platismouth*, 78 Neb. 163, 110 N. W. 749.

See § 1866 *ante*.

tions for public improvements.³⁶ Like the provisions of the law of municipal contracts in general, legal provisions relating specially to contracts for public improvements are designed to protect the public interests by guarding against unfair or fraudulent practices on the part of contractors and municipal officers. Accordingly, such contracts which have the effect of divesting the local corporation of any of its powers,³⁷ or defrauding the public,³⁸ or which constitute an abuse of power,³⁹ or which fails to observe mandatory legal requirements,⁴⁰ or which contains illegal provisions,⁴¹ are unenforceable.

36. Contracts in general. Chapter 29 *ante*, vol. 3.

37. *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

See § 382 *ante*, vol. 1.

38. Contract for public work must be fairly made at a reasonable price, with due regard to the lot owner's interest, and must be fairly carried out. *Eiermann v. Milwaukee*, 142 Wis. 606, 126 N. W. 53, 27 L. R. A. (N. S.) 1085.

A clause in the contract which guarantees a city official and his sureties immunity from liability does not render contract void. *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337.

Provisions in a municipal contract for alternative bidding, or for alterations and modifications in the contract, do not render the contract void. *Ampt v. Cincinnati*, 17 Ohio Cir. Ct. R. 516, 9 O. C. D. 690.

39. Where the municipal council limited the amount for which contracts for waterworks could be let to a sum then available for that purpose, though a much larger sum would eventually be needed to complete the system, the letting of a contract for a part of

the system within the limitation is not an abuse of power. *Yaryan v. Toledo*, 28 Ohio Cir. Ct. Rep. 259, *aff'd* in 76 Ohio St. Ct. 584, 81 N. E. 1199.

A clause in a paving contract authorizing the contractor to appropriate the old material was sustained, as to that extent it diminished the cost to the city. *Berg v. Grace*, 1 N. Y. St. 418, 40 Hun 639.

40. Where the statute requires a certificate of the city controller to be endorsed upon a municipal contract, purporting to designate the item of appropriation on which the contract is founded and to charge against such item the amount of expenditure thereunder, a failure to endorse such certificate on a contract involving an appropriation of money invalidates the contract. *Harrisburg v. Trego*, 7 Pa. Super. Ct. 511; *Erie v. Piece of Land on Eighteenth Street*, 176 Pa. 478, 35 Atl. 136. See also *Harrisburg v. Shepler*, 190 Pa. St. 374, 42 Atl. 893.

41. A contract between the owner of a patent pavement and the city for a royalty for the use

Fraud in the making of a public improvement contract has the effect, like fraud in the making of contracts generally, of rendering the contract void.⁴² A municipality is not liable on a void contract. The making of the contract is no guarantee on the part of the city that the forms of law have been complied with.⁴³

of the pavement will not prevent such owner from contracting to lay the pavement; nor will his contract for laying the pavement in any way affect the royalty contract unless it contains apt and proper words for that purpose. *Detroit v. Robinson*, 42 Mich. 198, 3 N. W. 845.

Illegal provisions. The fact that the contract for public work provides for payment in bonds not authorized by law does not render the contract wholly void. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659, rev'g 2 Woods, 272, Fed. Cas. No. 6,532.

A provision inserted in a contract for public work in compliance with an unconstitutional statute requiring its insertion will be disregarded. *Cleveland v. Clements Bros., etc. Co.*, 67 Ohio St. R. 197, 65 N. E. 885, 59 L. R. A. 775, 93 Am. St. Rep. 670.

A contract for public work is not rendered void by the existence of an agreement between the city and a railway company requiring the city to bind the contractors to ship the material for the work over a certain railway, where the contract for the work was independent of, and made no reference to, such agreement. *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768.

Where municipal contract provides that it shall become void on

failure of the contractor to perform a certain covenant therein it can become void for such reason only at the option of the city, and the city may waive a violation of such provision. *People v. Coler*, 67 N. Y. S. 701, 56 App. Div. 98, aff'd in 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605.

42. Fraudulent collusion. Under a charter requiring contracts for materials to be let to the lowest bidder, fraudulent collusion between a contractor and the city officers whereby the contract was let to the highest, instead of the lowest, bidder is a good defense on part of the city in an action against it on such contract. *Nelson v. New York*, 5 N. Y. S. 688, 53 Hun 630, aff'd in 131 N. Y. 4, 29 N. E. 814.

The award of a city contract by a board to one who was the highest bidder, whose bid was \$20,000 higher than that of the lowest bidder, and the subsequent execution of the contract with the highest bidder and another person, instead of with such bidder alone, was held sufficient to establish fraud in proceedings to vacate an assessment, in the absence of an explanation. *Re Delaware & H. Canal Co.*, 8 N. Y. S. 352.

43. *Daly v. San Francisco*, 72 Cal. 154, 13 Pac. 321.

§ 1911. Provisions affecting the cost of the work.

Provisions which tend to increase the cost of the work unnecessarily are generally declared to be invalid. Accordingly a provision requiring the contractor to assume the risk of damages done to property "along or near the line of the work" and for injuries to persons or animals resulting from any accident, invalidates the contract, as it tends to increase the amount of the bids for the contract.⁴⁴ But a provision in the specifications that bidders shall comply with the requirements of the labor law then in force does not invalidate the contract, where the price of the work is not increased thereby.⁴⁵

44. *Inge v. Board of Public Works*, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.

Increasing cost of work. A stipulation in a municipal contract making the contractor liable for damages arising from the nature of the work, held to invalidate an assessment and bonds based and issued thereon, as tending to increase the cost of the work. *Woolacott v. Meekin*, 151 Cal. 701, 91 Pac. 612.

A clause in a contract for street work requiring the contractor to observe certain ordinances for the protection of the public from dangers incident to exposed and unguarded obstructions in the public highway does not render the contract invalid as increasing the obligation of the contractor and the cost of the work to the property owners. *Schindler v. Young*, 13 Cal. App. 18, 108 Pac. 733.

A provision in a street improvement contract that "all loss or damage arising from the nature of the work to be done under the specifications" shall be sustained by the contractor contemplates

damages which might arise out of and subsequent to the completed work for which the city alone would be liable, and renders the contract void. *Blochman v. Spreckles*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213.

A stipulation in a contract for constructing a sewer, requiring the contractor to "dig up the old sewer pipe along the line of the contemplated sewer without additional cost or expense to the city" does not render the contract illegal where it is evident that the bid was not enlarged to cover such expense. *Comstock v. Eagle Grove City*, 133 Iowa 589, 111 N. W. 51.

45. *People ex rel. v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768.

Void labor laws. The insertion in a contract for public work of a provision requiring the contractor to comply with the provisions of the labor law does not render the contract void even though such provision is void. *Meyers v. Pennsylvania Steel Co.*, 79 N. Y. S. 199, 77 App. Div. 307.

Union labor. Board of educa-

§ 1912. Same—guaranty of work and stipulations for repairs.

Municipal corporations are generally empowered to charge against specific property only the cost of the original construction of local improvements, or the construction and reconstruction of the same, and are not empowered, as a rule, to charge to such property the cost of repairs. Where they have no authority to charge the property with repairs, it has been contended that a provision in a contract requiring the contractor to keep the work in repair for a specified number of years is in effect charging the property with the repairs and is beyond the grant of power. However, it is generally held that a provision requiring the maintenance of the work as to repairs made necessary by improper workmanship or by the inefficient quality of the material used to withstand the wear required of it, is, in effect, merely a guaranty of the quality of the work and is valid.⁴⁶

tion in Detroit held to have no power to require contractors on public building to employ union labor exclusively. *Lewis v. Board of Education*, 139 Mich. 306, 102 N. W. 756, 11 Det. Leg. N. 840.

As to provisions restricting the hours of labor, fixing wages, requiring materials to be procured within the state, and requiring employment of union labor, see §§ 1200-1203 *ante*, vol. 3.

⁴⁶. § 1892 *ante*.

Illinois. *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311.

Indiana. *Shank v. Smith*, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564.

Iowa. *Osburn v. Lyons*, 104 Ia. 160, 73 N. W. 650; *Diver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542.

Kansas. *Kansas City v. Han-son*, 60 Kan. 833, 58 Pac. 474.

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Kentucky. *Barber Asphalt Pav. Co. v. Gaar*, 115 Ky. 334, 24 Ky. L. Rep. 2227, 73 S. W. 1106.

Louisiana. *Barber Asphalt Pav. Co. v. Watt*, 51 La. Ann. 1345, 1352, 26 So. 70, 73; *Bacas v. Adler*, 112 La. 806, 36 So. 739.

Minnesota. *State ex rel. v. District Court, etc.*, 80 Minn. 293, 83 N. W. 183.

Missouri. *Sedalia ex rel. v. Smith*, 206 Mo. 346, 104 S. W. 15; *Sedalia v. Dogherty*, 206 Mo. 372, 104 S. W. 22; *Sedalia v. Dugan*, 206 Mo. 370, 104 S. W. 23; *Barber Asphalt Pav. Co. v. French*, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492, *aff'd in French v. Barber Asph. Pav. Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Barber Asph. Pav. Co. v. Ess*, 158 Mo. 557, 58 S. W. 1135; *Seaboard National Bank v. Woesten*, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; *Barber*

But such guaranty, it has been held, must not have the effect of raising the cost of the improvement to the property owners.⁴⁷ So it has been held in Oregon that a municipality having power to repair its streets when deemed expedient, and to assess the cost against abutting property, is empowered only to make provision for repairs demanded by present exigencies, and it has no

Asph. Pav. Co. v. Hezel, 76 Mo. App. 135, aff'd in 155 Mo. 391; *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926.

Nebraska. *Robertson v. Omaha*, 55 Neb. 718, 76 N. W. 442, 44 L. R. A. 534.

New Jersey. *Wilson v. Trenton*, 61 N. J. L. 599, 40 Atl. 575, 44 L. R. A. 540, 68 Am. St. Rep. 714.

New York. *O'Keeffe v. New York*, 76 N. Y. S. 796, 73 App. Div. 312, 173 N. Y. 474, 66 N. E. 194.

Ohio. *McGlynn v. Toledo*, 22 Ohio Cir. Ct. 34, 12 O. C. D. 15.

Pennsylvania. *Williamsport v. Hughes*, 21 Pa. Super. Ct. 443; *Erie v. Grant*, 24 Pa. Super. Ct. 109.

A requirement in the contract of a seven-year guaranty of the work was held not to be void. *Hedge v. Des Moines*, 141 Iowa 4, 119 N. W. 276.

The requirement of a five-year guaranty of the work required by the notice to bidders and the contract is not rendered prejudicial to the taxpayers by the fact that the resolution ordering the work provided for a seven-year guaranty, where the change to five years had been approved by the council before the period for publication of the notice had expired. *Dubbert v. Cedar Falls*, 149 Ia. 489, 128 N. W. 947.

Maintenance contract. In letting in one contract the construction or reconstruction and maintenance of the street, the method of ascertaining the lowest bid, "by taking the aggregate amount of the cost of construction or reconstruction, as the case may be, and the total cost of maintenance for the term of years designated by the ordinance," has been held valid. *Seaboard National Bank v. Woeston*, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; *Barber Asphalt Paving Co. v. Hezel*, 76 Mo. App. 135, aff'd by the Supreme Court on authority of *Seaboard* case, 155 Mo. 391, 56 S. W. 449.

The fact that there was but one bid does not invalidate the contract. *Barber A. P. Co. v. Hezel*, 76 Mo. App. 135, aff'd in 155 Mo. 391.

See elaborate note reviewing cases as to power of city to bind contractor to repair pavement which he makes, 44 L. R. A. 527, 541.

Such provision valid though law requires letting contracts for "repairs" on competitive bids. *Shank v. Smith*, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564, 568.

47. *Wilson v. Trenton*, 61 N. J. L. 599, 40 Atl. 575, 44 L. R. A. 540, 68 Am. St. Rep. 714.

power to incorporate in a street paving contract a condition that the contractor shall keep up repairs for a period of five years, because the effect of the provision is to increase the total contract price and to impose upon abutting property owners an added burden on account of anticipated repairs.⁴⁸ A like ruling has been made in California.⁴⁹

Under a contract requiring the contractor to make repairs for a specified time when due to certain stipulated causes, he is not liable to make repairs arising from any other cause.⁵⁰ In event repairs should be rendered

48. *Portland v. Portland Bituminous Pav. Co.*, 33 Ore. 307, 52 Pac. 28, 44 L. R. A. 527, 72 Am. St. Rep. 713.

49. In California it is held that a guaranty of an improvement for one year from injury by ordinary use invalidates the contract if it is not authorized by statute, since it increases the burdens of property owners by the necessarily higher price which the contractor would charge in view of the repairs he would have to make. *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264, 80 Am. St. Rep. 124.

Future maintenance. Laws authorizing paving of streets do not authorize the incorporation in the contract of an agreement for future maintenance. *Montgomery v. Barnett*, 149 Ala. 119, 43 So. 92; *Brown v. Jenks*, 98 Cal. 12, 32 Pac. 701.

See § 1892 *ante*.

50. *Lindsey v. Brawner*, 29 Ky. L. Rep. 1236, 97 S. W. 1; *Green River Asph. Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985; *Morley v. St. Joseph*, 112 Mo. App. 671, 87

S. W. 1013; *District of Columbia v. Chephane*, 2 Mackey 155.

Causes for repairs. Under a clause in a contract for public work obligating the contractor to guarantee the work against "deterioration caused by improper materials or neglect in the construction" of the work, the contractor is bound to repair any deterioration resulting from bad materials or bad workmanship in the original construction of the work. *American Bonding Co. v. Ottumwa*, 137 Fed. 572, 70 C. C. A. 270.

In one case the pavement was of wood. It became defective within the time limited (three years), and the city replaced the wood with vulcanite concrete pavement. No evidence was presented showing that defects were due to improper work or material and it was held that in the absence of such proof the contractor was not chargeable with the cost of the repairs, and if he were so charged he could not be required to pay all the cost of substituting a different kind of pavement. *District of Columbia v. Clephane*, 110

impossible by reason of defects in the plan or insufficiency of the improvement, both parties to the contract are excused from further performance and neither has the right to recover damages for the part not performed.⁵¹

The municipality has no right to withhold payment of money due the contractor in order to secure the performance of a clause in the contract binding the contractor to repair the work, free of cost, for a specified number of years after its completion,⁵² unless there is a stipulation in the contract to that effect.⁵³

U. S. 212, 3 Sup. Ct. 568, 28 L. Ed. 122.

In a case where a street was constructed across a swamp and soon after it was constructed it sank about eleven feet, it was held that the contractor was bound to restore it. *Riely v. Brooklyn*, 46 N. Y. 444, rev'g 56 Barb. 559.

51. *Asphalt Pav. Co. v. New York*, 127 N. Y. S. 794, 797, 69 Misc. Rep. 588. See *Dolan v. Rogers*, 149 N. Y. 489, 491, 44 N. E. 167.

Defects in the construction of public work which could not be discovered by the exercise of ordinary care may be set up by the city in defense of an action brought against it by the contractor to recover money retained by the city on the contract to secure the performance of a covenant for repairs. *Louisville v. Muldoon*, 20 Ky. L. Rep. 1576, 49 S. W. 791.

Pro rata recovery for part performance. Where there is an implied condition of the contract for repairs, that the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do what

was contemplated by the contract, there may be a *pro rata* recovery for a part performance where the other party receives a benefit from what has been done. *Dolan v. Rogers*, 149 N. Y. 489, 44 N. E. 167.

Notice to contractor to make repairs when provided for, must be given, to create liability. *O'Keeffe v. New York*, 173 N. Y. 474, 56 N. E. 194; *Mack Paving Co. v. New York*, 127 N. Y. S. 738, 142 App. Div. 702; *Barber Asph. Pav. Co. v. New York*, 127 N. Y. S. 746, 142 App. Div. 715; *Southern Paving Co. v. Mayor, etc. of Chattanooga (Tenn. Ch. App.)*, 48 S. W. 92.

52. *Stewart v. District of Columbia*, 19 Ct. of Cl. 98; *San Antonio v. Stevens (Tex. Civ. App., 1910)*, 126 S. W. 666.

53. *J. M. Griffith Co. v. Los Angeles*, 122 Cal. 18, 54 Pac. 383.

Sometimes contracts authorize a retention of a specified portion of the money due the contractor for a named period. *Johnson v. New York*, 1 N. Y. S. 254, 16 N. Y. St. Rep. 260, 46 Hun 620.

§ 1913. One contract for several improvements.

A contract for public work may embrace more than one improvement.⁵⁴ Thus, the construction of sidewalks on several streets may be provided for in a single contract and the cost thereof apportioned upon the different lots fronting on such sidewalks.⁵⁵ So a contract may be made for improving a street which includes both grading and the construction of a sidewalk.⁵⁶ So a contract and ordinance for pavement on both sides of a street is not invalid where it does not appear that the cost of the work has been improperly apportioned against the property on which it fell.⁵⁷

It would seem to be the better rule to restrict the improvements which may be embraced in a single contract to the same kind. It has been held that a contract for paving a street which also contains a provision for sprinkling streets is *ultra vires* and void.⁵⁸ And under a charter provision that the cost of grading a street shall be assessed upon property fronting on the street,

54. The letting in one contract of the different parts of the improvement, as removing material from the street, rendering the foundation firm, and laying down the asphalt does not render it void. In the absence of fraud, discretionary methods pursued by the municipal authorities cannot be questioned after the work is done. *Warren v. Barber Asphalt*, 115 Mo. 572, 22 S. W. 490.

One contract may be made for the grading of a street authorized by one ordinance, and the macadamizing, curbing and guttering of the same street under another ordinance where both are enacted on the same day. *Gibson v. Owens*, 115 Mo. 258, 21 S. W. 1107.

Under particular charter held two or more local improvements may be made under one order and

included in one contract although both or all do not benefit the same property and that the contract be at a gross price for all. *State v. Ramsey County District Court*, 47 Minn. 406, 50 N. W. 476.

55. *Parker v. Challiss*, 9 Kan. 155. See *Challiss v. Parker*, 11 Kan. 394.

56. Notwithstanding such proceeding may be irregular it does not invalidate an assessment for the grading. *Pittsburg C. C. & St. L. Ry. v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597.

57. *Langan v. Bitzer*, 26 Ky. L. Rep. 579, 82 S. W. 280; *Elder v. Cassilly*, 21 Ky. L. Rep. 1274, 54 S. W. 836.

58. *Kansas City v. O'Connor*, 82 Mo. App. 655.

and the cost of a sewer to be assessed upon the property immediately benefited thereby, the grading of streets cannot be let in the same contract with the building of a sewer in the same streets.⁵⁹ But work on separate parts of the same street may be let by a single contract where the work is all of the same character.⁶⁰ And the work of constructing or reconstructing a street and the maintenance of such street for a period of years, it has been held, may be let in a single contract.⁶¹

§ 1914. One or more contracts for one improvement.

Whether all the works specified in a single ordinance should be treated as an entirety and let by a single contract or whether it may be separated and let under different contracts will depend on the nature of the work to be done and the controlling law. Sometimes the whole work must be let under one contract,⁶² and under particular laws and certain circumstances it has been held that it may be divided and let under two or more contracts.⁶³

59. *People ex rel. v. Kingston*, 189 N. Y. 66, 85 N. E. 557, rev'g 99 N. Y. S. 657, 114 App. Div. 326.

60. *Sacramento Paving Co. v. Anderson*, 1 Cal. App. 672, 82 Pac. 1069; *Same v. Martyn*, 1 Cal. App. 18, 82 Pac. 1071.

61. *Seaboard National Bank, etc. v. Woesten*, 176 Mo. 49, 75 S. W. 464; *Williamsport v. Hughes*, 21 Pa. Super. Ct. 443. But see § 1912 *ante*.

Ordinance for each distinct improvement. § 1879 *ante*.

62. *One contract.* Under a particular law providing for a single contract for street improvements, held that an award of special contracts for such improvements was unauthorized. *Treanor*

v. Houghton, 103 Cal. 53, 36 Pac. 1081.

Where a contract is let for a particular public improvement, as the erection of a schoolhouse, a subsequent contract for a part of the work, as for bells, tubes and electric lights, is unauthorized, since the authority, by making a single contract for the erection of a whole building, was exhausted and no power existed for making the second contract. *Boston Electric Light Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787.

63. *Different contracts.* Under particular law held that work need not be let by a single contract nor treated as an entirety but discretionary power existed to order what part shall be done under dif-

§ 1915. Unauthorized and void contracts.

Usually no recovery can be had on a contract which the municipality was not authorized to make, nor where it is void for any other reason.⁶⁴ This doctrine and the reasons supporting it are stated elsewhere,⁶⁵ and is in accord with the settled rule that persons contracting with a municipality to make improvements must, at their peril, inquire into the power of the municipality

ferent contracts. *Ede v. Cogswell*, 79 Cal. 278, 21 Pac. 767.

The fact that all the work specified in an ordinance was not included in one contract, or that part of it was not let at all, is immaterial, unless it appears that the persons complaining thereof were prejudiced thereby. *Joyce v. Falls City Artificial Stone Co.*, 23 Ky. L. Rep. 1201, 64 S. W. 912.

"It is only in cases where the work to be done is ordered to be done as a unit, by one contractor, that the rule that requires the entire work to be completed before the taxbill may issue, applies." *Heman Construction Co. v. Loevy*, 179 Mo. 455, 471, 78 S. W. 613.

Ordinance for each distinct improvement. § 1879 *ante*.

64. *Baltimore v. Eschbach*, 18 Md. 276; *Sang v. Duluth*, 58 Minn. 81, 59 N. W. 878; *Ellis v. Cleburne* (Tex. Civ. App., 1896), 35 S. W. 495.

Unauthorized and void contracts. This is true although the city received the benefit of the work. *Ward v. Kropf*, 120 N. Y. S. 476.

There is no liability on a contract for expenditures in excess of the limit prescribed. *Turney v. Bridgeport*, 55 Conn. 412, 12 Atl. 520.

In a contract for street improvements it was agreed that in no event should the local corporation be liable. The contract was made without authority hence under the law the abutters were not liable, and the town could not be made to pay by action. *Bellevue v. Hohn*, 82 Ky. 1, 5 Ky. L. Rep. 730.

Where the provision of the charter was materially deviated from in the proceeding, the contractor cannot recover upon a *quantum meruit*. *Cowen v. West Troy*, 43 Barb. (N. Y.) 48.

Where contractor fails to recover of abutters ordinarily he has no recourse against the city. *Moylan v. New Orleans*, 32 La. Ann. 673.

Contracts made for street work where the appropriation is exhausted, held void under particular charter. *Donovan v. New York*, 33 N. Y. 291, rev'g 19 Abb. Pr. (N. Y.) 58, 44 Barb. 180.

A contract made under an unconstitutional law is void. The assent of the contractor cannot render such contract enforceable. *Devlin v. New York*, 44 How. Pr. (N. Y.) 457.

65. § 1164, *ante*, vol. 3.

and its officers to make such contract.⁶⁶ But sometimes under particular circumstances the contractor will be permitted to recover on a contract founded on error, as that a majority of the property owners had given their consent when in fact this was a mistake, where both the contractor and the municipality acted in good faith.⁶⁷ And where a city contracted for, and permitted the construction of, a waterworks, and for more than six years availed itself of the benefits derived therefrom, and assessed and collected an annual tax thereon, and permitted others to acquire title to the property without asserting any claim, it was held to be estopped from questioning the validity of the contract.⁶⁸

Whether a contractor who has completed work under a void contract can recover therefor on *quantum meruit* is fully treated in an earlier chapter.⁶⁹ Some cases hold that no recovery can be had,⁷⁰ while others hold that if the municipality receives the benefit of the improvement, recovery may be had on *quantum meruit*.⁷¹

66. §§ 1164, 1166 *ante*, vol. 3; § 1902 *ante*; *Turney v. Bridgeport*, 55 Conn. 412, 12 Atl. 520; *Boston Electric Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787; *Schumm v. Seymour*, 24 N. J. Eq. 143.

67. *Schier v. Buffalo*, 35 Hun (N. Y.) 564.

68. *Ogden v. Bear Lake Waterworks & Irr. Co.*, 28 Utah 25, 76 Pac. 1069.

69. Chapter 29, *Contracts in General*, *ante*, vol. 3. See also. § 1945 *post*.

70. *Citizens Bank v. Spencer*, 126 Ia. 101, 101 N. W. 643; *Keating v. Kansas City*, 84 Mo. 415; *Brady v. New York*, 20 N. Y. 312, 18 How. Prac. 343.

No action for damages can be maintained by municipal contractor against the municipality on

an illegal contract. *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841; *Baltimore v. Eschbach*, 18 Md. 276; *Uvalde Pav. Co. v. New York*, 112 N. Y. S. 535, 128 App. Div. 210.

In an early Indiana case it was held that where the council contracts for improvements to be made outside of the corporate limits, its members are personally liable for the value of the work. *Sylvester v. Macauley, etc.* (Ind. Super.), 1 Wilson 19.

71. *Tone v. Tillamook City*, 58 Ore. 382, 114 Pac. 938; *Lines v. Otego*, 91 N. Y. S. 785.

"If the city obtains property under a void contract and actually uses the property and collects the value of it from the property owners by means of assessments, the plainest principles

If the contract contains severable or divisible portions, some of which are valid and others invalid, it may be asserted and enforced as to the valid portions.⁷²

§ 1916. Estoppel.

A municipal corporation may be estopped from denying the validity of its contract made within the general scope of its powers, although not entered into or carried out in the precise or formal manner required by law; and especially is this true with reference to a contract relating to its proprietary as distinguished from its governmental functions.⁷³ The subject of estoppel as applied to municipal contracts generally is fully treated in an earlier chapter.⁷⁴ It is held, however, that the doctrine of estoppel cannot be applied to validate a contract

of justice require that it should make compensation for the value of such property to the person from whom it was obtained." Nelson v. Mayor, 63 N. Y. 535, quoted with approval in Mixer v. Adam, 121 N. Y. S. 31, 66 Misc. Rep. 238. See also Argenti v. San Francisco, 16 Cal. 255, 282.

Where labor and materials not included in the contract are furnished by the contractor and accepted by the city under a supplemental agreement, the city will be held liable for the reasonable value thereof. Chicago v. McKechney, 205 Ill. 372, 68 N. E. 954, rev'g 91 Ill. App. 442.

72. Hart v. New York, 201 N. Y. 45, 94 N. E. 219; Uvalde Paving Co. v. New York, 112 N. Y. S. 535, 128 App. Div. 210; Meyers v. Pennsylvania Steel Co., 79 N. Y. S. 199, 77 App. Div. 307; Turney v. Bridgeport, 55 Conn. 412, 12 Atl. 520.

73. Wykes v. City Water Co., 184 Fed. 752.

See also Moore v. New York, 73 N. Y. 238, 29 Am. Rep. 134.

74. Ch. 29 *ante*, vol. 3.

The contract of a municipality for a waterworks to supply itself and its inhabitants with water is not the exercise of its governmental or legislative power, but its business or proprietary power, and the municipality may be estopped from claiming that the contract is *ultra vires*. Wykes v. City Water Co., 184 Fed. 752; Tone v. Tillamook City (Ore., 1911), 114 Pac. 938.

Where contractor had notice before making the contract that the propositions for entering into the contract had not been legally carried, village authorities are not estopped from denying the liability of the village on such contract. Daniels v. Long, 111 Mich. 562, 69 N. W. 1112, 3 Det. Leg. N. 773.

which the municipality had no power to make.⁷⁵ And it is sometimes held that even although the contract under which work is done is unauthorized if the work done is beneficial to and accepted by the municipality it will be estopped to deny the contract and will be liable as on an implied agreement.⁷⁶

§ 1917. Contract to conform to specifications.

It is generally required that a contract must comply with the specifications for the work;⁷⁷ and it is usually held that a material departure from the specifications upon which the bids were invited will render the contract void.⁷⁸ However, it has been held that "a contract between a city and those who do work for it is not made invalid, although it may become improvident, because of a covenant that the city shall have power to add to or diminish the work called for by the specifications."⁷⁹

§ 1918. Contract must conform to law, ordinance, or order authorizing the improvement.

Obviously a contract for a public improvement should

75. *State ex rel. v. Murphy*, 134 Mo. 548, 563, 31 S. W. 784; *Unionville v. Martin*, 95 Mo. App. 28, 63 S. W. 605.

76. *Argenti v. San Francisco*, 16 Cal. 255.

See § 1262 *et seq.*, *ante*, vol. 3.

77. *Hedge v. Des Moines*, 141 Iowa 4, 119 N. W. 276.

78. *Le Tourneau v. Hugo*, 90 Minn. 420, 97 N. W. 115; *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911.

Sufficient compliance. A contract providing that the "contractor shall do the work in a good and workmanlike manner, under the direction and to the satisfaction of the superintendent of streets" (describing it) "in compliance with the specifications hereunto attached and made part of this

contract" sufficiently complies with a statute requiring that the "materials used shall comply with the specifications, and be to the satisfaction of (the) superintendent of streets." *Reid v. Clay*, 134 Cal. 207, 66 Pac. 851.

No specifications. Where a contract for public work requires the work to be done in accordance with specifications declared to be annexed to the contract and made a part thereof, a failure to annex the specifications to the contract renders the contract invalid. *Gray v. Richardson*, 124 Cal. 460, 57 Pac. 385.

79. *Re Wabash Ave.*, 26 Pa. Super. Ct. 305, 311. See also *Filbert v. Philadelphia*, 181 Pa. 530, 37 Atl. 545; *Chicago v. McKechney*, 91 Ill. App. 442.

conform to the statute or charter, ordinance, resolution or order authorizing it,⁸⁰ otherwise taxbills therefor may be unenforceable.⁸¹ Thus, if the resolution calls for the grading of more than one block the contract cannot be limited to the grading of one block.⁸² So a resolution ordering a street macadamized gives no authority to include in the contract a provision for rock gutter ways.⁸³ So if the contract for a street improvement makes an entirely new grade or assessment district from the one provided in the ordinance it is void.⁸⁴ So the construction of a sewer for drainage purposes only is not authorized by an ordinance directing the construction of a sewer for "sanitary and drainage purposes."⁸⁵

The contract for a municipal improvement "can create no rights or obligations in excess or defect of those

80. *California*. *McBean v. Redick*, 96 Cal. 191, 31 Pac. 7; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; *Beaudry v. Valdez*, 32 Cal. 269.

Maryland. *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

Massachusetts. *Palmer v. Haverhill*, 98 Mass. 487.

New York. *Paul v. New York*, 61 N. Y. S. 570, 46 App. Div. 69; *People v. Van Nort*, 65 Barb. (N. Y.) 331; *Bonesteel v. New York*, 22 N. Y. 162, 20 How. Pr. (N. Y.) 237; *Donovan v. New York*, 33 N. Y. 291, rev'g 44 Barb. 180.

Washington. *Halsch v. Seattle*, 10 Wash. 435, 38 Pac. 1131.

United States. *Johnston v. Philadelphia*, 113 Fed. 40.

Where power is limited to regulating and grading a street, the contract cannot include setting the curb and gutter stones and flagging the sidewalks. *Brown v. New York*, 3 Thomp. & C. (N. Y.) 155, 1 Hun 80,

81. *Boonville ex rel. v. Stephens* (Mo. App.), 95 S. W. 314; *Young v. People*, 196 Ill. 603, 63 N. E. 1075; *State v. Michigan City*, 138 Ind. 455, 37 N. E. 1041.

82. *Dougherty v. Hitchcock*, 35 Cal. 512.

83. *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082.

Additional work. When the published resolution of intent to construct a sewer, and the notice inviting proposals for the work, spoke simply of the construction of a sanitary sewer, a contract which provided that man-holes and lamp-holes should be constructed in connection with the work, and as a part thereof, held not unauthorized. *Comstock v. Eagle Grove City*, 133 Iowa 589, 111 N. W. 51.

84. *Halsch v. Seattle*, 10 Wash. 435, 38 Pac. 1131.

85. *Barton v. Kansas City*, 110 Mo. App. 31, 83 S. W. 1093.

created by the ordinance" authorizing the work,⁸⁶ but it is not every departure, however slight, from the literal terms of such authority that will invalidate the contract.⁸⁷

It is held that if part only of the work called for in the contract is unauthorized, and it can be separated from the part that is authorized, the contract will be upheld as to the latter. Thus, if the ordinance and plans do not agree because of clerical error, the contract is void only as to the excess beyond what the ordinance contemplates.⁸⁸ And where the resolution authorizes a street to be macadamized and curbed and the roadway only is meant, a contract including the construction of sidewalks is invalid, but where the work done on the sidewalks can be separated from that done on the roadway the contract for the latter will be sustained.⁸⁹ So where the resolution orders a street to be

86. *Platte City v. Paxton*, 141 Mo. App. 175, 182, 124 S. W. 531.

87. *Cole v. Skrinka*, 105 Mo. 303, 16 S. W. 491; *Voght v. Buffalo*, 133 N. Y. 463, 31 N. E. 340, rev'g 14 N. Y. S. 759, 59 Hun 627.

Variance in material. A contract for a municipal improvement is not void on collateral attack because it requires the contractor to furnish materials not mentioned or included in the resolution ordering the improvement. *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321.

If there is no repugnancy between the ordinance and contract the latter will be sustained. *Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383.

It will be sufficient if pavement contracted for corresponds in kind with that called for in the ordinance authorizing the improvement. Thus where the ordinance directs that the streets shall be

paved with "Nicholson or wooden block pavement" a contract may call for what is known as wooden block pavement. *Martindale v. Palmer*, 52 Ind. 411.

A municipality is bound by the contract for improvements although it imposes a more rigid condition on the contractor than authorized by the ordinance under which it was made. *Hitchcock v. Galveston*, 3 Woods, 287; Fed. Cas. 6534.

A contract for municipal work entered into in the mode prescribed by the ordinance authorizing the work is not subject to impeachment for non-conformity to a prior ordinance. *Barber Asphalt Pav. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 453.

88. *Eyermann v. Provenchere*, 15 Mo. App. 256.

89. *Himmelman v. Satterlee*, 50 Cal. 68.

graded to the official grade, a contract which provides in addition that the roadway shall be graded one foot below the official grade, being divisible in its nature, is valid to the extent authorized by resolution.⁹⁰ So a contract for a price in excess of the estimated cost provided for by statute is invalid to the extent of such excess.⁹¹

§ 1919. Approval of contracts.

The approval of contracts by the legislative or other municipal body or officer when required, is usually held to be essential to their validity.⁹² But minor irregular-

90. *Chambers v. Satterlee*, 40 Cal. 497.

91. *De Soto v. Showman*, 100 Mo. App. 323, 73 S. W. 257; *Probert v. Girard Inv. Co.*, 155 Mo. App. 344, 347, 137 S. W. 41; *Morrow v. Barber Asphalt Pav. Co.*, (Okla., 1910), 111 Pac. 198.

92. *Murphy v. Louisville*, 9 Bush (72 Ky.), 189; *Hildreth v. New York*, 122 N. Y. S. 1053, 138 App. Div. 103; *Wheeler v. New York*, 122 N. Y. S. 627.

No approval required of certain contracts. *Board of Public Works, etc. v. Selvage Construction Co.*, 25 Ky. L. Rep. 2098, 79 S. W. 1182.

The approval of a municipal contract by the city council is not essential to the lien of an apportionment warrant. *Barfield v. Gleason*, 23 Ky. L. Rep. 128, 63 S. W. 964; *Joyce v. Falls City Artificial Stone Co.*, 23 Ky. L. Rep. 1201, 64 S. W. 912.

A charter provision requiring contracts for public improvements to be examined and passed upon by board of public works before final approval by the council, held not to apply to a subsidiary contract for the supervision of the construction of the improvement.

Houston v. Potter, 41 Tex. Civ. App. 381, 91 S. W. 389.

Approval of a contract wholly void at its inception will not impart life to the contract. *Ruggles et al. v. Collier et al.*, 43 Mo. 353; *St. Louis v. The People's Railway Co.*, 43 Mo. 379; *McQuiddy v. Brannoch*, 70 Mo. App. 535.

Where approval of council is necessary, the contract may be rejected by the council. *Grant v. Detroit*, 91 Mich. 274, 51 N. W. 997.

Municipal contract may be approved by an amendatory ordinance. *Strassheim v. Jerman*, 56 Mo. 104.

Where municipal contract states on its face that it is entered into subject to the approval or rejection of the council, and nothing to the contrary appears, it will be assumed that the contract received the approval of the council in due form. *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491.

Where a contract tendered by the city to a bidder had not been approved by the council, held the city had no right to retain the bidder's deposit upon his refusal to sign the contract. *Chicago*

ities relating to the order or manner of approval that do not affect the substance of the act will be disregarded.⁹³

§ 1920. Ratification of contract.

The ratification in general by a municipality of contracts made by it which would be otherwise insufficient is considered elsewhere in this work.⁹⁴ Only matters relating to public improvement contracts, will be treated here.

The general rule that a municipality cannot ratify an *ultra vires* contract applies, of course, to one for public improvements.⁹⁵ Contracts which were within the power of the municipality to make but which were made by the wrong officers or in a manner not authorized may be ratified.⁹⁶

Bridge & Iron Co. v. West Bay City, 129 Mich. 65, 87 N. W. 1032, 8 Det. Leg. N. 839.

93. Order of approval by officers is immaterial. *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971.

Irregularities of minor importance will be disregarded. *Barber Asphalt Pav. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458.

94. Ch. 29, §§ 1255-1261 *ante*, vol. 3.

95. *Kansas City v. O'Connor*, 82 Mo. App. 655; *Cory v. Freeholders of Somerset*, 44 N. J. L. (15 Vroom.) 445, 455; *Ellis v. Cleburne* (Tex. Civ. App., 1896), 35 S. W. 495.

Insufficient appropriation. A contract let at a time when the appropriation therefor was insufficient and which was forbidden by present law cannot be ratified by a subsequent appropriation. *Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743.

96. *Illinois. Chicago v. Galpin*, 183 Ill. 399, 55 N. E. 731.

Maine. Morrell v. Dixfield, 30 Me. 157.

New Hampshire. Hett v. Portsmouth, 73 N. H. 334, 61 Atl. 596.

New Jersey. Cory v. Freeholders of Somerset, 44 N. J. L. (15 Vroom.) 445, 455.

Pennsylvania. Re Brighton Road, 213 Pa. 521, 63 Atl. 124; *Re Millvale Borough*, 162 Pa. St. 374, 29 Atl. 641; *Fingal v. Millvale*, 162 Pa. 393, 29 Atl. 641; *Philadelphia v. Jewell*, 140 Pa. 9, 21 Atl. 239; *Philadelphia v. Hays*, 93 Pa. St. 72.

Legalizing contracts. The general rule is that the municipal corporation may ratify the unauthorized acts and contracts of its agents and officer, when the corporation might legally authorize such acts and contract in the first instance. *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 526.

A contract for materials furnished a city for public work

What will constitute a ratification must depend on the nature of the contract and the particular circumstances involved. The judicial decisions are not entirely harmonious; they present apparent and real conflict. Under certain circumstances the acceptance of benefits under a void contract for public work does not render the municipality liable therefor,⁹⁷ while under other circumstances if the municipality accepts and pays for work done for it under a contract made without proper authority the contract will be held ratified.⁹⁸ The mere approval of a bill for the work by corporate officers will not always be treated as a ratification.⁹⁹ However, it has been adjudged that the allowance of bills by the council for the work under particular circumstances is a sufficient ratification.¹ So it has been held that an action by the municipality to enforce an assessment, in order that it may fulfill its obligations under a paving contract irregularly certified to by the controller, is a ratification of the contract and certificate.² Acceptance

which is invalid because not let to the lowest bidder as required by statute may be legalized by the council. *Valentine Clark Co. v. Alleghany City*, 143 Fed. 644.

97. *W. W. Cook & Son v. Cameron*, 144 Mo. App. 137, 128 S. W. 269; *Hoepfner-Bartlett Co. v. Rhinelander*, 142 Wis. 229, 125 N. W. 454.

98. *Devers v. Howard*, 88 Mo. App. 253.

Ratification. Contract for repair of sewer, held to be ratified by acceptance of the work and payment of part of the claim by the city. *Brown v. New York*, 55 How. Pr. (N. Y.) 8.

A contract to furnish a city with specific materials, fraudulently let to one who was apparently and not in fact the lowest bidder cannot be made binding on the city

by acceptance of the materials or by ratification of an officer or otherwise, except in a form prescribed by law. *Nelson v. New York*, 131 N. Y. 4, 29 N. E. 814, aff'g 5 N. Y. S. 688, 53 Hun 630.

99. **Approval of a bill** for the work done by a board of public works held not to be a ratification of the contract. *Keeney v. Jersey City*, 47 N. J. L. (18 Vroom.) 449, 1 Atl. 511.

1. *Wheat v. Van Tine*, 149 Mich. 314, 112 N. W. 933.

2. *Harrisburg v. Shepler*, 190 Pa. St. 374, 42 Atl. 893.

Ratification by electors. The law required the submission of a proposition for furnishing a water supply to a vote of the electors before making the contract therefor, in event the cost thereof exceeded a certain sum. Held, that

of the work does not necessarily constitute ratification.³

The ratification must be in proper form. Thus an invalid ordinance attempting to authorize a public improvement can only be legalized by ordinance and not by resolution or order.⁴ Where an ordinance is necessary to authorize an improvement the general rule is that the improvement cannot be made first and then ratified by ordinance afterwards.⁵ However, sometimes void municipal action may be ratified by subsequent legal action on the part of the municipality, as in the passage of ordinance after the work is done, or by curative act enacted by the legislature of the state. This subject is treated elsewhere.⁶

§ 1921. Modification.

A municipal corporation has the same authority to amend or change its contracts within the proper scope of its powers as an individual,⁷ and its contracts for

an attempted ratification by the election does not validate it as of the time when it was made, but simply renders it operative from and after date of such vote. *Squire v. Preston*, 31 N. Y. S. 174, 82 Hun 88.

3. **Ratification by council.** Where the contract is to be let by the city council the unauthorized consent of changes in the work by a municipal officer cannot be assented to by individual members of the council. The ratification by the council must be at a regular meeting. Such ratification will not be inferred merely from the acceptance of the work nor the subsequent use of the streets. *Murphy v. Albina*, 22 Ore. 106, 29 Pac. 353, 29 Am. St. Rep. 578.

4. An invalid ordinance attempting to authorize public improvement cannot be amended and

legalized by a mere resolution. *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853.

Ordinance can only be repealed or amended by ordinance. §§ 821, 839 *ante*, vol. 2.

5. *Paxton v. Borgardus*, 188 Ill. 72, 58 N. E. 675.

6. §§ 706, 707 *et seq.*, *ante*, vol. 2; §§ 1893, 1894 *ante*.

Where an ordinance attempting to authorize the execution of a contract was void, the revision and re-enactment of the ordinance, and the passage of a curative act by the legislature at the instance of the city, held to be a ratification of the void ordinance and all that had been done in pursuance thereof. *Marion Water Co. v. Marion*, 121 Iowa 306, 96 N. W. 883.

7. *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958. See § 1272 *ante*, vol. 3.

public improvements may be modified or amended unless there is some statutory or charter provision forbidding such changes, or unless, owing to the peculiar conditions under which the contract exists, it would be improper to alter it.⁸ But the power to modify the contract does not confer authority to make a different or new contract.⁹

8. *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702; *Laver v. Ellert*, 110 Cal. 221, 42 Pac. 806; *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249; *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515; *Board of Commissioners v. Silvers*, 22 Ind. 491; *Hellenkamp v. Lafayette*, 30 Ind. 192; *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. Rep. 472.

Changing contract. The municipality may make inexpensive and advantageous changes in the plans for the improvement, though the contract has been approved by the electors. *Ida Grove v. Ida Grove Armory Co.*, 146 Ia. 690, 125 N. W. 866.

The modification of a contract for public work by the council, when secured by means of fraud and corruption, will be declared of no effect by the courts. *Weston v. Syracuse*, 158 N. Y. S. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. Rep. 472.

Changes as to the price of materials to be used. *Tarentum Boro. v. Moorehead*, 26 Pa. Super. Ct. 273.

A city may with the consent of the contractor modify a contract for street improvement so as to reduce the quantity of material to be used and the price to be

paid. *Hellenkamp v. Lafayette*, 30 Ind. 192.

Unless expressly forbidden by charter a municipal corporation having power to make a public improvement and incidentally the power to contract for doing the work may voluntarily increase the contract price where the circumstances will equitably justify it. Rule applied to contract for the construction of a sewer where the increased expense was occasioned by the discovery of a vein of quick sand not previously known to the contracting parties. *Meech v. Buffalo*, 29 N. Y. 198.

City council may permit changes or modifications of the contract without impairing the rights of the contractor to collect the cost of the improvements. *Allen v. Silvers*, 22 Ind. 491.

Changes in the plans and specifications may be made by the council with the consent of the contractor where they are for the advantage of the city. *Reno Water Land & Light Co. v. Osborn*, 25 Nev. 53, 56 Pac. 945.

Charters forbid changes to be made increasing the cost of work after the contract is let. *Gano v. Eshelby*, 10 Ohio Dec. 442, 21 Wkly. Law Bul. (Ohio) 177, aff'd 29 Wkly. Law Bul. 287.

9. **Modification or new contract.** Where asphalt blocks used

The time specified for the completion of work may be extended by ordinance if the extending ordinance is passed prior to the expiration of such time.¹⁰ But the time for completing public work, when fixed by the ordinance ordering the work, cannot be changed by the council after the bids have been received.¹¹ Under certain condition the power to modify, in material respects, contracts for public work has been denied.¹² Thus, where the contract is required to be let to the lowest bidder, the municipal council cannot substantially change its terms after it has been awarded.¹³

under a street paving contract were defective, and suit for the contract price had been commenced by the contractor, a subsequent agreement to lay a different kind of pavement in lieu of the blocks for the balance of the unpaid price is a new contract which cannot be let without advertisement and bids. *Cahn v. Metz*, 101 N. Y. S. 392, 115 App. Div. 516.

Right of council to tack to a street grading contract another contract for paving the gutters of such street thereby materially increasing the cost of the work over the estimate and over the original contract price without again submitting the work to competitive bidding, denied. *Ely v. Grand Rapids*, 84 Mich. 336, 47 N. E. 447.

In a contract for adopting and enlarging a sewer a portion of which was to be tunneled, held that a retunneling of the entire work could be ordered without readvertising. *Lutes v. Briggs*, 64 N. Y. 404, 5 Hun (N. Y.) 67.

Where a sewer contract had been modified after it was let by

the municipality, changing the construction of the sewer and reducing the contract price, the failure to advertise and let the contract as it was modified left the question of the actual cost of the sewer not susceptible of determination and the municipality was held not entitled to a decree for the amount of an assessment therefor. *W. F. Stewart v. Flint*, 147 Mich. 697, 111 N. W. 352.

10. *Hund v. Rackliffe*, 192 Mo. 312, 91 S. W. 500.

11. *Osburn v. Lyons*, 104 Iowa 160, 73 N. W. 650.

12. *Murray v. Tucker*, 10 Bush (73 Ky.) 240.

Modification increasing contract price denied where there is no change in a local improvement on account of unforeseen obstacles. *Nash v. St. Paul*, 23 Minn. 132.

13. *Capital City B. & P. Co. v. Des Moines (Ia.)*, 127 N. W. 66.

Altering contract. Right of council to make other arrangements with the contractor for payment than those provided in the contract itself denied, under a charter requiring contracts to be let to the lowest bidder. De-

It is within the power of a municipal corporation to reserve in a contract for public work the right to make changes in the plan of the work.¹⁴ The customary provisions in contracts for public work that the municipal corporation or its engineer may make any necessary or desirable alterations in the work, and that the contractor shall receive the contract price or a price fixed by the engineer for the work and materials required by the alterations, are limited by the intention of the parties when the contract was made to such modifications of the work described in the contract as do not radically change its nature or its cost.¹⁵

troit v. Michigan Paving Co., 36 Mich. 335.

The terms of a contract for public work can not be changed by parol statements of municipal officers so as to permit the use of inferior materials. *Smith v. Salt Lake City*, 83 Fed. 784.

Where a contract for changing the grade of a street has been let, a subsequent change of the line of the official grade renders the contract inoperative. *Warren v. Chandos*, 115 Cal. 382, 47 Pac. 132.

14. *Filbert v. Philadelphia*, 181 Pa. St. 530, 37 Atl. 545.

Changing plan of work. A provision in a municipal contract that the contractor shall do such extra work as shall be required at a compensation therein limited, is not in violation of a statute which requires municipal contracts to be awarded to the lowest bidder, where the contract itself was so let. *Clark & Sons v. Pittsburgh*, 217 Pa. 46, 66 Atl. 154.

A reservation by the city of general power to change the work and materials required by the contract has been held a violation

of a charter provision requiring all work involving an expenditure of over \$1000.00 to be let to the lowest bidder. *Gage v. New York*, 97 N. Y. S. 157, 110 App. Div. 403.

In a sewer construction contract a provision authorized the board of public works to suspend or relet the construction of the sewer if the work should be imperfect or improperly performed. Held, that such provision did not authorize the board to arbitrarily shorten the sewer 176 feet against the contractor's protest. *Markey v. Milwaukee*, 76 Wis. 349, 45 N. W. 28.

15. *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637; *Allen v. Melrose*, 184 Mass. 1, 67 N. E. 1060.

Modifying plan. A provision in a contract for public work authorizing the municipal authorities to make alterations in the dimensions or plan of the work at any time and diminish the contract price proportionately, held to refer to modifications after the execution of the contract and not to negotiations preceding the con-

Generally the power of a municipality to modify a public improvement contract is lodged in the body or officer authorized to make the contract. Unless expressly authorized a municipal officer has no power to modify in any particular essential the provisions of such a contract.¹⁶ A municipal improvement contract required by statute to be made by the general council cannot be modified by a committee of the council.¹⁷

§ 1922. Assignment.

Unless the law or the contract forbids, contracts for public improvements may be assigned,¹⁸ upon due no-

tract. *Chicago Bridge & Iron Co. v. West Bay City*, 129 Mich. 65, 87 N. W. 1032, 8 Det. Leg. N. 839.

16. *Murphy v. Albina*, 22 Ore. 106, 29 Pac. 353.

Change by officer. The fact that the ordinance provides that the work is to be done under the direction of certain persons does not confer on such person the right to modify or change the contract in any essential particular. *Bone-steel v. New York*, 22 N. Y. 162, 20 How. Pr. (N. Y.) 237.

General authority of a municipal officer to modify a contract for public work will not be inferred from the fact that he is authorized to direct the performance of the work. *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78, 10 Det. Leg. N. 200.

Right of board of public works or the street superintendent to make material change in the plans of a sewer contract without the approval of the council denied. *Campau v. Detroit*, 106 Mich. 414, 64 N. W. 336.

Under some charters modification of a contract can only be

made by formal resolution of the board of public works. *Nash v. St. Paul*, 23 Minn. 132.

17. *Newport v. Schoolfield*, 142 Ky. 287, 134 S. W. 503.

A contract made by a committee of the council can not be modified without a meeting held upon notice to all of the members of the committee. *Burge v. Rockwell City*, 120 Iowa 495, 94 N. W. 1103.

Municipal contract required to be made by the mayor and the acting superintendent of streets, can not be modified by the acting superintendent of streets alone. *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510.

18. *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515; *Gordon v. Jefferson City*, 111 Mo. App. 23, 85 S. W. 617; *St. Louis, etc. v. Clemens*, 42 Mo. 69; *Philadelphia v. Lockhardt*, 73 Pa. St. 211.

Assignment of contract. A provision in a contract for public work that the contract shall not be assigned is valid, and an assignee cannot recover on the con-

tice,¹⁹ and with the assent of the other party.²⁰ Where the contractor transfers the contract to another and the latter does the work which is accepted by the municipality it is liable for the contract price.²¹ The assignment of a contract for municipal work which has been partly performed carries with it all sums due for work previously done under the contract but retained until

tract. *Murphy v. Plattsmouth*, 78 Neb. 163, 110 N. W. 749.

The assignees of a contract for city work cannot complain of the action of the city in delaying and obstructing the work prior to the time of the assignment and the ratification thereof by the city. *Marshall v. San Antonio* (Tex. Civ. App., 1910), 63 S. W. 138.

A contractor may recover actual damages from the municipal corporation where it wrongfully compels him to cease work under a street improvement contract notwithstanding he has assigned the contract and all estimates made under it. *Tipton v. Jones*, 77 Ind. 307.

19. Notice of the assignment of a public improvement contract given the controllers of schools is notice to the municipality where the contract was made in the name of the controllers. *Philadelphia v. Lockhardt*, 73 Pa. St. 211.

Where all the work under a municipal contract was done by subcontractors with the knowledge and consent of the municipality and the contractor assigned his claim to the subcontractor, the municipality can not in an action against it by the assignee set up the defense that it had no notice of the assignment. *Hanrahan v.*

Janesville, 145 Wis. 457, 130 N. W. 482.

20. The assignment by a municipal contractor of a portion of his claim is not binding on the municipality without its assent. *Cook v. Menasha*, 103 Wis. 6, 79 N. W. 26.

Waiver of written consent. *O. Corr & Rugg Co. v. Little Falls*, 79 N. Y. S. 251, 77 App. Div. 592, aff'd in 178 N. Y. 622, 70 N. E. 1104.

A formal order approving the assignment is not necessary where it appears that the assignment was recognized and acted upon as valid by the city council. *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515.

Where partial assignment of a claim under a contract for municipal work is assented to by the city, it waives its right to complain. *Gordon v. Jefferson City*, 111 Mo. App. 23, 85 S. W. 617.

A clause in a contract for municipal work prohibiting assignment without the written consent of municipal authorities is for the benefit of the city and is available only when pleaded by the city. *Episcopo v. New York*, 72 N. Y. S. 140, 35 Misc. Rep. 623.

21. *McCubbin v. Atchison*, 12 Kan. 166. See also *Dunkirk v. Wallace*, 19 Ind. App. 298, 49 N. E. 463.

completion to insure performance.²² If the contract for public work is transferred upon specified conditions, the one to whom it is transferred takes it subject to those conditions.²³

Laws forbidding the assignment or subletting of municipal contracts without the written consent of the municipal authorities will not prevent a subletting of a part of the work where a substantial part of the contract is to be performed by the original contractor.²⁴ And laws or stipulations against the assignment of contracts for public work are not violated by an assignment of money or earnings due or to become due under such contracts.²⁵

§ 1923. Construction.

In ascertaining the meaning of public improvement contracts the usual rules of construction are invoked,²⁶

22. *Chapin v. Pike*, 184 Mass. 184, 68 N. E. 42.

23. *McCubbin v. Atchison*, 12 Kan. 166.

24. *Ocorr & Rugg Co. v. Little Falls*, 79 N. Y. S. 251, 77 App. Div. 592, aff'd in 178 N. Y. 622, 70 N. E. 1104.

25. *Hipwell v. National Surety Co.*, 130 Iowa 656, 105 N. W. 318; *Dickson v. St. Paul*, 97 Minn. 258, 106 N. W. 1053; *Snyder v. New York*, 77 N. Y. S. 637, 74 App. Div. 421; *Brace v. Gloversville*, 167 N. Y. 452, 60 N. E. 779, aff'g 56 N. Y. S. 331, 39 App. Div. 25.

One to whom contractor assigns funds due him from the city under the contract, after the contractor has abandoned the work, is not entitled to funds retained by the city to insure the completion of the contract, without showing that such funds remained after the work was completed and the whole

cost of construction had been paid. *Abner T. Brown v. W. O. Easton & Co.* (Ind. App.), 89 N. E. 961.

26. *Construction of contracts illustrated.* Extra work due to claimed modification. *Dougherty v. Norwood Bros.*, 196 Pa. St. 92, 46 Atl. 384.

The law in force at the time controls the construction of contract and not the law enacted after the passage of the ordinance providing therefor. *Oster v. Jefferson*, 57 Mo. App. 485.

Oral permission as substitute for written. *Harrison v. New Brighton*, 97 N. Y. S. 246, 110 App. Div. 267.

Ambiguous contract. *Piedmont Pav. Co. v. Allman*, 136 Cal. 88, 68 Pac. 493.

Ambiguous as to who to furnish material. *Hill v. Duluth City*, 57 Minn. 231, 58 N. W. 992.

which is fully illustrated by the numerous judicial decisions set out in the notes. Whether a contract for pub-

An ordinance exercising the power of the city to appropriate to its own use private water mains in the street is not a contract for public work or improvement but is simply a contract for the present purchase of existent property. Consequently a charter provision concerning the construction of public works or repairs thereto does not apply. *State ex rel. v. St. Louis*, 169 Mo. 31, 68 S. W. 900.

Excavating trench. *Davies v. East Saginaw*, 66 Mich. 37, 32 N. W. 919.

Parol evidence of custom among contractors, to include slopes in rock excavations, is inadmissible when there is nothing ambiguous in the contract. *Voorhis v. New York*, 46 How. Pr. (N. Y.) 116.

See §§ 1897 and 1899 *ante*.

The term "grade" used in a contract for grading and improving a street, held to mean the difference between the "grade line" and a level or horizontal line and included excavation and filling so as to make the surface conform to the grade line; and to grade a street is to bring the surface of the street to the grade line. *Davies v. East Saginaw*, 66 Mich. 37, 32 N. W. 919.

See § 1843 *ante*.

The term "street" used without qualification in a street grading contract is held to include the entire width of the highway from the line of lots on one side to the line of lots on the other. *Board*

of Public Works v. *Hayden*, 13 Colo. App. 36, 56 Pac. 201.

See § 1286 *ante*, vol. 3.

Modification. A provision in a contract for additional compensation for rock excavation in both tunnel and shaft is not modified by a clause in the specifications making other provisions for rock excavation in the tunnel only. *Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725, aff'g 67 Ill. App. 247.

See § 1921 *ante*.

Extent of paving. A contract providing for paving a street "40 feet wide less car tracks 15 feet" is held to require the paving of a space under the flange on the outside of the rails. *Grant v. Detroit*, 119 Mich. 43, 77 N. W. 307.

Material. A sewer construction contract intended to require a higher grade of cement where the sewer was exposed to the action of the water will not be construed so as to require the upper part of the sewer not so exposed to be laid in the higher grade of cement. *Borough Construction Co. v. New York*, 200 N. Y. 149, 93 N. E. 480.

A contract to grade, curb, fill and remove dirt at the rate of so much per cubic yard construed to mean that the dirt taken from one point on the street and placed upon another point thereon was to be measured but once and the price to be estimated accordingly. *Leavenworth v. Rankin*, 2 Kan. 357.

"A good and substantial sidewalk or foot pavement," held not

lic work shall be construed as entire or divisible depends upon the intention of the parties, to be gathered from the language of the contract and the subject matter.²⁷ Words in the contract having a trade meaning will be given such meaning, unless they operate to defeat the plain language of the instrument.²⁸ The contract will be construed with reference to the ordinance authorizing the improvement.²⁹ And if the contract provides that the work shall be done according to plans or specifications attached to the contract or referred to therein,

to require the filling necessary to bring the walk to the grade of the street. *Smith v. St. Louis Mut. Life Ins. Co.*, 3 Tenn. Ch. 631.

Contract for grading of streets, held not to require "construction of sidewalk benches," etc. *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707.

"Grade" in such contract includes removing and placing the dirt. *Leavenworth v. Rankin*, 2 Kan. 357.

Delay claims. Provision against claim for delay in the delivery of water pipes, held not applicable to delay and expenses caused by necessary alterations in pipes furnished which were defective and which defects could not be detected until the pipes were put in place. *Wood v. Ft. Wayne*, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. Ed. 416.

Failure of city to provide in the ordinance for street paving for collecting the cost of paving from a street railway company does not render the city liable therefor. *Barber Asphalt Paving Co. v. Denver*, 67 Fed. 65.

"Difficulty." A provision in a street paving contract that "all

loss or damage arising out of the nature of the work or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same" should be cast on the contractor. Held, that the bad condition of the street, necessitating additional material to keep the pavement up to grade was a "difficulty" to be borne by the contractor. *Murdock v. District of Columbia*, 22 Ct. Claims (U. S.) 464.

A paving contract which became void because the work had not been completed in time was revived by the passage of an ordinance reducing the price to be paid for future paving. Held, that the latter ordinance is *prima facie* evidence that the price fixed therein is the value of the work at the time the contract was revived and the work done. *Philadelphia v. Jewell's Estate*, 135 Pa. 329, 19 Atl. 947.

27. *Dick & Gannon v. Riddle*, 139 Mo. App. 584, 123 S. W. 486.

28. *A. M. Dillow & Co. v. Monticello*, 145 Ia. 424, 124 N. W. 186.

See §§ 1897 and 1899 *ante*.

29. *Dunn v. McNeely*, 75 Mo. App. 217.

the contract must be construed with regard to such plans or specifications;³⁰ and where the latter differ from the proposal, the specifications must govern.³¹

If the ordinance fails to specify the period within which the work is to be completed, and if time is not made the essence of the contract by the express stipulation of the parties thereto, the improvement should be completed within a reasonable time.³²

§ 1924. Forfeiture and restoration.

If the contract has become forfeited because of failure to complete the work in time, an offer to allow the contractors to complete the work will, if accepted, restore the contract.³³ But a mere request by the contractor's sureties that another person be permitted to complete the work will not operate as a waiver of the forfeiture as to them.³⁴

30. *Barry v. New York*, 56 N. Y. S. 1049, 38 App. Div. 632; *Murphy v. Yonkers*, 60 N. Y. S. 940, 45 App. Div. 621.

31. *Murphy v. Yonkers*, 60 N. Y. S. 940, 45 App. Div. 621.

Specifications. Where the contract and the specifications each refer to the other so that neither can be understood without an examination of the other, the specifications will be considered as part of the contract. *Central Bitulithic Pav. Co. v. Mt. Clemens*, 143 Mich. 259, 106 N. W. 888.

Where an estimate contained in the specifications is essential to enable bidders to make intelligent bids it must be construed as part of the contract. *Smith v. Salt Lake City*, 83 Fed. 784.

32. *Hilgert v. Barber Asphalt Pav. Co.*, 107 Mo. App. 385, 81 S. W. 496.

Time. Contract for street paving which contains no stipulation

as to when the work shall be finished construed to be controlled by a general ordinance on the subject where the contract provided that it should be controlled by the ordinance applicable. *Philadelphia v. Jewell's Estate*, 135 Pa. 329, 19 Atl. 947, 20 Atl. 281.

Stipulation that for failure to complete the work by a certain date, the contractor shall forfeit a certain portion of his pay renders the contract indefinite as to the time of completion of the work, and the work must be completed within a reasonable time. *Paul v. Conqueror Trust Co.*, 125 Mo. App. 483, 102 S. W. 1070.

Time as essence of the contract. § 1933 *post*.

33. *Jones v. New York*, 70 N. Y. S. 46, 60 App. Div. 161; *O'Connor v. New York*, 174 N. Y. 517, 66 N. E. 1113.

34. *Jones v. New York*, 70 N. Y. S. 46, 60 App. Div. 161; *O'Con-*

b. *Performance.*

§ 1925. Substantial performance sufficient.

A substantial performance of a contract for municipal work is sufficient to entitle the contractor to recover payment for the work.³⁵ To exact literal compliance with the specifications and plans is viewed as a harsh and unjust requirement which the courts decline to enforce.³⁶ But without substantial performance neither the municipality nor the property owners can be forced to pay for the work.³⁷ In such case an ordinary action of *quan-*

nor v. New York, 174 N. Y. 517, 66 N. E. 1113.

35. *Indiana*. *Shirk v. Hup*, 167 Ind. 509, 78 N. E. 242; Rehearing denied 167 Ind. 509, 79 N. E. 490.

Kentucky. *Middlesborough, etc. Co. v. Knoll*, 21 Ky. L. Rep. 1399, 55 S. W. 205.

Massachusetts. *Lincoln v. Worcester*, 122 Mass. 119.

Missouri. *Burress v. Spring*, 143 Mo. App. 688, 128 S. W. 27; *Steffen v. Fox*, 124 Mo. 630, 28 S. W. 70; *St. Louis v. Ruecking*, 232 Mo. 325, 134 S. W. 657.

New York. *Brady v. New York*, 132 N. Y. 415, 30 N. E. 757.

36. *Brady v. New York*, 132 N. Y. 415, 30 N. W. 757, aff'g 58 N. Y. Super. Ct. 26, 26 Jones & S. 184, 9 N. Y. S. 893.

37. *Snouffer & Ford v. Tipton*, 150 Ia. 73, 129 N. W. 345; *Denton v. Atchison*, 34 Kan. 438, 8 Pac. 750; *Hund v. Rackliffe*, 192 Mo. 312, 91 S. W. 500.

Substantial performance of a contract for grading a street is established although a sidewalk at a driveway crossing is not yet reduced to the general level. *Lincoln v. Worcester*, 122 Mass. 119.

Contractor for the construction of a sidewalk cannot recover compensation for the work where he knew that he was laying same above the established grade. *Tan-anvich v. Lamezyk*, 134 Ill. App. 135.

Breach of performance if material furnished is not that specified. *McGovern v. Loder* (N. J., 1890), 20 Atl. 209.

Where in a contract to construct a sewer, fraud is set up as a defense, the requirements of the contract prevail over the requirement that the work was to be done to the satisfaction of the superintendent of streets. *McVerry v. Kidwell*, 63 Cal. 246.

Municipal authorities having general charge of public improvements may be compelled to investigate complaints against the contractor charging a violation of "labor laws" regulating the hours and wages of laborers employed thereon. *People v. Van Wyck*, 59 N. Y. S. 134, 27 Misc. 439.

A municipal contractor who voluntarily fails to complete work on a building, which he has contracted to perform, can recover

tum meruit will not lie. The reason given is that assessments for such improvements are not based upon contract, but are purely *in invitum* imposed by virtue of the sovereign power and can be enforced only where the law providing therefor has been substantially followed.³⁸ And if the contract has not been substantially performed it has been held that the assessment may be restrained at the suit of a tax payer.³⁹

the reasonable value of the part performed only when he has substantially performed the contract and has intended in good faith to perform the whole. *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510.

"It would be a harsh and unjust rule that would require the contractor to construct the sidewalk to conform exactly in its whole course to the established grade." *Platte v. Paxton*, 141 Mo. App. 175, 124 S. W. 531.

In an action by a municipal contractor on a contract which has been substantially performed the contractor is entitled to recover under the common counts, even though the special counts are insufficient, where nothing remains to be done except for the city to pay the amount due the contractor. *Chicago v. Duffy*, 218 Ill. 242, 75 N. E. 912.

A resolution ordering the improvement of a street in accordance with certain specifications does not require changes to be made of parts of the street that already conform to the specifications. *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, rehearing denied, 167 Ind. 515, 79 N. E. 490.

A contract for the construction of a sidewalk which required that

the subsills of sidewalks shall be of oak and two inches by six, held not substantially complied with by putting in subsills of pine two inches by four. Here it appeared that those provided for in the contract would last twice as long as those furnished. Where the city refuses to accept such sidewalks and does not waive a performance of the contract there can be no recovery on a *quantum meruit*. *Denton v. Atchison*, 34 Kan. 438, 8 Pac. 750.

Evidence held sufficient to show a substantial performance of the contract. *Gilchrist & Co. v. Des Moines* (Ia., 1911), 116 Pac. 776.

A contractor who relies for recovery upon substantial as contrasted with complete performance of the contract must prove the expense of supplying the omissions, or he fails in his proof. *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; *St. George Contracting Co. v. New York*, 128 N. Y. S. 393, 143 App. Div. 554.

Reasonable time. *Turner v. Springfield*, 117 Mo. App. 418, 93 S. W. 867.

38. *Snouffer & Ford v. Tipton*, 150 Ia. 73, 129 N. W. 345.

39. *McClain v. Des Moines*, 128 Iowa 331, 103 N. W. 979.

§ 1926. Defective performance.

According to the rule stated in the preceding section it follows that when the work is so defective as not to amount to a substantial performance of the contract, the contractor is not entitled to recover.⁴⁰ To express the rule in different language, a reasonable compliance with the requirement of the ordinance and the contract for public work is necessary, to the validity of the tax bill.⁴¹ Property owners are entitled to have a contract

40. Defective performance. Architects contracting to draw plans for a municipal building to cost not more than a specified amount for a compensation of a certain per cent of the cost are not entitled to recover compensation for making plans for a building costing more than such amount. *Bernstein v. New York*, 127 N. Y. S. 987, 143 App. Div. 543.

Where contract for municipal work provides that the contractor shall save the city harmless from all damages by reason of any negligence on his part in doing the work, contractor cannot recover on the contract during the pendency of a claim against the city for damages for personal injuries resulting from the dangerous condition of the work. *Anderson v. Grant*, 114 Mich. 161, 72 N. W. 1144, 4 Det. Leg. N. 544.

Where contractor for sidewalk improvements, by carelessness and unskillfulness left the place an eyesore and annoyance, he was held bound to restore it to good condition or pay the abutting owner what it would cost him to do so. *Schan v. Uvalde Asphalt Pav. Co.*, 88 N. Y. S. 1045.

In New Jersey it has been held

that a defect in the construction of a sewer and its failure to answer the purpose intended will not relieve one assessed from the payment of the assessment. *Vandebeck v. Jersey City*, 29 N. J. L. 441.

Where the defective condition of the work is due solely to an improper method of construction lawfully ordered by the engineer in charge, the contractor is entitled to recover payment for the work. *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78, 10 Det. Leg. N. 200. See also, *Chicago v. Duffy*, 288 Ill. 242, 75 N. E. 912.

An owner of land abutting on a street whose roadbed is being paved in an imperfect manner by a municipal contractor can sue in equity for himself and other abutting owners to restrain the council from paying for such work in cases in which such owners will be assessed in part for such cost. *Loder v. McGovern*, 48 N. J. Eq. 275, 22 Atl. 199, 27 Am. St. Rep. 446.

41. *Barber Asphalt Pav. Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062; *McQuiddy v. Brannock*, 70 Mo. App. 535.

for street improvements completed according to a fair and reasonable construction of the ordinance directing the work to be done before they shall be called upon to pay for it.⁴² The fact that the municipality makes payment of monthly estimates without protest will not estop it from setting up a defective performance of the work.⁴³

§ 1927. Same—waiver of defects.

Sometimes certain defects in the work may be waived by the appropriate corporate authorities.⁴⁴ For exam-

Workmanlike manner. Some laws allow in actions against the property owners on taxbills the property owners to set up the defense that the work was not done in a good and workmanlike manner. Under such provision it is held a good defense that the pavement was laid on a bed of concrete six inches thick while the contract required it to be nine inches thick. *Traders' Bank v. Payne*, 31 Mo. App. 512.

42. *Hund v. Rackliffe*, 192 Mo. 312, 91 S. W. 500.

43. *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78, 10 Det. Leg. N. 200.

44. **Waiver of strict compliance with contract and ordinance by city sanctioned.** *Lake Erie & W. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465.

Waiver of completion of contract by municipal corporation authorized, and contractor permitted to recover on *quantum meruit*. *Hayden v. Madison*, 7 Me. 76.

Where the municipality accepts improvements with knowledge that a certain kind of material has been used in the construction, it waives a requirement in the con-

tract for a different kind. *Newport v. Schoolfield*, 142 Ky. 287, 134 S. W. 503; *St. Louis v. Ruecking*, 232 Mo. 325, 134 S. W. 657.

A clause in a contract for excavating a tunnel, forbidding the use of explosives in the work may be waived by municipal officer having absolute control and supervision of the work. *Chicago v. Murdock*, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221, aff'g 113 Ill. App. 656.

Right to waive requirements as to depth of work or material to be used in a paving contract let by the legislative body on the part of the city engineer, denied. *King Hill Brick Mfg. Co. v. Hamilton*, 51 Mo. App. 120.

Committee, held not empowered to accept work or waive performance thereof in behalf of town. *Allen v. Cooper*, 22 Me. 133.

Where a contract for street improvements required stipulated damages to be paid for delay before the acceptance of the work performed under the contract, an acceptance of such work by the city without any claim for demand for such damages is a waiver of the city's right thereto. *Central Bitulithic Pav. Co. v. Mt.*

ple, defects may be waived by the council where all the details of the work are left to this body and not made the basis of the consent of property owners.⁴⁵ So it has been held that a requirement in a contract for the construction of a sewage disposal plant that a particular test be applied to the work may be waived by the municipality and the work may be accepted without the test being made.⁴⁶

§ 1928. Excuse for defective work or non-performance.

If defective work, or the failure of the contractor to perform the work contracted for, is due to the fault of the municipality,⁴⁷ or to some action by the state,⁴⁸ the

Clemens, 143 Mich. 259, 106 N. W. 888, 12 Det. Leg. N. 996.

In making and providing for street improvements, to a certain extent, municipal officers are the agents of the property owners where the improvements are made at their own expense. § 88 *ante*, vol. 1. Regular contracts though injudicious are binding on the lot owners, and such owners are entitled to have such contracts performed substantially. Municipal officers have no power to dispense with such performance especially where it results in loss to the property owners and gain to the contractor. *Pepper v. Philadelphia*, 114 Pa. St. 96, 6 Atl. 899; *Brown v. Philadelphia*, 3 Sad. (Pa.) 45, 6 Atl. 904.

45. *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. Rep. 472.

46. *Hart v. New York*, 201 N. Y. 45, 94 N. E. 209.

47. Failure of the city to pay money when it falls due under a contract for public work will excuse delay in the performance of the rest of the work. *Chicago v.*

Duffy, 117 Ill. App. 261; *Chandley v. Cambridge Springs*, 203 Pa. 139, 52 Atl. 87.

If delay is due to failure of municipality to obtain right of way the contractor may abandon the work or claim damages. *Sheehan v. Pittsburg*, 213 Pa. St. 133, 62 Atl. 642.

The contractor may recover if it appears that the full completion of the street improvement is prevented by the building of railroad tracks on the street with the consent of the city and the work is performed as far as possible. *Lake Erie & W. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465.

Where the failure of a municipal corporation to perform its part of the contract contributes to the failure of the contractor to complete his part, the corporation cannot urge the failure of the latter in defense of an action for partial performance. *Delafield v. Westfield*, 58 N. Y. S. 277, 41 App. Div. 24, *aff'd* in 169 N. Y. S. 582, 62 N. E. 1095.

See § 1932 *post*.

48. A contractor prevented from

contractor stands excused therefor. But the contractor is not justified in delaying his work, it has been held, solely because the municipality has been unable to sell bonds issued for payment of the work.⁴⁹ So the fact that part of the improvement contracted for by the municipality was to be done by the contractor under a prior contract with a property owner will not excuse the performance of the whole work within the time required by the contract.⁵⁰ So the fact that the assessment levied to pay for the improvements is invalid furnishes no ground to the contractor to abandon his contract where the charter authorizes a new assessment to be made in lieu of the one declared void.⁵¹

Mere interference with the work by third persons,⁵² bad weather, and the like will not excuse non-performance, unless it is so provided in the contract.⁵³

§ 1929. Acceptance of work by municipality—effect.

The acceptance by the municipality, or by its proper corporate authorities, of a public improvement after its completion is, in the absence of fraud, conclusive on property owners that the work was done according to the contract,⁵⁴ and such decision of the proper corporate

completing a paving contract by reason of a state law forbidding the opening of streets through certain parts, held entitled to recover for work done. *Philadelphia v. Fell*, 9 Phila. (Pa.) 180, *aff'd* *Fell v. Philadelphia*, 81 Pa. St. 58.

49. *Chandley v. Cambridge Springs*, 203 Pa. St. 139, 52 Atl. 87.

50. *Childers v. Holmes*, 95 Mo. App. 154, 68 S. W. 1046.

51. *Morgan Park v. Gahan*, 136 Ill. 515, 26 N. E. 1085, *rev'g* 35 Ill. App. 646.

52. *Whittemore v. Sills*, 76 Mo. App. 248.

An injunction secured by a

stranger to the contract, restraining the work, will not excuse the failure of the contractor to complete the work within the time specified in the contract, unless the injunction makes the prosecution of the work unlawful. *Whittemore v. Sills*, 76 Mo. App. 248.

53. *Cochran v. People's Railway Co.*, 131 Mo. 607, 33 S. W. 177; *McQuiddy v. Brannock*, 70 Mo. App. 535.

54. *Arkansas. Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702.

California. Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; *Phelan v. San Francisco*, 62 Cal.

44.

authorities made in good faith and in the public interest is usually regarded as binding and precludes judi-

Indiana. Lux & Talbott Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014; Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676; Green v. Spanklin, 24 Ind. App. 608, 57 N. E. 269.

Kentucky. Preston v. Roberts, 75 Ky. (12 Bush) 70; Eversole v. Walsh, 25 Ky. L. Rep. 784, 76 S. W. 358; Isenberg v. Selvage, 103 Ky. 260, 44 S. W. 914; Bogard v. O'Brien, 14 Ky. L. Rep. 648, 20 S. W. 1097; Baldrick v. Gast, 25 Ky. L. Rep. 1977, 79 S. W. 212; Whitefield v. Hipple, 11 Ky. L. Rep. 386; Joyes v. Shadburn, 11 Ky. L. Rep. 892, 13 S. W. 361; Henderson v. Lambert, 14 Bush. (77 Ky.) 24.

Maryland. Baltimore v. Raymo, 68 Md. 569, 13 Atl. 383.

Minnesota. State ex rel. v. McCardy, 87 Minn. 88, 91 N. W. 263.

Missouri. Neosho City Water Co. v. Neosho, 136 Mo. 498, 38 S. W. 89.

Oregon. Duniway v. Portland, 47 Ore. 103, 81 Pac. 945; Chance v. Portland, 26 Ore. 286, 38 Pac. 68.

Pennsylvania. Philadelphia v. Brooke, 81 Pa. St. 23, rev'g 9 Phila. (Pa.) 168.

Acceptance and approval of work by the council held to be a ratification of certain changes made by the city surveyor. Gilmore v. Utica, 15 N. Y. S. 274, 40 N. Y. St. Rep. 7, 61 Hun (N. Y.) 618.

Acceptance by the board of public works of the performance of a paving contract, held to be a bar

to the defense that the material and work done were not as the contract provided. In such case equity will not enjoin the collection of the assessment. Dixon v. Detroit, 86 Mich. 516, 49 N. W. 628.

The fact that the city accepted sidewalk improvements, before the sidewalks in front of some of the lots had been begun, is immaterial where the council consented that the owners of such lots could put down their own pavement, and such sidewalks were not included in the contract. Middlesborough Town & Land Co. v. Knoll, 21 Ky. L. Rep. 1399, 55 S. W. 205.

Where labor and materials furnished by a municipal contractor under a void supplemental agreement are accepted by the city, the contractor is entitled to recover their reasonable value. Chicago v. McKechney, 205 Ill. 372, 68 N. E. 954, rev'g 91 Ill. App. 442.

The construction of a gutter three feet wide instead of four feet wide, as required by the contract, is a defective performance, not a non-performance, and acceptance is conclusive. Whitefield v. Hipple (Ky., 1889), 12 S. W. 150.

Authority to accept. Under a law imposing the duty of acceptance on the city council acceptance of such work by the board of public works will not render an assessment therefor enforceable. Haisch v. Seattle, 10 Wash. 435, 38 Pac. 1131.

Acceptance by the city of part of a public improvement does not

cial review.⁵⁵ However, it has been held in some decisions that such acceptance in the absence of proof of fraud, is only *prima facie* evidence as to completion and the manner in which work was done.⁵⁶

make property owners liable to pay for the work done. *Henderson v. Lambert*, 77 Ky. (14 Bush.) 24.

Decision of superintendent of streets that work was performed in accordance with contract, held conclusive in the absence of appeal from such decision to the legislative body. *Emery v. Bradford*, 29 Cal. 75; *Walsh v. Mathews*, 29 Cal. 123; *Cochrane v. Collins*, 29 Cal. 130.

Certificate of engineer. Where contract makes the certificate of an engineer final and conclusive as to the quantity of work done, such certificate is not conclusive as to the legal interpretation of the terms of the contract, and whether the amount of work is under the terms of the contract is a question for the court. *Re Morris & Cummings Dredging Co.*, 101 N. Y. S. 726, 116 App. Div. 257.

See § 1938 *et seq.*, *post*.

In *mandamus* proceeding by the contractor to compel the corporation to collect the assessment to pay for the work of building a sewer the certificate of the city engineer who inspected the work as it progressed that the work had been performed as per specifications cannot be impeached as incorrect. *People v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006.

Liability for refusal to accept. Where contract for municipal work provides that no payments

thereunder shall be made to the contractor until the money has been collected by assessments, the city will be liable for wrongfully refusing to accept the work after completion. *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. Rep. 472.

Refusal of part. Municipality cannot avail itself of that part of an unauthorized contract which is beneficial to itself and repudiate the rest. *Ida Grove v. Ida Grove Armory Co.*, 146 Ia. 690, 125 N. W. 866; *Kagy v. Independent School Dist.*, 117 Ia. 694, 89 N. W. 972.

55. Discretionary power vested in the municipal legislative body to accept and approve work performed under contract, held not subject to judicial review no matter how unsatisfactory the action of the council may be so long as the members thereof acted in good faith in performing such duty. *Motz v. Detroit*, 18 Mich. 495.

Under Illinois statutes the judgment of the county court confirming an acceptance of a local improvement by the city is *res adjudicata* of all questions of fact approved and confirmed by it. *Martin v. McCall*, 247 Ill. 484, 93 N. E. 418.

56. *Gulick v. Connely*, 42 Ind. 134; *Municipality No. 2 v. Guillothe*, 14 La. Ann. 297; *New Orleans v. Ferriere*, 17 La. Ann. 183; *New Orleans v. Halpin*, 17 La. Ann. 185, 87 Am. Dec. 523.

Mere acceptance of the work is not necessarily binding. Thus, as indicated, fraud on the part of the contractor in connection with the act of the municipal authorities in accepting his work renders the acceptance void as to property owners.⁵⁷ The corporate authorities in accepting work act in a *quasi* judicial capacity, and the order of acceptance may be set aside by a court of equity for fraud.⁵⁸ If the improvement is so defective or incomplete in its construction that a reasonable man cannot honestly say that there is a substantial performance of the contract, its acceptance by the authorities is in a legal sense a fraud upon the property owner, and he is entitled to relief against the assessment.⁵⁹

Acceptance on conditions which are not performed does not establish liability to pay for the work.⁶⁰ The fact that the municipality made payments on the work of periodical estimates will not estop it from setting up

57. Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676; Green v. Shanklin, 24 Ind. App. 608, 57 N. E. 269.

58. Gorman v. Johnson, 46 Ind. App. 672, 91 N. E. 971.

59. Eiermann v. Milwaukee, 142 Wis. 606, 126 N. W. 53, 27 L. R. A. (N. S.) 1085.

Acceptance by the town engineer of work and materials not complying with the contract cannot bind the municipality. Sterling v. Hurd, 44 Colo. 436, 98 Pac. 174.

In a contract for flagging, paving, etc., which had not been substantially complied with, although the work was approved by certain municipal officers and the street had been in public use for several years the court authorized a deduction from the price of the difference between the cost of the work if it had been done and the materials if they had been fur-

nished according to the substantial requirements and their cost as done and furnished. The city was also restrained from paying to the contractor any more than the balance. Bond v. Newark, 19 N. J. Eq. 376.

Burden of proof. In an action against the municipality upon a contract for municipal work accepted by the municipality the onus is upon the municipality to establish affirmatively the liability of the contractor for expenses incurred by it for repairs to the work after the acceptance, where it alleges that the repairs were made necessary by the contractor's failure to comply with the terms of the contract. Consolidated Engineering Co. Ltd. v. Crowley, 105 La. 615, 30 So. 222.

60. Atkinson v. Davenport, 117 Ia. 687, 84 N. W. 689

an insufficient performance.⁶¹ And a municipality cannot be held liable on an implied promise to pay for work done under an illegal contract, even though it accepted the work with knowledge of the benefits accruing therefrom.⁶²

§ 1930. Same—what is acceptance.

What particular act or acts on the part of the proper corporate authorities will constitute an acceptance must depend on the governing law, the contract in question and the special circumstances involved.⁶³ In the absence of fraud certain acts, as approval of work by municipal officer, issuing of bonds by the council to pay for the work, and the payment to the contractor of money collected, have been held to constitute acceptance, and waiver of performance of a contract for constructing a sewer although the work was defective.⁶⁴ So a certificate signed by a majority of municipal officers who had been duly empowered to make the contract approving the contractor's accounts for the removal of snow and ice from certain streets was held a ratification and acceptance of the work.⁶⁵

On the contrary, acceptance by the council of a report of its committee that certain streets "have been accepted for the purpose of special assessment," which does not refer to the work done, has been held insufficient to bind property owners.⁶⁶ So where the municipal authorities take possession of public work from necessity and expressly state that it is done without prejudice to the city's rights against the contractor, there

61. *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78, 10 Det. Leg. N. 200.

62. *Newport v. Schoolfield*, 142 Ky. 287, 134 S. W. 503.

63. Certain acts held to constitute acceptance and ratification of contract for repair of streets.

Davis v. Jackson, 61 Mich. 530, 28 N. W. 526.

64. *People v. Syracuse*, 20 N. Y. S. 236, 65 Hun 321.

65. *Leverich v. New York*, 66 Barb. (N. Y.) 623.

66. *Ryan v. Dubuque*, 16 Ia. 312, 76 N. W. 703.

is no acceptance of the work.⁶⁷ So the use of roads by the public was held not to be an acceptance or waiver on the part of the municipal corporation of the performance of a contract to keep the roads in good repair for the term of three years under a contract providing that the acceptance and approval should be by the mayor and the joint standing committee on streets and highways for the time being.⁶⁸ And the mere presence of the municipality's inspectors while concrete pavement was being laid in cold weather was held insufficient to render the public liable to pay for portions of the work made defective by freezing.⁶⁹ So where a contractor for the construction of a public building proceeded to erect a building not designated by the contract, and the municipality refused to allow him to proceed after the foundation walls were constructed, a completion of the building by the city on such walls is not an acceptance of the work done by the contractor so as to make the city liable therefor.⁷⁰

§ 1931. Delay and waiver of damages therefor.

A contract provision that the contractor may be granted an extension of time to complete the work on condition that a certain per cent per month shall be deducted from the assessments is in the nature of a penalty which the municipality may enforce, or not, in its discretion.⁷¹ The specified penalty for delay is a matter entirely between the municipality and the contractor, and a property owner taxed for the improvement is not entitled to credit for any part of the penalty where payment of the penalty is not enforced.⁷²

67. *MacKnight Flintic Stone Co. v. New York*, 43 N. Y. S. 139, 116.

13 App. Div. 231; *Madison v. American Sanitary Eng. Co.*, 118 Wis. 480, 95 N. W. 1097.

68. *Veazie v. Bangor*, 53 Me. 134.

50. 72. *Lindsey v. Brawner*, 29 Ky. L. Rep. 1236, 97 S. W. 1.

69. *Ryan v. Bay City*, 160 Mich.

70. *Ketterman v. Ida Grove* (Ia., 1909), 120 N. W. 641.

71. *Gulick v. Connely*, 42 Ind.

Acceptance of work without claim for stipulated damages provided in the contract on account of delay in completing the work to be paid prior to acceptance, constitutes a waiver of such damages.⁷³ But where the improvement is to be paid for by both the municipality and the property owners, failure to take such damages into consideration in making the assessment on the property is not a waiver of the penalty for delay.⁷⁴ So allowing the contractor to complete the work after the time limit has expired does not operate as a waiver on the part of the municipality of its right to liquidated damages for the delay.⁷⁵

§ 1932. Effect of partial performance.

Generally the acceptance by a municipality of the benefit of a partial performance of a public improvement, establishes liability for the reasonable value of the work done.⁷⁶ However, where the improvement is part of a connected system, an acceptance by the municipality of part of the whole work, it has been held, is not binding on abutting property owners.⁷⁷

If the contractor is prevented by the municipality from completing the work, he may recover the value

73. *Central Bitulithic Pav. Co. v. Mt. Clemens*, 143 Mich. 259, 106 N. W. 888, 12 Det. Leg. N. 996.

74. (1909) *Barber Asphalt Pav. Co. v. Wabash*, 43 Ind. App. 167, 86 N. E. 1034.

75. *Hipp v. Houston*, 30 Tex. Civ. App. 573, 71 S. W. 39.

The fact that the city waives its right to charge liquidated damages against the contractor for delay in the performance of the work does not necessarily operate as an admission on the part of the city that it is responsible for the delay. *Mairs v. New York*, 65 N. Y. S. 160, 59 N. E. 1126, *aff'd in*, 166 N. Y. 618, 52 App. Div. 343.

Under a contract prescribing a

time for the performance of the work, with a proviso that upon default by the contractor the city may either declare the contract forfeited or hire persons to complete the unfinished portion and charge the expense to the contractor, the municipal authorities may waive a delay in performance. *Hubbard v. Norton*, 28 Ohio St. 116.

76. *Sherman v. Connor* (Tex. Civ. App., 1903), 72 S. W. 238; *Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053.

77. *Berwind v. Galveston & H. Inv. Co.*, 20 Tex. Civ. App. 426, 50 S. W. 413; *Henderson v. Lambert*, 14 Bush. (Ky.) 24.

of what has has done.⁷⁸ An abandonment of a contract by the contractor prior to its completion because the assessments against property to pay therefor were illegal, usually deprives him of the right to recover on warrants or assessments thereunder.⁷⁹

§ 1933. Time as essence of contract.

As a general proposition complete performance of the contract, as the improvement of a street, is a condition precedent to the right to recover compensation therefor.⁸⁰ Hence if the contractor fails to complete the work, no liability arises against the municipality merely because what has been done may appear to be beneficial to it; nor in such case is the municipality bound to tear up and return the material.⁸¹ A contract for municipal work must be completely performed within the time specified therein or within the time extended during the life of the contract, or no assessment thereupon can be levied,⁸² nor is the contractor entitled to compensation.⁸³

Generally where time for completion of public work is made the essence of the contract, failure to complete the work within such time invalidates the taxbills therefor.⁸⁴ If the ordinance provides that the work shall be

78. *Hardiman v. New York*, 47 N. Y. S. 786, 21 App. Div. 614.

See § 1928 *ante*.

79. *Connolly v. San Francisco*, 99 Cal. 17, 33 Pac. 1109.

See § 1963 *post*.

80. *Bonesteel v. New York*, 20 How. Pr. (N. Y.) 237.

81. *Detroit v. Michigan Paving Co.*, 36 Mich. 335.

82. *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353; *John Kelso Co. v. Gillette*, 136 Cal. 603, 69 Pac. 296; *Childers v. Holmes*, 95 Mo. App. 154, 68 S. W. 1046.

Where a time is fixed in the contract for the completion of the work, omission to complete it

within such time, in the absence of authorized extension thereof, renders all subsequent proceedings invalid. *Rose v. Trestrail*, 62 Mo. App. 352.

83. Where the time for completing work under a municipal contract is fixed by ordinance, the contractor is not entitled to compensation unless he completes the work within such time. *Springfield ex rel. v. Schmook*, 120 Mo. App. 41, 96 S. W. 257.

84. *Springfield v. Schmook*, 120 Mo. App. 41, 96 S. W. 257.

When the whole work is not completed within the time specified in the contract the taxbills given

completed "within the time agreed upon" in the contract, the time specified therein will be of its essence in the absence of provision for a forfeiture if the work is not completed within that time.⁸⁵ A requirement in the ordinance that the work shall be completed within a certain time, cannot be changed by a provision in the contract for a penalty of a certain sum per day in case the work is not completed within such time.⁸⁶ But where the time specified in the contract for the completion of the work is not fixed by ordinance nor made the essence of the contract, the failure to complete the work within that time will not avoid the taxbill.⁸⁷

If time is not of the essence of the contract, completion within a reasonable time is sufficient.⁸⁸ If the ordinance fixes no time for the completion, the fixing of such

therefor are invalid, although there is no ordinance requiring the work to be completed within that time. *Ayres v. Schmohl*, 86 Mo. App. 349.

85. *Jones v. Paul*, 136 Mo. App. 524, 118 S. W. 522.

86. *Barber Asphalt Pav. Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062.

87. *Carlin v. Cavender*, 56 Mo. 286; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163; overruling *Ayres v. Schmohl*, 86 Mo. App. 349.

The law required abutting owners to improve the street when ordered and in event of failure, the city had power to contract therefor. Failure to complete the work within the time specified in the contract cannot be set up as a defense by the property owner in a proceeding to collect the cost for such work unless he shows an injury to him from the delay. *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533.

88. *Hilgert v. Barber Asphalt Co.*, 107 Mo. App. 385, 81 S. W. 496; *Sparks v. Villa Rose Land Co.*, 99 Mo. App. 489, 74 S. W. 120; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163; *Schibel v. Merril*, 185 Mo. 534, 83 S. W. 1069; *Carlin v. Cavender*, 56 Mo. 286.

Where time is not of the essence of the contract it is no defense to the collection of a tax imposed for street paving that the contractor failed to complete the work within the time specified. *Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383.

Where the notice for a letting of the contract required the work to be completed within ninety days and no time was fixed by the contract, the completion of the work more than a year after the date of the contract is not a completion within a reasonable time. *Turner v. Springfield*, 117 Mo. App. 418, 93 S. W. 867,

time in the contract followed by a clause providing for deductions from the contract price for each day's delay does not make time of the essence of the contract, and hence completion within a reasonable time will be sufficient to entitle the contractor to compensation.⁸⁹ In the absence of ordinance fixing the time within which public work shall be completed, time is not of the essence of the contract unless made so by the contract.⁹⁰ If an ordinance extends the time it will be presumed in the absence of evidence to the contrary that such time is reasonable.⁹¹

§ 1934. Right to abandon or annul contract.

A municipality may reserve the right to rescind or annul a contract.⁹² But before it can take such action

89. *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163; *Schibel v. Merrill*, 185 Mo. 534, 83 S. W. 1069. See also *Turner v. Springfield*, 117 Mo. App. 418, 93 S. W. 867.

90. *Carlin v. Cavender*, 56 Mo. 286; *Ayres v. Schmohl*, 86 Mo. App. 349; *Boulton v. Kolkemeyer*, 97 Mo. App. 530, 71 S. W. 539; *Hilgert v. Barber Asphalt Co.*, 107 Mo. App. 385, 81 S. W. 496; *Sparks v. Villa Rose Land Co.*, 99 Mo. App. 489, 74 S. W. 120; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163.

Courts of equity are slow to enforce forfeitures under the contract and will prefer a construction that will preserve rather than defeat the contractor's rights under it. *Wheless v. St. Louis*, 90 Mo. App. 106.

"Where the time of completion is specified in the contract, but not in the ordinance authorizing the improvement, time is not of the essence of the contract." *Brig-*

ham v. Hickman, 136 Mo. App. 216, 218, 116 S. W. 449; *Montague v. Kolkemeyer*, 138 Mo. App. 288, 120 S. W. 637.

91. *Brigham v. Hickman*, 136 Mo. App. 216, 116 S. W. 449.

Where a reasonable time is allowed by ordinance for the completion of public work, the city engineer cannot grant extensions delaying the completion beyond a reasonable time. *Gilsonite Construction Co. v. Field*, 157 Mo. App. 577, 138 S. W. 676.

92. *Bietry v. New Orleans*, 22 La. Ann. 149; *Bietry v. New Orleans*, 24 La. Ann. 21.

City may abandon improvement contract, subject to an action for damages thereon for breach of contract. *Broad v. Spokane*, 59 Wash. 268, 109 Pac. 1014.

Where the council had no authority to order the improvement its action in accepting a bid for the work may be rescinded by resolution. *McKee v. Greensburg*,

it must clearly appear that the contractor has failed to perform the conditions of his contract.⁹³ Obviously the municipality cannot annul the contract on account of something due to its own fault.⁹⁴

160 Ind. 378, 66 N. E. 1009. See also *Harrison v. New Brighton*, 97 N. Y. S. 247, 110 App. Div. 267.

The municipal corporation may repeal the ordinance providing for the work and thus abandon the work if the public good so requires. *Rittenhouse v. Baltimore*, 25 Md. 336.

The reservation of the right to make alterations in the form and dimensions of the work does not authorize the work to be stopped and the agreement thereby annulled. *Clark v. New York*, 4 N. Y. 338, 53 Am. St. Dec. 379, aff'g 3 Barb. (N. Y.) 288.

Under a charter providing that resolution, etc., not published and recorded shall be "null and void," a resolution revoking a contract for street grading and entered into a new contract not published and recorded is inoperative. *Marshall v. Commonwealth*, 59 Pa. St. 455.

93. *El Reno v. El Reno Water Co.*, 14 Okla. 53, 76 Pac. 126.

Report of city engineer or neglect on part of contractor to proceed as contract required, held sufficient to give the council jurisdiction to declare the contract forfeited. *Powers v. Yonkers*, 113 N. Y. 145, 21 N. E. 132.

Contract was for the construction of a street extension. The city failed to secure the right of way. The contract was annulled. Held, no defense to an action that the contract reserved to the city the right to annul the same at

any time "for any failure on the part of the contractor, or for the reason that the interest of said city may demand such annulment." *Murray v. Kansas City*, 47 Mo. App. 105.

Where municipal contract requires the whole contract to be completed within a certain time, and certain portions thereof within a proportionate time, a failure to do the first portion within the time allotted to it will not justify the city in abrogating the entire contract. *Cody v. New York*, 75 N. Y. S. 648, 71 App. Div. 54.

94. **Waiver of forfeiture.** City will not be permitted to declare forfeiture because of delay where it stands by and sees the contractor prosecute the work without objection. The contractor is entitled to compensation for the benefit which the city derived from his labor. *Carland v. New Orleans*, 13 La. Ann. 43.

An offer to allow the contractor to complete the contract on certain conditions, which is not accepted, does not constitute a waiver of the city's right to forfeit the contract for failure to complete it within the prescribed time. *Jones v. New York*, 70 N. Y. S. 46, 60 App. Div. 161; *O'Connor v. New York*, 174 N. Y. 517, 66 N. E. 1113.

A city cannot declare a contract abandoned for failure of the contractor to perform promptly the work thereunder, when the only cause for ceasing work

Under certain conditions the contractor may abandon the contract. It is competent to specify such conditions in the contract, and if so stipulated the abandonment must be in accordance with them.⁹⁵

§ 1935. Extension of time for performance.

Unless restricted it is competent for a municipality to extend the time for the performance of a contract for public improvements, prior to the expiration of the period for the completion named therein,⁹⁶ but ordinarily

was the failure of the city to pay the contractor money which he had a right to have and which was essential to enable him to hire men and purchase material necessary for the prompt performance of the contract. *Episcopo v. New York*, 72 N. Y. S. 140, 35 Misc. Rep. 623; *Snyder v. New York*, 77 N. Y. S. 637, 74 App. Div. 421.

95. **Abandonment by contractor.** A contractor for excavating a section of a canal can not rescind the contract on the ground that he discovered material to be excavated which was not contemplated by the contract, where he does not exercise his election to rescind until six months after the discovery and continues in the work during that time. *Sanitary District v. Ricker*, 91 Fed. 833, 34 C. C. A. 91; reversing 89 Fed. 251.

Where a contract for the construction of a sewer imposed upon the contractor the duty to remove water from trenches when encountered, the refusal of the city to recognize a claim for extra work and material therefor does not justify the contractor in abandoning the contract. *Winona v. Jackson*, 92 Minn. 453, 100 N. W. 358.

96. *California.* *Gafney v. San Francisco*, 72 Cal. 146, 13 Pac. 467; *Oakland Paving Co. v. Barstow*, 79 Cal. 45, 21 Pac. 544; *Taylor v. Palmer*, 31 Cal. 240; *Conlin v. Seamen*, 22 Cal. 546; *Houston v. McKenna*, 22 Cal. 550.

Indiana. *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788; *Terre Haute & L. R. Co. v. Nelson*, 130 Ind. 258, 27 N. E. 486.

Missouri. *Hund v. Rackliffe*, 192 Mo. 312, 91 S. W. 500; *Bridewell v. Cockerell*, 122 Mo. App. 196, 99 S. W. 22; *Sparks v. Villa Rosa Land Co.*, 99 Mo. App. 489, 74 S. W. 120.

New York. *People v. Brennan*, 18 Abb. Pr. (N. Y.) 100.

Under particular law extension denied where no work under the contract had been commenced. *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078.

The extension need not be indorsed on the contract before the expiration of the time originally fixed for the completion of the work. *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125.

Sometimes laws provide that upon the failure of a contractor to complete the work before the expiration of the contract time the

not afterwards;⁹⁷ and such extension does not constitute a new contract.⁹⁸ But if the law under which the contract is executed makes time of the essence of the contract an agreement extending the time for completing the work made after the expiration of the time originally agreed on, is void as against the municipality.⁹⁹ However, it has been held that although time may be of the essence of the contract it may be extended if the law so provides.¹

contract shall be relet. Frequently such provision has been construed to be mandatory. *Beveridge v. Livingston*, 54 Cal. 54; *Mahoney v. Braverman*, 54 Cal. 565.

The fact that the resolution authorizing the extension specifies wrong parties to the contract is immaterial. *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266.

The fact that the certificate provided to be given by the street superintendent of such an extension gives the wrong number of the resolution authorizing the inspection is immaterial. *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860.

Under a law authorizing the legislative body by resolution to empower the superintendent of streets to extend the time and which requires such resolution to be recorded under the supervision of the superintendent, held that failure to record the resolution of extension during the life of the contract did not render the extension invalid since the duties of the superintendent relating thereto are merely ministerial. *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885, followed in *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860.

97. *Dougherty v. Nevada Bank*,

81 Cal. 162, 22 Pac. 513; *Turner v. Dougherty*, 53 Cal. 619; *Torrens v. Townsend* (Cal., 1885), 6 Pac. 423; *Hund v. Rackliffe*, 192 Mo. 312, 324, 91 S. W. 500; *Neill v. Gates*, 152 Mo. 585, 592, 54 S. W. 560; *Paul v. Burress*, 152 Mo. App. 39, 132 S. W. 330; *Sparks v. Villa Rosa Land Co.*, 99 Mo. App. 489, 74 S. W. 120.

98. *Ede v. Cogswell*, 79 Cal. 278, 21 Pac. 767; *Oakland Pav. Co. v. Barstow*, 79 Cal. 45, 21 Pac. 544.

99. *Raisch v. San Francisco*, 80 Cal. 1, 22 Pac. 22.

Where ordinance makes time for completion of work of the essence of the contract, the city council has no power to waive same by extension. *Smith v. Westport*, 105 Mo. App. 221, 79 S. W. 725; *Spalding v. Forsee*, 109 Mo. App. 675, 83 S. W. 540.

1. *Probert v. Girard Inv. Co.*, 155 Mo. App. 344, 137 S. W. 41.

Under authority to extend the time an extension may be granted before a previous extension has taken effect, to begin at the expiration of such previous extension. *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025.

If power to extend the time for performance is vested in the municipal legislative body, it may be extended by ordinance or resolution;² but usually the time can not be extended by oral agreement.³ Approval and acceptance of the work completed after the expiration of the time specified, it has been held, constitutes an extension,⁴ but the adoption by the council of the report of its committee reciting that they believed it best to allow the matter of extension petitioned for by the contractor to stand open until the final settlement of the contract has been held not an extension of the contract.⁵

§ 1936. Completion by municipality of abandoned work.

Contracts for improvements generally provide that in event of neglect or refusal on the part of the contractor to complete the work the municipality may declare the contract forfeited and finish the improvement. In such case, ordinarily, the power of the local corporation to complete the contract is not limited to the ground upon which it was declared forfeited (*e. g.* refusal of the contractor to prosecute the work with due diligence) but extends to all matters necessary to the execution of the contract according to the plans and specifications.⁶

2. *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432; *Leavenworth v. Mells*, 6 Kan. 288; *Hund v. Rackliffe*, 192 Mo. 312, 91 S. W. 500.

3. Under a charter providing that "all contracts relating to city officers shall be in writing" extension of time cannot be by oral agreement. *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628.

4. Where contract provides for the completion of public work within a certain time or within such time thereafter as shall be directed or allowed, completion after the time designated, ap-

proved and accepted by the municipal authorities, is sufficient to entitle the contractor to payment. *Levi v. Coyne*, 22 Ky. L. Rep. 493, 57 S. W. 790.

5. *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78, 10 Det. Leg. N. 200.

Action of the council in setting aside the first assessment and warrant and directing further work, held not to operate as an extension of time. *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844.

6. *Powers v. Yonkers*, 114 N. Y. 145, 21 N. E. 122.

If a contractor abandons the work before completion, usually a new contract may be made under the law or ordinance authorizing the first contract, unless the law provides a different method in such case.⁷ Public work abandoned by the contractor and completed by the municipality under the terms of the contract is not always required to be re-let on advertisement and bids.⁸ If sureties complete the work as agents for the municipality after the contractor abandons it, they simply complete the original contract, and hence a re-letting of the contract to the lowest bidder is not required.⁹ Under a law providing that if the work should not be done within the time limited in the contract such work may be re-let without further notice, it was held that the "further notice" intended to be dispensed with is the notice to the lot owner and that notice of reletting of the contract as required was indispensable.¹⁰

Charters sometime provide that in case it becomes necessary to re-let the work to a new contractor, the first contractor shall pay any excess should the work be let at a greater expense and in event the expenses of re-letting should be less the contractor shall be paid the difference.¹¹ If the cost of the work exceeds the contract price, the municipality will not be liable to the contrac-

7. *Kemper v. King*, 11 Mo. App. 116.

8. *Jones v. Savage*, 53 N. Y. S. 308, 24 Misc. Rep. 158; *Re Gardner*, 6 Hun (N. Y.) 67.

9. *McChesney v. Syracuse*, 22 N. Y. S. 507.

10. *Mitchell v. Milwaukee*, 18 Wis. 92.

11. In one case a contract was let and the work declared abandoned. About six years thereafter a contract was made for the same work with another contractor. Here it was held that the facts did not show such a reletting or continuance of the first contract

as to give the first contractor a cause of action. *Ferdinand v. New York*, 13 N. Y. S. 226, 59 Hun 623.

A municipality is entitled to recover the reasonable cost of completing work unjustifiably abandoned by the contractor, over and above the amount which the contractor was to receive therefor, and such recovery may be had in an action against the surety on the contractor's bond. *Winona v. Jackson*, 92 Minn. 453, 100 N. W. 368. See also *San Antonio v. L. A. Marshall & Co.* (Tex. Civ. App., 1905), 85 S. W. 315.

tor for the value of material left by the contractor and used by the municipality in completing the work after it had been abandoned.¹² Where a contract for public work provided that if the contractor should fail to complete the work, the commissioner of streets might procure the necessary labor and materials and complete it at the expense of the contractor, the failure of the commissioner to procure such labor and materials at a reasonable cost is no defense against the city's claim against the contractor for the expense actually incurred in completing the work.¹³ The rule has been declared in Illinois that a contractor may recover in *assumpsit* for his tools, material and machinery taken and used by the municipality in completing the work.¹⁴ Under some laws a street improvement abandoned by the contractor before completion may be completed by the municipality at the expense of property owners.¹⁵

The expense of completing public work by the municipality on default of the contractor cannot be charged against the contractor where the work as constructed by the municipality is essentially different in plan and cost of construction from that contemplated by the contract.¹⁶ The right of a contractor for public work to have any particular plan adopted for the completion of the work by the municipality after he has abandoned it is waived by his acquiescence in the plan actually pursued.¹⁷

§ 1937. Rights of third persons.

Assignees and creditors of a contractor for public

12. *Winamac v. Hess*, 151 Ind. 229, 50 N. E. 81.

13. *Camden v. Ward*, 67 N. J. L. 558, 52 Atl. 392.

14. *Elgin v. Joslyn*, 36 Ill. App. 301, *aff'd* in 136 Ill. 525, 26 N. E. 1090.

15. *Worthington v. Covington*, 3 Ky. L. Rep. 392, (abstract).

16. *Milwaukee v. Shaller*, 84 Fed. 106, 28 C. C. A. 286, *certiorari* denied, 174 U. S. 802, 19 Sup. Ct. 884, 43 L. Ed. 1188, *aff'g* 91 Fed. 858, 34 C. C. A. 112.

17. *Camden v. Ward*, 67 N. J. L. 558, 52 Atl. 392.

work who abandons his contract occupy no better position thereunder than the contractor.¹⁸

Damage claims. A provision in a contract for public work authorizing the city to retain a part of the contract price to secure the payment of all claims for damages arising out of the performance of the work does not give a lien on moneys so retained by the city to a person injured by the negligence of the contractor. And a person so injured has no right to intervene in an action by the contractor against the city to recover money so retained.¹⁹

Laborers. In the absence of a right to a lien, a mechanic cannot recover a general judgment against the municipality for work done for the municipal contractor, since there is no privity of contract between him and the city.²⁰ The fact that the contract between the municipal corporation and the contractor provides that the former might retain money until the contractor should pay his laborers, gives no right of action to the laborers against the municipal corporation where the contractor has been paid in full.²¹

Materialmen. Charters sometimes provide that any person who has not been paid for material furnished or labor performed under a contract with the city may bring an action in his own name against the contractor and his bondsmen.²² The municipality is not liable to a materialman for material furnished the contractor for public work.²³ But it is held to be liable for material fur-

18. *Jones v. Savage*, 53 N. Y. S. 308, 24 Misc. Rep. 158.

19. *Mansfield v. New York*, 44 N. Y. S. 229, 15 App. Div. 316, *aff'd* in 165 N. Y. 208, 58 N. E. 889.

20. *Albany v. Lynch*, 119 Ga. 491, 46 S. E. 622.

21. *Old Dominion Granite Co. v. District of Columbia*, 20 Ct. of Cl. 127.

22. In one case such an amendatory provision was held to be retrospective and to apply to actions brought to enforce a liability on a bond executed under the charter before so amended. *Tompkins v. Forrestal*, 54 Minn. 119, 55 N. W. 813.

23. *E. I. Dupont, etc. Co. v. Culin-Pace Contracting Co.*, 206 Mass. 585, 92 N. E. 1023.

nished where the contractor fails to pay for the same, and it had due notice that it was being furnished.²⁴

Failure of municipal officers to require a contractor for public work to give a bond to secure laborers and materialmen, though required by statute, imposes no liability upon the corporation for materials furnished the contractor.²⁵ However, in some states the contrary has been held.²⁶ The mere right to retain an amount sufficient to meet claims of those who had done work and furnished material until the contractor could furnish proof of having paid such claims does not authorize the application of the money so retained to the payment of such claims.²⁷

Property owners. Where the expense of an improvement is to be borne by the property owners such owners cannot be held liable for work not covered by the contract.²⁸ Abutting owners may restrain the municipality from accepting and paying for street improvements not made in accordance with the contract.²⁹

A sub-contractor cannot be held to assume the obligations of the contractor under a municipal contract which involves mere conventional obligations and not

24. See *American Mill Co. v. Montesano*, 63 Wash. 683, 116 Pac. 257.

25. *Rock Island Lumber & Mfg. Co. v. Elliott*, 59 Kan. 42, 51 Pac. 894; *Freeman v. Chanute*, 63 Kan. 573, 66 Pac. 647; *Kettle River Quarries Co. v. East Grand Forks*, 96 Minn. 290, 104 N. W. 1077.

A materialman cannot recover for material not used in the work or delivered on the ground for such use. *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799.

26. *Scott-Graff Lumber Co. v. Independent School District No. 1*, 112 Minn. 474, 128 N. W. 672; *Gate*

City Lumber Co. v. Montesano, 60 Wash. 586, 111 Pac. 799.

27. *Quinlan v. Russell*, 15 Jones & S. (47 N. Y. Super. Ct.) 212.

An order given by the contractor upon the proper municipal officer for a warrant in favor of a materialman, held not to have the effect of making the municipal corporation the debtor in place of the contractor. *Stewart v. Christy*, 15 La. Ann. 325.

28. *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393.

29. *Wilkesbarre v. McDermott*, 6 Kulp. (Pa.) 345; *Pleasants v. Shreveport*, 110 La. 1046, 35 So. 283; *McCartan v. Trenton*, 57 N. J. Eq. 571, 41 Atl. 830.

the exercise by the municipality of its law making power.³⁰ A provision in a contract authorizing the city to retain moneys sufficient to satisfy the claims of third persons for work and materials furnished is solely for the benefit of the immediate parties to the contract and gives a sub-contractor no right of action against the city either in law or in equity.³¹ Equity will treat a sum retained for the payment of sub-contractors as an assignment of the sum so retained and will apply it to the payment of the sub-contractors to the exclusion of any other creditors or the original contractor.³²

Sureties. A charter provision which prohibits municipal authorities from entering into a contract with persons in default or arrears with the municipality does not apply to the surety of a municipal contractor who is called upon by the municipality to complete a contract abandoned by the contractor, so as to prevent the surety from recovering upon a supplemental agreement entered into between him and the city.³³

§ 1938. Certificate of approval of work.

Provisions that the work shall be done under the supervision of a designated municipal officer,³⁴ as the superintendent of streets,³⁵ whose decision as to the esti-

30. *Shreveport v. Shreveport Traction Co.*, 127 La. 560, 53 So. 863.

31. *McCabe v. Rapid Transit Subway Co.*, 127 Fed. 465.

Where money due under a municipal contract is assigned to a bank as collateral for a debt, the bank is a necessary party to the suit of a subcontractor to enforce his lien thereon. *Herman & Grace v. Board of Chosen Freeholders*, 73 N. J. Eq. 415, 416, 64 Atl. 742.

32. *Luthy v. Woods*, 6 Mo. App. 67.

A law to secure sub-contractors, etc., held to apply where the work

or materials were furnished before the passage of the law. *Klaus v. Green Bay*, 34 Wis. 628.

33. *O'Rourke Eng'r Const. Co. v. New York*, 125 N. Y. S. 664, 140 App. Div. 498.

34. *Supervision of an engineer. City Street Improvement Co. v. Marysville*, 155 Cal. 419, 101 Pac. 308.

35. Under a charter requiring street improvements to be made by or under the direction of the superintendent of streets a contract for the paving of certain streets expressly providing that the work shall be done under the

mates and the construction of the specification shall be final are valid. So it is competent for the parties to a contract for street improvements to provide that all measurements and estimates of given quantities of the work shall be made by a particular individual and that his estimates and measurements shall be conclusive on the parties, and, in such case, the judgment of the person selected on matters within his authority cannot be impeached by either party without a showing of fraud on his part, or mistake so gross as to imply bad faith, or that he failed to exercise his honest judgment on the matters submitted to him.³⁶ But to make such a certifi-

supervision and direction of the superintendent is valid. *Schenectady v. Union College*, 21 N. Y. S. 147, 66 Hun 179, rev'd in 144 N. Y. 241, 39 N. E. 67, 26 L. R. A. 614.

36. *California*. *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500.

Dakota. *McGuire v. Rapid City*, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752.

Georgia. *Green v. Jackson*, 66 Ga. 250.

Illinois. *Salfisberg & Co. v. St. Charles*, 154 Ill. App. 531.

Michigan. *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78, 10 Det. Leg. N. 200; *Rens v. Grand Rapids*, 73 Mich. 237, 41 N. W. 263.

Missouri. *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038.

New York. *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. Rep. 472, 43 L. R. A. 678; *People v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006; *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276, 15 Am.

St. Rep. 376; *Molloy v. Briarcliff Manor*, 129 N. Y. S. 929; *Everhard v. New York*, 35 N. Y. S. 315, 89 Hun 426; *Sewer Com'rs v. Sullivan*, 42 N. Y. S. 358, 11 App. Div. 472; *O'Brien v. New York*, 15 N. Y. S. 520; *Snyder v. New York*, 77 N. Y. S. 637, 74 App. Div. 421; *People v. Coler*, 57 N. Y. S. 461, 26 Misc. Rep. 509; *Thilemann v. New York*, 73 N. Y. S. 352, 66 App. Div. 455; *Smith v. New York*, 42 N. Y. S. 522, 12 App. Div. 391; *Jones v. New York*, 65 N. Y. S. 747, 32 Misc. Rep. 211, aff'd in 70 N. Y. S. 46, 60 App. Div. 161, aff'd in *O'Connor v. New York*, 174 N. Y. 517, 66 N. E. 1113.

Pennsylvania. *Commonwealth ex rel. v. Pittsburg*, 206 Pa. 379, 55 Atl. 1058; *Commonwealth ex rel. v. Pittsburg*, 204 Pa. 217, 53 Atl. 769; *McManus v. Philadelphia*, 201 Pa. 632, 51 Atl. 322; *Sicilian Asphalt Pav. Co. v. Williamsport*, 186 Pa. 256, 40 Atl. 471; *Smith v. Philadelphia*, 13 Phila. (Pa.) 177, 36 Leg. Int. 277.

C. C. A. 49; *Omaha v. Hammond*, 94 U. S. 98, 24 L. Ed. 70.

cate conclusive plain language in the contract is required. It is not to be implied.³⁷ If an engineer under an erroneous interpretation of the provisions of the contract evludes from his final certificate work actually done by the contractor and required by the contract, the certificate is not binding upon the contractor but may be attacked for palpable error.³⁸

Washington. McKivor v. Savage, 60 Wash. 135, 114 Pac. 810.

United States. Mobile v. Shea, 127 Fed. 521, 62 C. C. A. 319; Guild v. Andrews, 137 Fed. 369, 70 C. C. A. 49; Omaha v. Hammond, 94 U. S. 98, 24 L. Ed. 70.

The certificate under such provisions is conclusive only against the contractor. *People v. Coler*, 68 N. Y. S. 448, 58 App. Div. 131.

But where the certificate has been given and the work accepted by the proper officers, the city cannot question the certificate, unless fraud or palpable mistake is shown. *Quinn v. New York*, 45 N. Y. S. 7, 16 App. Div. 408.

The certificate of the architect authorized by the contract to certify the work is conclusive against the city. *Lantry v. New York*, 44 N. Y. S. 874, 19 Misc. Rep. 558.

In Pennsylvania it is provided by statute that the certificate of the engineer or other officer supervising the improvement, filed in the proper office, shall be conclusive of the time of completion thereof, but the officer making the certificate is made personally liable to any one injured by any false statement therein. *Philadelphia v. Street*, 41 Pa. Super. Ct. 503.

37. *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811; *Salfisberg &*

Co. v. St. Charles, 154 Ill. App. 531.

A provision in the contract for certificates of performance of work thereunder does not make such certificates conclusive of the validity of the contract. *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

In a contract to furnish material for, and construct, a harbor, held that the engineer's estimate of the value of extra work and material, was not conclusive but evidence of its actual value was admissible. *Hasbrouck v. Milwaukee*, 17 Wis. 266.

The certificate of the engineer designated by the contract to pass on the work is conclusive upon both parties, in the absence of fraud or such gross mistake as implies bad faith or a failure to exercise an honest judgment, notwithstanding a proviso in the contract that nothing therein contained shall affect the right of the city to reject the whole or any portion of the work should the certificate be inconsistent with the terms of the agreement, or otherwise improperly given. *Trinidad v. Hokasona*, 178 Fed. 438, 102 C. C. A. 421.

38. *Molloy v. Briarcliff Manor*, 129 N. Y. S. 929, 145 App. Div. 483; *Burke v. New York*, 40 N. Y. S. 81, 7 App. Div. 128.

Where city completes work

In order to impeach the certificate relating to the amount of work done on the ground of fraud or mistake the evidence must be direct, clear and satisfactory.³⁹ A mere showing that the individual who made the certificate was negligent and made mistakes is insufficient.⁴⁰ If the contract provides that the municipality shall not be estopped by any certification of the work from showing the true amount and character of the work, the burden of proving the incorrectness of the certificate is on the city.⁴¹ By accepting payment in accordance with the terms of the certificate ordinarily the contractor will be held to have accepted the certificate as final.⁴²

§ 1939. Same—what officer to give certificate.

To be valid the certificate must be given by the corporate officer designated in the law, and not by another, as by a clerk, subordinate or deputy.⁴³ Thus where the city engineer is required by charter to inspect and approve public work before property owners can be held liable for the same, such duties are *quasi-judicial* and cannot be performed by a deputy.⁴⁴ But where the law

which the contractor has failed to perform the decision of the city engineer will not bind the contractor for the expense incurred in completing the contract where there is no evidence that the expense was reasonable and necessary to the completion of the contract. *Marshall v. San Antonio* (Tex. Civ. App., 1901), 63 S. W. 128.

39. *Brady v. New York*, 132 N. Y. 415, 30 N. E. 757, 50 N. Y. Super. Ct. (26 Jones & S.) 184, 9 N. Y. S. 893.

40. *Bowman v. Stewart*, 165 Pa. St. 394, 30 Atl. 988.

41. *Dean v. New York*, 61 N. Y. S. 374, 45 App. Div. 605, rev'd in 167 N. Y. 13, 60 N. E. 236.

42. *Gearty v. New York*, 70 N.

Y. S. 942, 62 App. Div. 72, rev'd in 171 N. Y. 61, 63 N. E. 804.

43. Where a statute requires the certificate of certain officers, the contract cannot dispense with the necessity of a certificate by such officers and make that of the engineer sufficient. *People v. Coler*, 75 N. Y. S. 37, 69 App. Div. 409; appeal dismissed, 171 N. Y. 373, 41 N. E. 149.

44. *Harris v. Zable*, 5 Ky. L. Rep. 114.

Engineer required by the ordinance to estimate the quantity of rock excavated under a contract for the construction of a sewer must apply his professional skill and judgment in securing a proper measurement of the rock, and can not delegate the performance of

expressly authorizes such duties to be performed by a board or its deputy or deputies they may be performed by a subordinate agent.⁴⁵ If the contract calls for the joint certificate of the engineer and another, a certificate of the engineer alone is not conclusive.⁴⁶ Where payment for public work is required by the contract to be made in accordance with the decision of the city engineer, the engineer in office when the work is completed is the one to make the decision.⁴⁷

§ 1940. Same—necessity for certificate.

Where municipal officers are authorized to act only on the certificate of the city engineer or some other designated officer, they cannot lawfully act without it.⁴⁸

such duties to another. *Ernst v. Springfield*, 145 Mo. App. 89, 130 S. W. 419.

Certificate held not insufficient because signed by deputy instead of commissioner of public works himself. *Leeson v. New York*, 72 N. Y. S. 538, 65 App. Div. 105.

Under a contract requiring the certificate of the chief engineer as a prerequisite to payment, the certificate of a subordinate may not be substituted though the work was done under his supervision. *Worthington v. District of Columbia*, 19 Ct. of Claims 123.

The work was to be approved and accepted by the superintendent of streets. Held, he was not required personally to examine the work before accepting it but may approve it on the report of subordinates. *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127.

A clerk cannot sign a certificate as to completion of a public improvement where such certificate is required to be signed by the city surveyor in the absence of specific directions from the sur-

vveyor to the clerk to sign it. *Dowling v. Adams*, 108 Cal. XVII, 41 Pac. 413, following *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337.

In Illinois, the approval of public work by the board of local improvements is only tentative and before the improvement can be accepted and paid for by the municipality, the court in which the assessment is confirmed must determine that the improvement is constructed substantially according to the improvement ordinance. *Northwestern University v. Wilmette*, 230 Ill. 80, 84, 82 N. E. 615; *Chicago v. LeMoyne*, 243 Ill. 379, 90 N. E. 746; *People v. Martin*, 243 Ill. 284, 90 N. E. 699.

45. *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. Rep. 917.

46. *Graham v. Etna*, 79 N. J. L. 235, 75 Atl. 749.

47. *San Antonio v. L. A. Marshall & Co.* (Tex. Civ. App., 1905), 85 S. W. 315.

48. Where commissioners are authorized to pay money to the contractor on the certificate of the

But the certificate is not a condition precedent to the right of the contractor to maintain an action to recover a balance due on the contract.⁴⁹ So where the defective condition of work is due solely to an improper method of construction lawfully ordered by the engineer in charge, the contractors may recover for the work without the engineer's certificate.⁵⁰ So a provision requiring the contractor to obtain a certificate has no application where the action is against the city for damages for a breach of the contract.⁵¹

A municipality cannot avoid liability to pay for work done in accordance with the contract by delaying or refusing to give a certificate of approval therefor,⁵² although payment is made by the contract to depend upon the certificate or approval of a municipal officer.⁵³

§ 1941. Same—sufficiency of certificate.

There is a presumption in favor of the correctness of a certificate of a proper municipal officer relative to

engineer, parol assurance of the engineer that work is within the contract is insufficient. *O'Brien v. New York*, 19 N. Y. S. 793, 65 Hun 112, *aff'd* in 139 N. Y. 543, 35 N. E. 323.

49. *Cameron-Haron Realty Co. v. Albany*, 119 N. Y. S. 128, 134 App. Div. 722; *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661; *Dady v. New York*, 10 N. Y. S. 819, 57 Hun 456; *Toop v. New York*, 13 N. Y. S. 280.

50. *Willey v. School Dist.*, 25 Mich. 420, 90 N. W. 704; *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78, 10 Det. Leg. N. 200; *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700.

51. *Gearty v. New York*, 171 N. Y. 61, 63 N. E. 804, *rev'g* 70 N. Y. S. 942, 62 App. Div. 72.

52. *North Pacific Lumbering and Mfg. Co. v. East Portland*, 14 Ore. 3, 13 Pac. 4.

53. *Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321; *Parlin-Orendorf Co. v. Greenville*, 127 Fed. 55, 61 C. C. A. 591.

Contractor permitted to recover what his labor and materials were reasonably worth, although a majority of the board of public works neglected or refused to examine or accept the work where such acceptance was required. *Noonan v. Donoghue*, 50 Mo. 493.

Where an arbitrator designated by the contract to settle disputes thereunder, hears the claims and proofs and thereafter declines to make an award, the jurisdiction of the courts will attach. *Werneberg, Sheehan & Co. v. Pittsburg*, 210 Pa. St. 267, 59 Atl. 1000.

public work, but it is subject to rebuttal.⁵⁴ When otherwise sufficient, the omission of the date of the certificate will not invalidate it.⁵⁵ Where the original contract for public work was modified by resolution of the common council, the engineer's certificate, certifying, in effect that the work had been performed in accordance with the original contract as modified by the resolution, is sufficient.⁵⁶

c. Payment for Work.

§ 1942. Liability of municipality to contractor.

The liability of a municipality for the cost of any public improvement will depend upon the proper construction of the laws applicable and the contract made or authorized to be made with the contractor for the improvement. These laws and the contracts made under them vary widely in the several jurisdictions. Very few rules of general applicability may be deducted from the numerous decisions respecting this matter. However, the decisions which follow will illustrate the grounds of liability and the course of judicial reasoning.

Where municipal authorities, without collusion and against the contractor's opposition, compel the latter to do work or furnish material which the contractor claims is not required by the contract, and the question is fairly debatable and its determination doubtful, the contractor may comply with the demand under protest and subsequently recover damages if it should be shown that he was right in his contention. On the other hand, if the thing compelled is clearly beyond the require-

54. *Rooney v. May*, 23 La. Ann. 30.

55. *Leeson v. New York*, 72 N. Y. S. 538, 65 App. Div. 105.

Where engineer's certificate is required simply for the purpose of assisting the superintendent of streets in determining whether the contract has been satisfactorily

performed, the contents of a certificate satisfactory to the superintendent are immaterial to the validity of the lien for the work. *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

56. *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. Rep. 472.

ments of the contract, the contractor may not recover therefor even though he did it under protest.⁵⁷

If no power is possessed by the municipality to make the improvement at the expense of owners of property benefited thereby, it will be liable to the contractor for the cost of the improvement, provided it had general power to contract for such improvement.⁵⁸ Failure on part of the municipality to pay installments due under a contract for municipal work, on the ground of non-liability, is a breach of the contract for which the local corporation may be held responsible.⁵⁹ Under a contract giving the municipal corporation an option to pay special assessment certificates in city orders or in improvement bonds the contractor is entitled to a money recovery where the municipality fails to exercise or declare its option.⁶⁰ Where an appropriation is made by the municipality of the amount of money bid by it for property delinquent for a special assessment the contractor may recover it.⁶¹

An offer made to the municipality by a stranger to pay for a proposed improvement will not affect the rights of the contractor who makes the improvement.⁶² A municipality cannot be held liable for the cost of a public building erected out of the donation of a private person upon a lot owned by the local corporation where it has never assumed any liability therefor.⁶³ If the municipality has no power to make improvements out of a general fund, it cannot be held liable for failure to provide a special fund.⁶⁴

Arrangements between the municipality and a contractor for the performance of street work which are not

57. *Borough Const. Co. v. New York*, 200 N. Y. 149, 93 N. E. 480.

58. *Covington v. Noland*, 28 Ky. L. Rep. 314, 89 S. W. 216.

59. *Jones v. New York*, 62 N. Y. S. 284, 47 App. Div. 39.

60. *Herman v. Oconto*, 100 Wis. 391, 76 N. W. 364.

61. *Chicago v. Union Trust Co.*, 138 Ill. App. 545.

62. *Bramlage v. Wood*, 11 Ky. L. Rep. 486 (abstract).

63. *Miles v. Atlanta*, 120 Ga. 972, 48 S. E. 355.

64. *German American Sav. Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542.

intended by the parties to establish contract relations until a formal contract is executed, which is not done, will not render the municipal corporation liable for refusing to allow the other party to do the work.⁶⁵ A municipal contractor cannot recover possession of the superstructure of a bridge constructed by him over a street under an invalid contract, unless it can be separated from the foundation without injuring the structure and unless the contractor refunds the money paid on the contract.⁶⁶ A municipal corporation may successfully defend an action on improvement certificates by showing fraud in their issuance,⁶⁷ and it may recover the consideration parted with on the faith of an *ultra vires* contract.⁶⁸ In an action against the municipality on a contract for municipal work, it cannot recoup damages which do not grow out of the contract sued upon.⁶⁹

§ 1943. Same—default or neglect of municipality.

If additional expense incurred by a contractor for municipal work is rendered necessary by the default or neglect of the municipality, liability is thus imposed.⁷⁰ If the inability of a municipal contractor to collect the amount of paving certificates issued by the municipality for an improvement is caused by the failure of the mu-

65. Central Bitulithic Pav. Co. v. Highland Park, 164 Mich. 223, 129 N. W. 46, 17 Det. Leg. N. 1078.

66. Berlin Iron Bridge Co. v. San Antonio (Tex. Civ. App., 1899), 50 S. W. 408.

67. O'Neil v. Hoboken, 73 N. J. L. 189, 63 Atl. 986.

Estimates of work done under a municipal contract which are given by the engineer under a scheme to defraud the municipality need not be set aside by a court of equity to entitle the municipality to recover at law damages suffered by it as a result of

the fraud. West Homestead Borough v. Erbeck, 230 Pa. St. 316, 79 Atl. 570.

68. Kansas City v. O'Connor, 82 Mo. App. 655.

69. Rens v. Grand Rapids, 73 Mich. 237, 41 N. W. 263.

70. Ash v. Independence, 79 Mo. App. 70; Cody v. New York, 75 N. Y. S. 648, 71 App. Div. 54; O'Neill v. Milwaukee, 121 Wis. 32, 98 N. W. 963; Burnham v. Milwaukee, 100 Wis. 55, 75 N. W. 1014. See also Grant v. District Water Com'rs, 122 Mich. 694, 81 N. W. 969.

municipal corporation to give proper notice to abutting owners, a liability is thus imposed in favor of the contractor for the amount of the certificates.⁷¹ Where a municipality rescinds or discontinues work under a contract, thereby preventing the possibility of collecting assessments upon the property benefited it is liable for a breach of the contract.⁷² So liability arises where the contractor is damaged by the act of the municipality preventing him from carrying out his contract,⁷³ or if the local corporation illegally compels him to perform work a second time,⁷⁴ or if the municipality by its negligence causes delay in the work.⁷⁵

On the other hand it is held that where the costs of doing the work under the contract is increased by reason of delay caused by the municipality the contractor cannot proceed with the work and recover such increase as damages for the city's breach of the contract in so delaying the work. This was so held on the ground that a party to a written contract cannot perform his part and then claim rights in opposition to the contract, in the absence of fraud, accident or mistake.⁷⁶ The municipality is not liable to the contractor for injuries to the work caused by the negligence of an independent contractor.⁷⁷

71. *Brunning v. New Orleans*, 122 La. 316, 47 So. 624.

72. *Dunkirk v. Wallace*, 19 Ind. App. 298, 49 N. E. 463.

73. *Brady v. St. Joseph*, 84 Mo. App. 399; *Gearty v. New York*, 171 N. Y. 61, 63 N. E. 804; *Jones v. New York*, 68 N. Y. S. 228, 57 App. Div. 403, *aff'd* in 171 N. Y. 628, 63 N. E. 1118; *Sheehan v. Pittsburg*, 213 Pa. St. 133, 62 Atl. 642; *Ayers v. New Castle*, 10 Pa. Super. Ct. 559.

74. *Gearty v. New York*, 171 N. Y. 61, 63 N. E. 804.

75. *Sheehan v. Pittsburg*, 213 Pa. St. 133, 62 Atl. 642.

76. *Newport v. Schoolfield*, 142 Ky. 287, 134 S. W. 503.

In an action by a contractor against the city, a petition which alleges in substance, that owing to the neglect of the city to make a valid assessment, and its failure to exercise due diligence in prosecuting suits involving the validity of the assessments and has wholly failed to provide special fund for nearly five years to pay for such improvement states a good cause of action. *O'Neill v. Portland*, 59 Ore. 84, 113 Pac. 655.

77. *Kelly v. New York*, 94 N. Y. S. 872, 106 App. Div. 576.

A repudiation by the municipality of a valid contract for municipal work on the ground of invalidity will enable the contractor to recover prospective profits.⁷⁸

§ 1944. Same—assumpsit.

Municipal corporations are liable to actions of implied assumpsit with respect to money or property received by them and applied beneficially to their authorized objects through contracts which are simply unauthorized as distinguished from contracts which are prohibited by their charters, or some other law bearing upon them, or are *malum in se*, or violative of public policy.⁷⁹ In some jurisdictions assumpsit is the proper remedy of the contractor to recover special assessments collected by the municipality where nothing remains to be done but to pay over the money.⁸⁰

§ 1945. Same—quantum meruit.

There is a distinction between contracts void as violative of a statute, and contracts which are void because in excess of corporate power, in respect to a recovery on *quantum meruit*.⁸¹ This distinction is well recognized in adjudicated cases. In the latter class, where the corporation has received benefits which have been applied to authorized objects under an *ultra vires* contract, although no action can be had upon the contract, a recovery may be had on the *quantum meruit*;⁸²

78. Jones v. New York, 62 N. Y. S. 284, 47 App. Div. 39.

79. Bluthenthal v. Headland, 132 Ala. 249, 31 So. 87, 90 Am. St. Rep. 904.

See chapter 29 *ante*, vol. 3.

80. Conway v. Chicago, 237 Ill. 128, 86 N. E. 619.

Municipal contractor may recover against the city on an implied assumpsit on a voucher issued to pay for improvements from fund collected by special as-

sessments. Chicago v. McNichols, 98 Ill. App. 447.

81. See chapter 29 *ante*, vol. 3.

82. Allen v. La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497.

Under the provisions of the charter of Greater New York a contract for improvements made by a municipal department without public letting is equivalent to an agreement to pay *quantum meruit*. F. V. Smith Contracting Co. v. New York, 128 N. Y. S. 351, 70 Misc. Rep. 132.

but in the former class, where the contract is illegal because in violation of a positive statute, or being offensive to public policy, no action can arise out of the transaction for any purpose.⁸³

§ 1946. Extra pay for extra work.

Whether liability exists to pay additional compensation to the contractor for extra work,⁸⁴ how far it is discretionary with the corporate authorities,⁸⁵ the conditions precedent, if any, to recovery⁸⁶ and whether they may be waived, and if so, the method thereof,⁸⁷

83. *Ensley v. J. E. Hollingsworth & Co.*, 170 Ala. 396, 54 So. 95.

Where contract for public work is void as against public policy the contractor cannot maintain an action upon *quantum meruit* for work done or upon *quantum valebat* for material furnished thereunder. *Ensley v. J. E. Hollingsworth*, 170 Ala. 396, 54 So. 95.

84. *Extra work.* Under some laws a contract which leaves the payment for such extra work to be agreed upon by private agreement between the municipal officer and the contractor is void. The doctrine of implied liability has no application in such a case. *McBrien v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206.

An allowance for delay necessitated by the performance of extra work will not preclude the contractor from recovering extra compensation for the work. *Thileman v. New York*, 81 N. Y. S. 773, 82 App. Div. 136.

Where a contracting company for the construction of a bridge had to remove rock which had not been indicated in the description of the borings, it was entitled to compensation for the extra ex-

pense in the absence of any agreement to the contrary. *Capital City Brick & Pipe Co. v. Des Moines* (Ia., 1911), 132 N. W. 188.

Where the alterations constitute new and different work not governed by the contract the contractor may recover its reasonable value. *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637; *Cook County v. Harms*, 108 Ill. 151; *Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090; *Sexton v. Chicago*, 107 Ill. 323.

85. The allowance for extra work is sometimes within the discretion of the municipal officer in charge. *Van de Beck v. Jersey City*, 29 N. J. L. 441.

86. A requirement that the contractor obtain a certificate from municipal officers in case a claim is made for extra work, does not exact such a certificate where the contractor sues for a breach of the contract on the ground that he was illegally compelled to perform work a second time. *Gearty v. New York*, 171 N. Y. 61, 63 N. E. 804.

87. A requirement that the contractor shall submit a statement of the cause of extra work before he shall be entitled to payment

and the amount of extra pay, when allowable and the manner of determining the items thereof,⁸⁸ and whether set-offs are permissible, and if so, the nature thereof,⁸⁹ must necessarily depend on the controlling law, the terms of the contract involved, the particular circumstances attending the doing of the extra work and the authority directing it to be done.⁹⁰

therefor, unless the mayor shall approve same, can be waived only by the mayor. *Cashman v. Boston*, 190 Mass. 215, 76 N. E. 671.

88. The contract was for the construction of a system of water-works. It provided that extra work resulting from a change of a plan should be paid for at contract rate for work of that class. A change of plan was made which involved extra work of a much more difficult character than that involved in the original plan. Held, that the actual increase of cost must be compensated for. *Wood v. Ft. Wayne*, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. Ed. 416.

Statements made by municipal officers as to how much the city ought to pay for extra work after it had been completed cannot change the construction of the contract. *Braney v. Millbury*, 167 Mass. 16, 44 N. E. 1060.

A provision in a contract for filling and grading a street at a certain price per cubic yard, that the price of the entire work shall not exceed a certain sum, will not prevent the contractor from recovering the price per cubic yard for all of the work done by him. *McManus v. Philadelphia*, 211 Pa. St. 394, 60 Atl. 1001.

A clause in a contract between a municipal contractor and prop-

erty owners providing that disputes as to the amount of excavation to be paid for shall be finally determined by the city engineer does not give the city engineer the right to determine whether or not such owners should pay for an increase of excavation caused by an unauthorized change in the plans for the work. *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393.

89. An allowance to the contractor for delay caused by the performance of extra work cannot be set up against the contractor's right to recover for such work. *Thileman v. New York*, 81 N. Y. S. 773, 82 App. Div. 136.

90. **Decision as to extra work.** A provision in a contract for public work confiding to the engineer the final decision of the construction and meaning of the plans and specifications does not authorize him to decide whether or not certain work done by the contractor was extra work, and his decision that it was not will not bind the contractor. *Murphy v. Yonkers*, 60 N. Y. S. 940, 45 App. Div. 621.

A stipulation that controversies regarding the work shall be referred to the city engineer does not give the engineer jurisdiction to determine whether work done was covered by the contract. *Salt*

Extra work as here used means work done not required in the performance of the contract; something done or furnished in addition to, or in excess of, the requirements of the contract.⁹¹ The distinction between extra work and additional work is that the former is work arising outside and entirely independent of the contract; something not required in its performance; the latter is something necessarily required in the performance of the contract and without which it could not be carried out.⁹² There can be no true test to determine whether or not certain work falls within the classification in a contract for public work, other than the understanding of the parties. "The law prescribes no rules to govern with respect to matters of this kind, but leaves the parties to group and classify for purposes of contract according to any standard or system they may choose to adopt, and when controversy arises, all it seeks to do is to ascertain, as the true test, the understanding of the parties."⁹³

Lake City v. Smith, 104 Fed. 457, 43 C. C. A. 637.

There can be no recovery for extra work not provided for in the contract, expressly or by implication. O'Hara v. New Orleans, 30 La. Ann. 152; Re Wood, 51 Barb. (N. Y.) 275.

Extra work done and material therefor furnished by the contractor at the direction of a municipal officer in excess of an estimate cannot be recovered for where the estimate was not properly made a part of the contract. Fox v. Bay City, 122 Mich. 499, 81 N. W. 352, 6 Det. Leg. N. 868.

There can be no recovery unless the contract is made as provided by law nor can there be a recovery for work and material furnished on a *quantum meruit*. Parr v. Greenbush, 72 N. Y. 463.

Work done under a written contract cannot be recovered for on a *quantum meruit*. Ryan v. Dubuque, 112 Ia. 284, 83 N. W. 1073.

91. United States Wood Preserving Co. v. New York, 123 N. Y. S. 538, 138 App. Div. 841; Shields v. New York, 82 N. Y. S. 1020, 84 App. Div. 502; Dady v. New York, 121 N. Y. S. 860, 65 Misc. Rep. 382; Fullerton v. Des Moines, 147 Ia. 254, 126 N. W. 159; Casgrain v. Milwaukee, 81 Wis. 113, 51 N. W. 88.

92. Shields v. New York, 82 N. Y. S. 1020, 84 App. Div. 502.

93. Coryell v. Dubois Borough, 226 Pa. St. 103, 75 Atl. 25.

When work provided for to be done without extra compensation, is included in the contract price, it cannot be considered extra work. Voorhis v. New York, 46 How. Pr. (N. Y.) 116.

The performance of extra work by the contractor on the order of a duly authorized officer, usually creates a legal liability to pay therefor.⁹⁴ So if extra work is rendered necessary due to the fault or negligence of municipal officers a liability to pay therefor is usually created.⁹⁵ Likewise if the municipal corporation by its own act causes the work to be done by a contractor to be more expensive than it otherwise would have been according to the terms of the original contract it is liable to him for the increased cost for the extra work.⁹⁶

94. *California*. Keating v. Edgar, 65 Cal. XIX, 3 Pac. 594.

Kentucky. Henderson v. Louisville, 4 Ky. L. Rep. 437.

Missouri. Steffen v. St. Louis, 135 Mo. 44, 36 S. W. 31.

New Jersey. Vanderbeck v. Jersey City, 29 N. J. L. 441.

New York. Fleming v. Suspension Bridge, 92 N. Y. 368; Johnson v. Albany, 83 N. Y. S. 1002, 86 App. Div. 567; Dwyer v. New York, 79 N. Y. S. 17, 77 App. Div. 224; Mulholland v. New York, 113 N. Y. 631, 20 N. E. 856; Kingsley v. Brooklyn, 78 N. Y. 200.

Oregon. Murphy v. Albina, 20 Ore. 379, 26 Pac. 234.

Texas. Sherman v. Connor (Tex. Civ. App., 1903), 72 S. W. 238.

United States. Wood v. Fort Waynes, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. Ed. 416.

95. Extra work due to negligence of the city engineer. Chicago v. Duffy, 218 Ill. 242, 75 N. E. 912; Chicago & Great Eastern Ry. Co. v. Vosburgh, 45 Ill. 311; Sexton v. Chicago, 107 Ill. 323; McCann v. Albany, 42 N. Y. S. 94, 11 App. Div. 378, aff'd in 158 N. Y. 634, 53 N. E. 673; Becker v. New York, 78 N. Y. S. 1064, 77 App.

Div. 635; modified in 176 N. Y. 441, 68 N. E. 855.

Extra work made necessary by negligence of city surveyor must be paid for by the city. Becker v. New York, 170 N. Y. 219, 63 N. E. 298.

96. Horgan v. New York, 160 N. Y. 516, 55 N. E. 204; Messenger v. Buffalo, 21 N. Y. 196; Mulholland v. New York, 113 N. Y. 631, 20 N. E. 856; Ayers v. New Castle, 10 Pa. Super. Ct. 559.

Extra work may be recovered for when due to a subsequent change of the street grade after the city engineer had established the depth of the excavation prior to the commencement of the work. Slusser v. Burlington, 47 Ia. 300.

Under a contract requiring crushed granite to be of a certain size and free from dust and dirt, extra work done in sifting the granite, not for any reason required by the contract, but at the direction of a properly authorized municipal officer, may be recovered for. Steffen v. St. Louis, 135 Mo. 44, 36 S. W. 31.

Material changes in a contract made by an officer possessing power to make them does not im-

Ordinarily if the contractor is compelled to do work not contemplated by the contract in order to perform the terms of the contract he is entitled to recover compensation for the extra work.⁹⁷

Obviously extra compensation is not allowable for doing work covered by the contract notwithstanding it proves to be greater than anticipated when the contract was made;⁹⁸ as necessary excavations through rock in constructing a sewer,⁹⁹ or unexpected difficulties caused by rocks in the ground,¹ or extra work in repairing damages to the work necessarily made in order to com-

pair the contractor's right to recover for work done. *Kingsley v. Brooklyn*, 78 N. Y. 200, 7 Abb. N. C. 28, aff'g 5 Abb. N. C. 11.

A provision in a bridge construction contract that the city should not be liable for extras of any kind nor for any damage the contractor might sustain in coming in contact with rock or any other unforeseen material will not deprive the contractor of the right to extra compensation for expenses resulting from a misrepresentation on the part of the city as to what was shown by borings it caused to be made and upon the faith of which the bids for the work were made. *Capital City B. & P. Co. v. Des Moines (Ia., 1910)*, 127 N. W. 66.

Where the contract is void a claim of the contractor for extra compensation for extra services and materials made necessary by the city must necessarily fall with the contract. *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

97. *Dunn v. New York*, 126 N. Y. S. 61, 141 App. Div. 280.

98. *Illinois. Chicago v. Duffy*, 179 Ill. 447, 53 N. E. 982; *Chicago*

v. Weir, 165 Ill. 582, 46 N. E. 725.

Iowa. McCauley v. Des Moines, 83 Ia. 212, 48 N. W. 1028.

Michigan. Gartner v. Detroit, 131 Mich. 21, 90 N. W. 690.

New York. Kelly v. New York, 180 N. Y. 507, 72 N. E. 1144, aff'g 87 App. Div. 299; *Mairs v. New York*, 65 N. Y. S. 160, 52 App. Div. 343, aff'd in 166 N. Y. 618, 59 N. E. 1126.

Wisconsin. Burnham v. Milwaukee, 100 Wis. 55, 75 N. W. 1014.

When work done by the contractor is necessary to the work to be performed under the contract it does not constitute extra work, and the contractor cannot recover therefor. *Leuthilon v. New York*, 92 N. Y. S. 897, 102 App. Div. 548, aff'd in 185 N. Y. 549, 77 N. E. 1190; *Rens v. Grand Rapids*, 73 Mich. 237, 41 N. W. 263; *Palladino v. New York*, 10 N. Y. S. 66, 56 Hun 565, 31 N. Y. St. Rep. 775, aff'd in 125 N. Y. 733, 26 N. E. 757.

99. *McCauley v. Des Moines*, 83 Iowa 212, 48 N. W. 1028.

1. *Gisel v. Buffalo*, 15 N. Y. St. Rep. 561, 48 Hun 615.

plete the contract in a proper manner.² Ordinarily where improvements are to be paid for wholly by assessments on property presumed to be benefited on account thereof there can be no recovery for work done and material furnished outside of the terms of the contract.³ A charter provision requiring all contracts for public work exceeding a specified amount to be let on competitive bidding has been held to preclude a recovery for extra work exceeding such amount.⁴

If the contractor does extra work not required by the contract and without authority from the municipality he cannot recover therefor,⁵ as work done by direction of a municipal officer without power to order such work done,⁶ although he may be the supervisor appointed by the municipal corporation to superintend the execution of the contract.⁷ To bind the municipality for extra work the authority to perform such work must be given in the manner prescribed by law or in accordance with the terms of the contract; as for example, where the order is to be given in writing,⁸ or where the contractor

2. *Slattery v. New York*, 165 N. Y. 618, 59 N. E. 1130, aff'g 52 N. Y. S. 546, 31 App. Div. 127.

3. *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443.

4. *Dady v. New York*, 121 N. Y. S. 860, 65 Misc. Rep. 382.

5. *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443; *Davies v. East Saginaw*, 66 Mich. 37, 32 N. W. 919.

Right to recover for extra work for outside rock excavations, not included in the contract, denied. *Voorhis v. New York*, 62 N. Y. 498.

West Chicago Park Com'rs v. Kincade, 64 Ill. App. 113.

6. City not liable to contractor for extra street improvements directed by the city engineer which

were not included in the specifications or contract. *Dallas v. Brown*, 10 Tex. Civ. App. 612, 31 S. W. 298.

7. *Leathers v. Springfield*, 65 Mo. 504.

8. *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443; *Johnson v. Albany*, 83 N. Y. S. 1002, 86 App. Div. 567; *Abells v. Syracuse*, 40 N. Y. S. 233, 7 App. Div. 501; *Waterson v. Mayor, etc. of Nashville*, 106 Tenn. 410, 61 S. W. 782.

Under a contract providing that all additions or alterations should be specified in writing, extra work which was in fact additions and alterations not specified in writing cannot be recovered for. *Condon v. Jersey City*, 43 N. J. L. (18 Vroom.) 452.

is required to submit a written statement of extra work and claim for extra work.⁹ A provision which is common, that no extra work shall be paid for or allowed unless done on the written order of a designated corporate officer, as one in charge of the work, it is held, may be waived;¹⁰ however, this has been denied.¹¹ The promise of a municipal officer, to the contractor to pay for extra work is not binding.¹²

The mere acceptance and use of a building by the municipal corporation does not necessarily bind it to pay for extra, unauthorized work in its construction, notwithstanding such work was beneficial.¹³ However, if the extra work is done under a supplemental agreement not binding on the municipality and it is accepted by the proper corporate authorities it has been held that the reasonable value thereof may be recovered by the contractor.¹⁴ If the contractor rendered monthly bills for extra work which were paid it has been held

9. *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

10. *Elgin v. Joslyn*, 36 Ill. App. 301, *aff'd* 136 Ill. 525, 26 N. E. 1090.

The law required a written order to authorize extra work. Held statement that a written order was unnecessary constituted a waiver. *Cincinnati v. Cameron*, 33 Ohio St. 336.

11. A provision that the contractor shall not be entitled to compensation for extra work unless same has been done in pursuance of written orders signed by the engineer, cannot be waived by the engineer. *Molloy v. Briarcliff Manor*, 129 N. Y. S. 929, 145 App. Div. 483.

12. *Rens v. Grand Rapids*, 73 Mich. 237, 41 N. W. 263.

Extra work done by direction of the architect in charge under a

contract conferring such authority, may be recovered for. *Stuart v. Cambridge*, 125 Mass. 102.

Direction by a majority of the individual members of the council to the contractor to do extra work, held binding on the city. *Murphy v. Albina*, 20 Ore. 379, 26 Pac. 234.

In a contract to furnish sand for grading a street where more sand is required than the quantity specified, and it is furnished under the direction of the commission in charge of the work, held the city was liable therefor without the sanction of the city council for extra work. *Messenger v. Bufalo*, 21 N. Y. 196.

13. *Boston Electric Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787.

14. *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954.

he cannot recover for other extra work done during the same period.¹⁵

§ 1947. Method and time of payment.

The time and method of payment, whether partial, at stated intervals, or in a lump sum upon the completion of the contract, or whether it shall be in money or special taxbills, or certificates of special assessments against the property chargeable, or whether any of it may be withheld for a specified time, will depend upon the proper construction of the local provisions applicable.¹⁶ So whether the compensation to the contractor shall be from a general or special fund, the time and method of appropriating it, or whether warrants or certificates of indebtedness may be issued and delivered to the contractor or whether it is to be paid for by the levy of special or general taxation in like manner will depend upon the meaning of the legal provisions applicable.¹⁷

15. *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

16. *California*. *McGee v. San Jose* (Cal., 1885), 7 Pac. 189, rev'd 68 Cal. 91, 8 Pac. 641.

Indiana. *Broker v. New Albany*, 12 Ind. 417; *Allen County Com'rs v. Silvers*, 22 Ind. 491.

Missouri. *State ex rel. Stifel v. Flad*, 26 Mo. App. 500.

New York. *People v. Kelly*, 5 Abb. N. C. 383.

Wisconsin. *Jenks v. Racine*, 50 Wis. 318, 6 N. W. 818.

United States. *Key West v. Baer*, 66 Fed. 440, 13 C. C. A. 572, 30 U. S. App. 140.

17. *Sinton v. Ashbury*, 41 Cal. 525; *Goodrich v. Detroit*, 12 Mich. 279; *Lansing v. Van Gorder*, 24 Mich. 456; *Chaffee v. Granger*, 6 Mich. 51; *Second National Bank v. Lansing*, 25 Mich. 207; *Soule v.*

Seattle, 6 Wash. 315, 33 Pac. 384, 1080; *Thomas & Co. v. Olympia*, 12 Wash. 465, 41 Pac. 191; *Stephens v. Spokane*, 14 Wash. 298, 44 Pac. 31; *Wilding v. San Antonio*, 74 Fed. 668, 20 C. C. A. 667, 41 U. S. App. 400.

Contracting debts against fund. Where contractor's compensation is to be paid out of the proceeds of the sale of bonds, he cannot be deprived of his pay by the action of the city in afterwards contracting debts against the fund in excess of the amount thereof and paying same to the exclusion of the contractor's claim. *Houston v. Potter*, 41 Tex. Cix. App. 381, 91 S. W. 389.

Approval of estimates. Where the board of public works has exclusive authority in all matters connected with the construction

§ 1948. Payment by special assessment.

Municipalities are frequently authorized to pay for local improvements by special assessments, but they will not be restricted to this method unless the charter so provides,¹⁸ and when not so restricted the decision of the municipal authorities as to the plan of payment is final.¹⁹ But the method of payment by special assessment provided by ordinance cannot be changed after the completion of the work and the levy of the assessment and issue of bonds.²⁰

Where a municipality has power to contract for a public improvement but no authority to make it a charge on property, it will be liable therefor to the contractor.²¹

of public improvements, and the bonds or warrants therefor are not to be issued until their estimate has been approved by the mayor, the mayor's duty to approve the estimates is mandatory and he may be compelled to do so by *mandamus*. *McMurray v. Hayden*, 13 Colo. App. 51, 56 Pac. 206.

Time of payment. Where the exact amount of work to be done under a contract, or the cost thereof, is not determined or fixed by the contract, the city has a reasonable time after the completion of the work in which to make and collect assessments to pay for same. *Keigher v. St. Paul*, 69 Minn. 78, 72 N. W. 54.

But where the amount of work to be done and the price to be paid therefor are definitely determined and fixed by the contract the city must collect the assessment by the time the improvement is completed and accepted. *Keigher v. St. Paul*, 69 Minn. 78, 72 N. W. 54.

Statements or admissions made

by the city comptroller with regard to the payment of an order given by a municipal contractor for money due him on his contract are not binding on the city. *Dickerson v. Spokane*, 35 Wash. 414, 77 Pac. 730.

18. *Pine Tree Lbr. Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357.

19. *Pontiac v. Talbot Pav. Co.*, 96 Fed. 679, 37 C. C. A. 576.

If the law fixes the proportionate share of the cost of an improvement to be borne by the abutting property owners and the city, respectively, a provision to that effect need not be incorporated in the contract. *Barber Asphalt Pav. Co. v. Gogreve*, 41 La. Ann. 251, 5 So. 848.

20. *Chicago v. Brede*, 218 Ill. 528, 75 N. E. 1044, aff'g 121 Ill. App. 562.

21. *Illinois*. *Chicago v. People*, 56 Ill. 321; *Maher v. Chicago*, 38 Ill. 266.

Iowa. *Bucroft v. Council Bluffs*, 63 Iowa 643, 19 N. W. 807.

Louisiana. *Tournier v. Municipality No. 1*, 5 La. Ann. 298.

It cannot procure work to be done on the faith of a special assessment, and then avoid payment by setting up that it had no power to levy it.²² But it has been held in Kentucky that the municipality will not be held liable for the cost of the improvement until there has been a litigation of the question whether abutting property is subject to a lien for the improvement.²³ Where the contractor agrees to look to the special assessment for payment and takes the risk of its invalidity he cannot recover from the municipality in case the assess-

Kentucky. Caldwell v. Rupert, 73 Ky. 179; Louisville v. Nevin, 73 Ky. 549, 19 Am. St. Rep. 78; Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625; Louisville v. Tyler, 111 Ky. 588, 64 S. W. 415, 23 Ky. L. Rep. 1609; Louisville v. McNaughten, 19 Ky. L. Rep. 1695, 44 S. W. 380; Craycroft v. Selvage, 10 (Bush.) Ky. 698; Guthrie v. Louisville, 6 B. Mon. (45 Ky.) 575; Terrell v. Paducah, 122 Ky. 331, 28 Ky. L. Rep. 1237, 92 S. W. 310, 5 L. R. A. (N. S.) 289; Louisville v. Bitzer, 115 Ky. 359, 73 S. W. 1115, 24 Ky. L. Rep. 2263, 61 L. R. A. 434; Gosnell v. Louisville, 104 Ky. 212, 46 S. W. 722.

Missouri. Fisher v. St. Louis, 42 Mo. 482; Oster v. Jefferson, 57 Mo. App. 485.

Wisconsin. Allen v. Janesville, 35 Wis. 403; Miller v. Milwaukee, 16 Wis. 642.

United States. Barber Asphalt Paving Co. v. Denver, 72 Fed. 336, 19 C. C. A. 139, 36 U. S. App. 499.

Laws construed. Louisville v. Bitzer, 115 Ky. 359, 73 S. W. 1115, 24 Ky. L. Rep. 2263, 61 L. R. A. 434; Terrell v. Paduach, 122 Ky. 331, 28 Ky. L. Rep. 1237, 92 S. W. 310, 5 L. R. A. (N. S.) 289.

A city by issuing certificates of

assessment for improvements impliedly warrants that they are valid. Scofield v. Council Bluffs, 68 Iowa 695, 28 N. W. 20.

The amount of certificates of assessment issued against state property may be recovered against the city. Pope County Savings Bank v. State, 69 Iowa 24, 28 N. W. 416.

Contract for paving made under the belief on the part of the city and contractor that the city had authority to charge the cost thereof against the abutting property owners is enforceable against the city where it appears that the city had in fact no such authority notwithstanding the stipulation in the contract that the assessment shall be accepted in payment and that the city shall not be otherwise liable under the contract whether the assessment was collectible or not. Barber Asphalt Paving Co. v. Harrisburg, 64 Fed. 283, 12 C. C. A. 100, 28 U. S. App. 108, 29 L. R. A. 401, rev'g 62 Fed. 565.

22. Maher v. Chicago, 38 Ill. 266; Chicago v. People, 48 Ill. 416.

23. Louisville v. Hexagon Tile Walk Co., 103 Ky. 552, 20 Ky. L. Rep. 236, 45 S. W. 667.

ment is set aside.²⁴ Some laws allow the contractor to resort to the municipality for payment if the assessment is declared void by the courts without fault on the part of the contractor. Under such law the judgment of invalidity need not find affirmatively that the invalidity was not caused by any fault of the contractor.²⁵

Failure or neglect on the part of the municipality to make or collect the assessment to pay the cost of an improvement usually renders it liable to the contractor for such cost out of its general fund.²⁶ The numerous

24. *California*. *Connolly v. San Francisco*, 99 Cal. XVII, 33 Pac. 1109.

Illinois. *Alton v. Foster*, 207 Ill. 150, 69 N. E. 783; *Dolese v. McDougall*, 78 Ill. App. 629, aff'd in 182 Ill. 486, 55 N. E. 547; *Foster v. Alton*, 173 Ill. 587, 51 N. E. 76, aff'g *Alton v. Foster*, 74 Ill. App. 511; *Chicago v. Farrell*, 100 Ill. App. 204, aff'd in *Farrell v. Chicago*, 198 Ill. 558, 65 N. E. 103; *Park Ridge v. Robinson*, 198 Ill. 571, 65 N. E. 104, rev'g 100 Ill. App. 409.

Indiana. *Robinson v. Valparaiso*, 136 Ind. 616, 36 N. E. 644; *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788.

Iowa. *Crawford v. Mason*, 123 Iowa 301, 98 N. W. 795.

United States. *Pontiac v. Talbot Pav. Co.*, 94 Fed. 65, 36 C. C. A. 88, 96 Fed. 679, 37 C. C. A. 556.

Usually he cannot recover on an implied assumpsit. *Affeld v. Detroit*, 112 Mich. 560, 71 N. W. 151, 4 Det. Leg. N. 121.

The assignee of a contract for street improvements is bound by a stipulation to the effect that the payment shall be alone by assessment and that in no event shall

the city be liable. *Keszler v. Cincinnati*, 2 Ohio C. D. 127.

25. *Gafney v. San Francisco*, 72 Cal. 146, 13 Pac. 467.

26. *Illinois*. *Chicago v. People*, 56 Ill. 327; *Maher v. Chicago*, 38 Ill. 266.

Indiana. *Dunkirk v. Wallace*, 19 Ind. App. 298, 49 N. E. 463.

Iowa. *Scofield v. Council Bluffs*, 68 Ia. 695, 28 N. W. 20; *Bucroft v. Council Bluffs*, 63 Ia. 646, 19 N. W. 807.

Kansas. *Leavenworth v. Mills*, 6 Kan. 288; *Heller v. Garden City*, 58 Kan. 263, 48 Pac. 841.

Kentucky. *Kearney v. Covington*, 1 Metc. (58 Ky.) 339.

Louisiana. *Cronan v. Municipality No. 1*, 5 La. Ann. 537; *O'Brien v. Police Jury*, 2 La. Ann. 355.

Missouri. *Fisher v. St. Louis*, 44 Mo. 482; *Ash v. Independence*, 79 Mo. App. 70.

Nebraska. *Ward v. Lincoln*, 87 Neb. 661, 128 N. W. 24.

New York. *Quin v. Buffalo*, 26 Hun 234.

Ohio. *Folz v. Cincinnati*, 2 Handy 261.

Oregon. *Jones v. Portland*, 35 Ore. 512, 58 Pac. 657; *Commercial Nat. Bank v. Portland*, 24 Ore. 188,

decisions on this subject show the varying circumstances under which such liability is enforced. In the absence

33 Pac. 532, 41 Am. St. Rep. 854; Beers v. Valles City, 16 Ore. 334, 18 Pac. 835.

Texas. Belton v. Sterling (Tex. Civ. App., 1899), 50 S. W. 1027.

Wisconsin. Miller v. Milwaukee, 14 Wis. 642.

United States. Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; Barber Asphalt Pav. Co. v. Harrisburg, 64 Fed. 283, 12 C. C. A. 100; Barber Asphalt Pav. Co. v. Denver, 72 Fed. 336, 19 C. C. A. 139.

In Oregon "it is now the settled law that where the expense of improving a city street is to be paid from a special fund created by assessment on abutting property, a failure of the municipality to comply with any of the requirements of the charter essential to supplying such fund, or an unreasonable delay in enforcing such provision, or collecting and paying over the money, gives the contractor a right of action *ex delicto* against the corporation for damages, in which he is entitled to recover the amount due under the contract with interest notwithstanding a provision therein that he shall look for payment only to the special fund and will not require the municipality by any legal process or otherwise to pay the same out of any other fund." O'Neil v. Portland, 59 Ore. 84, 113 Pac. 655.

Failure of the city to provide means of collecting a special assessment levied for an improvement will render the city liable

therefor. Leavenworth v. Stille, 13 Kan. 539.

Where the city fails or neglects for a considerable time, as two years, to collect the assessments, under some charters the certificates of approval for labor and material furnished may be issued, payable out of the general funds of the local corporation. Knapp v. Hoboken, 38 N. J. L. (9 Vroom.) 371.

Failure for four years or more to collect assessments for the payment of an improvement as required by the contract renders the municipality liable for payment. Dale v. Scranton, 231 Pa. St. 604, 80 Atl. 1110.

In one case the work was completed in 1887. In 1888 a temporary injunction restraining the city from collecting the assessment was obtained by property owners. The injunction was allowed to lie five years. In the meantime the city enjoyed the benefits of the improvement. In an action against the city by the contractor's assignee brought in 1891, held that there had been such an unreasonable delay on the part of the city in raising such fund as would charge it with neglect of duty. Commercial National Bank v. Portland, 24 Ore. 188, 33 Pac. 532, 41 Am. St. Rep. 854.

The failure of the city to levy an assessment in time to prevent the bar of the limitations, renders the city liable to the contractor. Denny v. Spokane, 79 Fed. 719, 25 C. C. A. 164; McEwan v. Spokane,

of any legal provision as to time the general rule is that the municipal corporation is entitled to a reasonable time alter the completion of the work in which to levy the assessment to pay therefor.²⁷ When the municipality levies the assessment and uses due diligence to make it productive in accordance with the law, usually no further liability attaches.²⁸ Charters frequently pro-

16 Wash. 212, 47 Pac. 433. See also *O'Hara v. Scranton*, 205 Pa. 142, 54 Atl. 713.

Under a law requiring the city engineer to issue a special taxbill against the abutting property, held the engineer is liable for delinquency in issuing the bill. *Kiley v. St. Joseph*, 67 Mo. 491.

Failure to levy the assessment will render the city liable. The rule that a municipal corporation is not liable for the non-exercise of discretionary powers of a legislative character is not applicable. *Oster v. Jefferson*, 57 Mo. App. 485.

Delay on part of the city in collecting special assessments will not render the city liable to the contractor for interest in the absence of an express agreement. *Vider v. Chicago*, 164 Ill. 354, 45 N. E. 720.

Failure to apply money so collected to the payment of the contract. *McCord v. Jackson*, 135 Ga. 176, 69 S. E. 23.

The warrants issued to the contractor directed payment out of the improvement funds of the particular street improved under a specified ordinance. Held, that the contractor could not maintain an action on the warrants as for a tort because of the failure of the city to levy the special assess-

ment. *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384, 1080.

Failure to collect assessments does not render the municipality generally liable to the contractor, where the improvements were to be paid for wholly by owners of property specially benefited. *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935, 22 Wash. 404, 60 Pac. 1115.

Under statutes making the city responsible for part of the cost of an improvement and property owners liable for part, the city is primarily liable for the entire cost. *Belton v. Sterling* (Tex. Civ. App., 1899), 50 S. W. 1027.

27. *Lowder v. Cincinnati*, 2 Disney (Ohio) 203.

28. *Richardson v. Brooklyn*, 34 Barb. (N. Y.) 569.

The city must show due diligence in collecting the assessment to pay for the work. The fact that the assessment was evaded on *certiorari* before it could be collected is a sufficient answer to an allegation of want of diligence. *Flemming v. Hoboken*, 40 N. J. L. (11 Vroom.) 270.

That the cost of an improvement is chargeable against property in special taxing districts does not relieve the city from its obligation to pay for same as provided in the contract. *Barber Asphalt Pav. Co.*

vide that in no event shall the municipal corporation be liable to the contractor for the cost of public improvements which are to be paid for by levy of a special tax or local assessments against the property abutting the improvements or the property in the taxing district presumed to be benefited by reason of the improvement.²⁹

A municipal corporation being bound by all authorized contracts regularly made in like manner as private corporations and individuals may be compelled by action in favor of the contractor to proceed to levy or collect assessments or issue special taxbills as the law and the contract for the improvement may require.³⁰ If municipal authorities refuse to levy and collect assessments to pay for public work, the contractor is entitled to *mandamus* to compel them to proceed,³¹ and if this remedy

v. Topeka, 6 Kan. App. 133, 50 Pac. 904.

29. *Conlin v. San Francisco*, 99 Cal. 17, 33 Pac. 753, 37 Am. St. Rep. 17, 21 L. R. A. 474; *Caldwell v. Rupert*, 10 Bush. (73 Ky.) 179; *Louisville v. Meyer*, 17 Ky. L. Rep. 666, 32 S. W. 290; *Keating v. Kansas City*, 84 Mo. 415; *Saxton v. St. Joseph*, 60 Mo. 153; *Carroll v. St. Louis*, 5 Mo. App. 584; *Chambers v. St. Joseph*, 53 Mo. App. 536; *Hoyt v. Fass*, 64 Wis. 273, 25 N. W. 45; *Fletcher v. Oshkosh*, 18 Wis. 228.

Sometimes the contract expressly stipulates that the contractor must look for payment to the proceeds of certain special assessments. In such case this method of payment is exclusive, the city not being liable. *Chicago v. People*, 48 Ill. 416.

Where the corporate authorities have no power to bind the owners of lots without the unanimous consent of the council or on petition of such owners, the city cannot

waive responsibility for the cost of improvements by having the contractor agree to look alone to such owners for payment. *Louisville v. Hyatt*, 5 B. Mon. (44 Ky.) 199.

30. *District of Columbia. Lyon v. District of Columbia*, 20 D. C. 484.

Iowa. Morgan v. Dubuque, 28 Ia. 575.

Kansas. Atchison v. Byrnes, 22 Kan. 65.

Kentucky. Kearney v. Covington, 58 Ky. L. (1 Metc.) 339.

New York. Beard v. Brooklyn, 31 Barb. (N. Y.) 142; *Baldwin v. Oswego*, 1 Abb. Dec. 62; *Smith v. Buffalo*, 44 Hun (N. Y.) 156; *Weston v. Syracuse*, 82 Hun (N. Y.) 67, 31 N. Y. S. 186.

Oregon. Commercial Nat. Bank v. Portland, 24 Ore. 188, 33 Pac. 532, 41 Am. St. Rep. 854; *Little v. Portland*, 26 Ore. 235, 37 Pac. 911.

31. *Second National Bank v. Lansing*, 25 Mich. 207; *Harrison v. New Brighton*, 97 N. Y. S. 246, 110 App. Div. 267.

proves inadequate equity may make and enforce the assessment.³² If the assessment is insufficient to meet the cost of the improvement it is generally held that the municipality is not liable for the deficiency.³³ However, much depends upon the provisions of the charter, statute or ordinance under which the work is done. It has been held that where the assessment exceeds the limit of twenty-five per cent on the value of property fixed by law after the improvement is completed, the municipality is liable to the contractor for deficiency.³⁴ But municipal corporations cannot be made liable for street improvements beyond the liability fixed by statute.³⁵ Where the money raised by assessments is in-

Sometimes the payment is to be made on confirmation of the assessment for the work by special officers or boards. Neglect in this respect cannot be imputable to municipal corporation so as to support an action for money due for the work prior to the confirmation of the assessment. The contractor's remedy in such case is by *mandamus* to compel the proper officers or boards to act. *Tone v. New York*, 6 Daly (N. Y.) 343.

Failure of the corporate authorities to deliver to the contractor certificates as required by law will not give the contractor a right of action against the city as on a money demand. His remedy is by *mandamus* to compel delivery. *Whalen v. La Crosse*, 16 Wis. 271.

32. *German Am. Sav. Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542.

33. *New Albany v. Sweeney*, 13 Ind. 245; *Creighton v. Toledo*, 18 Ohio St. 447.

Failure on part of the municipality to levy a sufficient assessment to pay for an improvement,

as required by charter, renders the city liable to the contractor for damages. *McCann v. Albany*, 42 N. Y. S. 94, 11 App. Div. 378, aff'd in 158 N. Y. 634, 53 N. E. 673; *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. Rep. 472; *Barber Asphalt Pav. Co. v. Harrisburg*, 64 Fed. 283, 12 C. C. A. 100, 28 U. S. App. 108, 29 L. R. A. 401.

34. *Cincinnati v. Diekmeyer*, 31 Ohio St. 242.

35. *New Albany v. Conger*, 18 Ind. App. 230, 47 N. E. 852; *New Albany v. Sweeney*, 13 Ind. 245; *Johnson v. Common Council*, 16 Ind. 227; *Greencastle v. Allen*, 43 Ind. 347; *Wren v. Indianapolis*, 96 Ind. 206.

Where the ordinance for a municipal improvement provided that the city should not be liable therefor, the city held not to be liable, though special assessments failed to discharge the cost. *Union Trust Co., etc. v. State*, 154 Cal. 716, 99 Pac. 183; *Frank v. State*, 154 Cal. 730, 99 Pac. 189.

sufficient the contractor's remedy must be by proceedings to supply the deficiency.³⁶ In the absence of charter restriction a municipality may render itself generally liable upon its contract for improvements.³⁷ In Illinois the liability of a municipality for improvements to be paid for by special assessments is limited to the amount actually collected by it.³⁸ Under a contract providing for payment from special assessments when same are "actually paid into the city treasury" recovery against the municipality will be limited to the amount so paid.³⁹

Money derived from assessments made for the purpose of paying for local improvements becomes a trust fund to be applied to that purpose.⁴⁰ And where the city wrongfully diverts such fund by using it for other purposes it is liable to the contractor as for money had and received.⁴¹ Money raised by assessment to pay for improvements may be used by the municipality to reimburse itself for money advanced by it to the contractor in payment of the work.⁴²

36. *Second Nat. Bank v. Lansing*, 25 Mich. 207.

Where payment under a contract for public work is to be made as the assessments therefor are collected, the contractor cannot recover from the municipality without showing either that an assessment has been levied or that the municipal authorities had put it out of their power to levy an assessment. *Harrison v. New Brighton*, 97 N. Y. S. 246, 110 App. Div. 267.

37. *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357; *Frush v. East Portland*, 6 Ore. 281.

38. *Conway v. Chicago*, 237 Ill. 128, 86 N. E. 619; *Momence v. R. Shannon & Co.*, 135 Ill. App. 533.

39. *Chicago v. Farrell*, 100 Ill. App. 204, *aff'd in Farrell v. Chicago*, 198 Ill. 558, 65 N. E. 103.

40. *Illinois. Conway v. Chicago*, 237 Ill. 128, 86 N. E. 619.

Iowa. Allen v. Davenport, 107 Ia. 90, 77 N. W. 532.

Michigan. Second National Bank of Lansing v. Lansing, 25 Mich. 207.

North Dakota. Red River Valley National Bank v. Fargo, 14 N. D. 88, 103 N. W. 390.

Wisconsin. State v. Hobe, 106 Wis. 411, 82 N. W. 336.

41. *Conway v. Chicago*, 237 Ill. 128, 86 N. E. 619.

42. *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357.

§ 1949. Conditions as to payment.

Contracts for public work, and statutes and charter provisions relative thereto, frequently specify certain conditions that must be complied with before payment shall be made in full to the contractor. When these conditions are valid they must of necessity be performed before final payment can be demanded. Thus, the condition that the corporate authorities shall be satisfied that all claims for labor and material have been paid by the contractor is valid.⁴³ So is a provision in such a contract that no payment shall accrue to the contractor until the cost of the work shall have been ascertained, and assessed and collected from taxpayers.⁴⁴ So is a stipulation that the municipality shall not be liable for payments on the contract until there is money in the treasury collected for and applicable to that purpose.⁴⁵ So a requirement that claims for extra work shall be presented and settled before estimates for payments shall be allowed is valid.⁴⁶ But a statute providing that a contractor for public work shall forfeit his compensation under the contract for failure to pay laborers on the work the prevailing rate of wages, it

43. *State ex rel. v. Webster*, 20 Mont. 219, 50 Pac. 558; *Denver v. Hindy*, 40 Colo. 42, 90 Pac. 1028, 11 L. R. A. (N. S.) 1028.

Affidavit, who to make. Lowry v. Duluth, 94 Minn. 95, 101 N. W. 1059.

A provision in a municipal contract allowing the city to withhold payment from the contractor until the laborers and material men have been paid held valid, though the ordinance authorizing such provision was passed without statutory or charter authority. *State v. Liebes*, 19 Wash. 589, 54 Pac. 26.

44. *People v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006.

45. *Kronsbein v. Rochester*, 78 N. Y. S. 813, 76 App. Div. 494.

Where contract for public work provided for the payment of the money for the work, with interest, out of moneys collected on assessments against property owners, and such money was voluntarily paid to the city by the property owners, the city could not, in an action on the contract, urge that the contract was illegal, though the assessments were not legally subject to interest. *Chicago v. McGovern*, 226 Ill. 403, 80 N. E. 895.

46. *Capital City Brick & Pipe Co. v. Des Moines*, 136 Ia. 243, 113 N. W. 835.

has been held, is unconstitutional since it deprives the contractor of property without due process of law.⁴⁷

§ 1950. Payment out of special fund.

Unless restricted it is competent for a municipal corporation to provide for paying the cost of a public improvement out of a special fund.⁴⁸ Usually warrants issued for an improvement, payable out of a special fund, cannot be collected against the municipality generally although the remedy to collect from the special fund should be lost.⁴⁹ However, where public improvements are to be paid for out of assessments on warrants drawn against a special fund, the municipality will be held liable generally if it is unable to make the assessment or negligently fails to make it.⁵⁰ But in the absence of proof that the assessment is invalid or that the municipality has been negligent in making the assessment, it will not

47. *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814.

48. An appropriation by a city of liquor license money to pay for street improvements in legal. *Hett v. Portsmouth*, 73 N. H. 334, 61 Atl. 596.

49. *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524; *Rhode Island Mortgage & Trust Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104.

Warrants drawn on a special street improvement fund should be paid in the order of their priority. *Heman v. Ballard*, 40 Wash. 81, 82 Pac. 277; *La France Fire Engine Co. v. Davis*, 9 Wash. 600, 38 Pac. 154; *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524.

Certificates issued for street paving, block by block, as the work progresses, are payable in cash upon appropriations when made by the city, and their payment does not depend upon the

contractor's fulfillment of a clause in the contract for the maintenance of the work after its completion. *State v. New Orleans*, 51 La. Ann. 699, 25 So. 421.

Where the fund against which a check is drawn by the city treasurer in favor of municipal contractor is sufficient to pay the check, the contractor is entitled to payment, though such fund was not raised by general taxation in accordance with the ordinance requiring the money to be raised by that method. *First National Bank v. Keith*, 183 Ill. 475, 56 N. E. 179.

Where money is appropriated for street improvements, the contractor is not bound to see that it is not used for other purposes. *Hett v. Portsmouth*, 73 N. H. 334, 61 Atl. 596.

50. *Denver v. National Exchange Bank*, 34 Colo. 387, 82 Pac. 448; *Bill v. Denver*, 29 Fed. 344.

be liable on the warrants. The proper remedy is by *mandamus* to compel a valid assessment and levy.⁵¹

§ 1951. Amount of recovery.

Where the purpose of a public contract has been accomplished by a substantial performance the municipality cannot defeat recovery in full by the contractor on the ground that the exact method of doing the work as specified by the contractor was not followed.⁵² However, any wrongful action on the part of the contractor increasing the cost of the work will constitute a good defense to a recovery of more than the actual value thereof.⁵³ Under laws empowering named corporate officers or boards to adjust and determine the amount due under the contract, the finding of such authority is usually binding.⁵⁴

There may be a *deduction from the contract price* for delay in completing the work, but when it should be allowed, the amount thereof and the method of ascertaining the same must be determined from the law or

51. *Denver v. National Exchange Bank*, 34 Colo. 387, 82 Pac. 448.

52. The contract was for the extinguishment of fires. It had been faithfully performed by the contractor. The fact that the contractor adopted a more economical mode than that stipulated in the contract does not authorize a recovery on the part of the city for money paid under the contract because the essential element is the extinguishment of fires and not the mode of performance. *New Orleans v. Firemen's Charitable Association*, 43 La. Ann. 447, 9 So. 486.

53. Collusion between the contractor and a city officer which results in rates which makes the cost of the work exceed its value

constitutes fraud and the city may set this up as a defense to defeat a recovery for more than the value. Such defense is available although the fraud was not discovered until the work was completed and improvement certificates issued therefor. *Dime Sav. Institution v. Hoboken*, 42 N. J. L. (13 Vroom.) 283.

54. It is constitutional for a charter to constitute a board of public works the arbiter to adjust and determine all questions as to amounts earned under contracts with the city, and therefore a valid award made upon a contract which, by its terms is subject to such provision is binding. *Forristal v. Milwaukee*, 57 Wis. 628, 15 N. W. 769.

ordinance directing the improvement, the contract stipulation, if any, and the circumstances of the particular case.⁵⁵

§ 1952. Interest on sum due.

Whether the contractor is entitled to interest on money due him but unpaid depends on the statutory or charter provisions relative thereto, and also on the terms of the contract under which the work was done.⁵⁶ If the municipality unlawfully withholds payment of special assessment vouchers the contractor is entitled to inter-

55. Penalty of certain amount per day for delay in completing work under contract cannot be recovered by the city on foreclosure of subcontractor's lien, without proof of damage. *Bader v. New York*, 101 N. Y. S. 351, 51 Misc. Rep. 358.

In an action by a contractor against the municipality to recover a balance due on a contract, the question as to the amount to be deducted for delay in completing the work is for the jury. *F. V. Smith Contracting Co. v. New York*, 100 N. Y. S. 756, 115 App. Div. 180.

56. Interest. Contractor allowed interest on certificates. *J. D. Moran Mfg. & Const. Co. v. St. Paul*, 65 Minn. 300, 67 N. W. 1000.

The time of the beginning of the running of interest will depend upon the particular contract under the law applicable. *Fellows v. New York*, 17 Hun (N. Y.) 249; *Re Deering*, 14 Daly (N. Y.) 89; *Merchants' & Traders' Nat. Bank v. New York*, 97 N. Y. 355; *Booth v. Pittsburg*, 154 Pa. St. 482, 25 Atl. 803.

Money due from a city for constructing a sewer becomes due on acceptance of the work and will bear interest from that date. *Murphy v. Omaha*, 33 Neb. 402, 50 N. W. 265.

Where part of the money is to be held back for six months after the acceptance of the work, interest thereon runs after the expiration of such time until paid. *Murphy v. Omaha*, 33 Neb. 402, 50 N. W. 265.

City held not liable for interest to contractor where the assessment levied was invalid and a new levy was required. *Louisville v. Nevin*, 16 Ky. L. Rep. 438, 28 S. W. 499.

Under the law the city was only liable in case the assessment levied on property owners to pay should be declared void by the courts. In such case the debt bears interest as against the city only from the date of adjudication of invalidity. Although under the law the assessment itself bears interest from the time it becomes due. *Gafney v. San Francisco*, 72 Cal. 146, 13 Pac. 467

See § 768 *ante*, vol. 2.

est thereon.⁵⁷ But if the contractor is to be paid out of the proceeds of a special assessment levied therefor when it is collected, it has been held, the fact that the municipality wrongfully delays collecting such assessment will not authorize the contractor to recover interest, as such, on the contract price.⁵⁸

§ 1953. Retention of part by municipality.

If so provided the municipality may retain a designated part of the compensation for a named purpose or purposes. Thus a stipulation in a paving contract that the municipality may retain a certain sum per square yard to secure itself against claims for royalty or infringement of any patent in the construction of the pavement is valid, and sums so retained cannot be recovered by the contractor.⁵⁹ So if the contract provides that the municipality may retain a certain amount of the price until all claims for labor and material are settled, laborers and materialmen, it is held, have a right to have such fund appropriated to the payment of their claims.⁶⁰

d. *Liens.*

§ 1954. Liens for labor and material.

Persons furnishing labor and material used in the construction of a public improvement are generally given a lien on the money due the contractor from the municipality under the contract for that particular improvement. This is in its nature an application of the principle of the mechanics' lien law and is upheld as constitutional.⁶¹

57. *Barber Asphalt Pav. Co. v. Chicago*, 139 Ill. App. 121.

58. *Vider v. Chicago*, 60 Ill. App. 595, aff'd 164 Ill. 354, 45 N. E. 720.

59. *Detroit v. Robinson*, 42 Mich. 198, 3 N. W. 845.

60. *Thorn & Hunkins Lime & Cement Co. v. Citizens Bank of*

St. Louis, 158 Mo. 272, 59 S. W. 109. But see *American Surety*

Co. v. Waseca, 77 Minn. 92, 79 N. W. 649.

61. *Callahan v. Boston*, 175 Mass. 201, 55 N. E. 892.

Nature of lien. "A lien given by statute to mechanics and material men is but a cumulative

A lien for public improvements does not attach to any real property, but is confined to the fund in the possession of the municipality applicable to the payment of claims for labor and material.⁶² This rule is applicable,

remedy to enforce their contracts, and is as much within legislative control as any other remedy afforded by law." *Smith v. Bell*, 70 Ill. App. 490; *Smith v. Bryan*, 34 Ill. 364; *Templeton v. Horne*, 82 Ill. 491.

Mechanics' lien laws, being remedial, do not operate extratorially, and will be applied according to the place where the action is instituted, without regard to the law of the place where the right arose. *Mack v. De Graff & Roberts Quarries*, 57 Ohio St. 463, 49 N. E. 697, 63 Am. St. Rep. 729.

Contractor is not entitled to a personal judgment against the city in proceedings to enforce such lien. *McDonald v. New York*, 62 N. Y. S. 72, 29 Misc. Rep. 504.

Persons furnishing labor or materials to the subcontractor under a contract for a public improvement have a right to inspect the subcontract and are chargeable with notice of its contents and with knowledge of their rights thereunder as against the claims of the contractor. *Upson v. United States Engineering & Contracting Co.*, 130 N. Y. S. 726, 72 Misc. Rep. 541.

One who has no lien on the funds due the contractor for a public improvement is not entitled to payment of his claim out of a deposit made by the contractor to discharge liens on such funds as permitted by statute. *Milliken*

Bros. v. New York, 201 N. Y. 65, 94 N. E. 196.

62. *Iowa*. *Iowa Brick Co. v. Des Moines*, 111 Iowa 272, 82 N. W. 922.

Kentucky. *Noonan v. Hastings*, 101 Ky. 312, 41 S. W. 32, 19 Ky. L. Rep. 485, 72 Am. St. Rep. 419; *Ansbeck v. Schardien*, 20 Ky. L. Rep. 178, 45 S. W. 507.

Louisiana. *Stewart v. Christy*, 15 La. Ann. 325.

New Jersey. *Garrison v. Borio*, 61 N. J. Eq. 236, 47 Atl. 1060.

New York. *Clapper v. Strong*, 85 N. Y. S. 748, 90 App. Div. 536.

Ohio. *Coney v. Dorsey*, 8 Ohio S. & C. Pl. Dec. 642, 3 Ohio N. P. 162.

United States. *Columbia Brick Co. v. District of Columbia*, 1 App. Cas. (D. C.) 351.

Constitutional provision that laborers shall have a lien on property on which they have bestowed labor does not permit a lien to be enforced against a municipal sewer. Only the fund owing by the city to the contractor is liable to a lien. *Goldtree v. San Diego*, 8 Cal. App. 505, 512, 97 Pac. 216, 218.

Mechanics' lien laws do not apply to public buildings or structures erected by states, cities or counties for public uses, unless the statute creating the lien expressly so provides. *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596; *Manly Mfg. Co. v. Broad-due*, 94 Va. 741, 27 S. E. 596.

notwithstanding a provision in the contract that the contractor will not permit any liens to remain on the property.⁶³ Such lien attaches not only to what is due to the contractor at the time the lien notice is filed, but also to what may thereafter become due to him under the contract.⁶⁴ But the lien of a materialman of a subcontractor on funds in the hands of the contractor, due the subcontractor, it is held in New Jersey, attaches only to such funds as are due at the time of service of notice of the lien.⁶⁵ Liens for labor and materials furnished to the subcontractor on a public improvement, it seems, can be enforced only to the extent of moneys due the subcontractor from the contractor.⁶⁶ If nothing is due the contractor when a lien for labor or materials is filed, and the work is abandoned by the contractor and completed by the municipality the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien is filed.⁶⁷

The lien attaches from the time of filing notice with the proper officer, whether the whole work be then completed by the contractor, or be abandoned by him.⁶⁸ Usually the priority of liens of subcontractors on funds due the contractor may be determined by the municipality.⁶⁹

The statutes usually specify persons furnishing labor or material for a public improvement as being entitled

Under the statutes of Kentucky a lien exists in favor of the contractor against abutting property for the cost of regrading and recurb-ing incurred in the improvement of a sidewalk. *Gocke v. Staebler & McFarland*, 141 Ky. 66, 132 S. W. 167.

63. *McKay v. New York*, 62 N. Y. S. 53, 46 App. Div. 579.

64. *Pierson v. Haddonfield*, 66 N. J. Eq. 180, 57 Atl. 471.

65. *Wilson v. Dietrich*, 59 Atl. 251 (N. J. Eq., 1904).

66. *Wright v. Sehoharie Valley R. Co.*, 101 N. Y. S. 801 116 App.

Div. 542, aff'd in 191 N. Y. 549, 85 N. E. 118; *Upson v. United States Engineering & Contr. Co.*, 130 N. Y. S. 726, 72 Misc. Rep. 541.

67. *Van Chief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *Brainard v. County of Kings*, 155 N. Y. 538, 50 N. E. 263. See also *Jones v. Savage*, 53 N. Y. S. 308, 24 Misc. Rep. 158.

68. *Pierson v. Haddonfield*, 66 N. J. Eq. 180, 57 Atl. 471.

69. *Fortunato v. New York*, 53 N. Y. S. 683, 42 App. Div. 14.

to a lien. This ordinarily includes material and labor furnished a subcontractor as well as the general contractor.⁷⁰ Where materials are furnished a contractor in one state to be transported to another state and there to be used in the construction of a public improvement the one furnishing the material, it has been held, is entitled to a lien in the latter state under its statute providing liens for materialmen who furnish materials for the construction of a public improvement.⁷¹

§ 1955. Filing notice of lien.

When the notice required by law is served upon the proper officers by subcontractors the officers are bound to retain a sufficient sum of money to pay the liens, and should there not be enough to pay all the claims in full those serving notice are entitled to share in the fund *pro rata*.⁷²

The *time for filing the lien* depends, of course, on the proper construction of the law involved. Under some laws the time of filing a lien for labor is to be computed from the date of performance of the latest work, regardless of acceptance or occupation by the municipality.⁷³

70. **Materialman.** One who quotes prices on material to be used in a public building and furnishes the material is a materialman and not a subcontractor, and in Michigan is entitled to a lien on the building for the amount of his claim. *People v. Thompson*, 119 Mich. 21, 77 N. W. 314.

A materialman who furnishes materials to a subcontractor is not entitled to a lien on money due from the municipality to the contractor if nothing is due from the contractor to the subcontractor. *Meurer v. Kilgus*, 77 N. J. Eq. 175, 75 Atl. 899; *Garrison v. Borio*, 61 N. J. Eq. 236, 47 Atl. 1060.

71. *Mack v. De Graff & Roberts*

Quarries, 57 Ohio St. 463, 49 N. E. 697, 63 Am. St. Rep. 729.

72. *Spalding Lumber Co. v. Brown*, 171 Ill. 487, 49 N. E. 725; *Beardsley v. Brown*, 71 Ill. App. 199.

Form of notice. The fact that a materialman's notice of suit to enforce a lien on funds due the contractor from the municipality is in the form of a letter instead of a paper entitled in the cause does not impair its validity as a notice. *National Fire Proofing Co. v. Daly*, 76 N. J. Eq. 35, 74 Atl. 152, *aff'd* in 77 N. J. Eq. 583, 78 Atl. 1135.

73. *Milliken Bros. v. New York*, 201 N. Y. 65, 94 N. E. 196,

Sometimes the time is to be computed from the date of the completion of the work in front of the premises subject to lien, and not from the completion of the entire improvement.⁷⁴ Under a statute that recognizes lien claims as operative from the time of service of notice, each of two lienors are to be paid *pro rata* where it does not appear that one service preceded the other.⁷⁵ It is said that the municipality alone can raise the objection that the notice of a subcontractor's claim of lien was not served within the statutory time.⁷⁶

§ 1956. How lien may be lost.

A compliance with the statute is necessary to the validity of the lien.⁷⁷ The liens may be defeated by an *assignment of the moneys to become due* under the contract by the contractor before the work is done or the material furnished.⁷⁸ But a municipal contractor, it has been held, cannot defeat the lien of a subcontractor by giving an order to another person upon funds due or to become due under the contract.⁷⁹ Materialmen do not disable themselves from acquiring a statutory lien on moneys due the contractor from the municipality by taking an assignment of the subcontractor's claim against the contractor.⁸⁰

The fact that the contractor unjustifiably abandoned the work is immaterial in proceedings to enforce the lien.⁸¹ A statute giving a lien for labor upon lots front-

74. *Philadelphia v. Beatty*, 9 Pa. Super. Ct. 255. See also *Philadelphia v. Armstrong*, 16 Pa. Super. Ct. 55.

75. *Wilson v. Dietrich* (N. J. Ch.), 59 Atl. 251.

76. *First National Bank v. Elgin*, 136 Ill. App. 453.

77. *Mertz v. Press*, 91 N. Y. S. 264, 99 App. Div. 443, *aff'd* in 184 N. Y. 530, 76 N. E. 1100.

78. *Cope v. C. B. Walton Co.*, 77 N. J. Eq. 512, 76 Atl. 1044.

79. *Spalding Lumber Co. v. Brown*, 171 Ill. 487, 49 N. E. 725; *Beardsley v. Brown*, 71 Ill. App. 199.

80. *National Fire Proofing Co. v. Daly*, 76 N. J. Eq. 35, 74 Atl. 152, *aff'd* in 77 N. J. Eq. 583, 78 Atl. 1135.

81. *Rockland Lake T. R. Co. v. Port Chester*, 92 N. Y. S. 631, 102 App. Div. 360, *aff'd* in 185 N. Y. 590, 78 N. E. 1111.

ing on the improvement will not deprive a laborer of the right to avail himself of the provisions of the charter requiring the municipality to retain a certain per cent of the contract price of the work to secure the payment of claims of laborers and giving laborers a lien thereon.⁸² Where a lien has attached under a statutory notice to moneys earned by the contractor before he abandoned the work, it will not be divested by subrogating the surety of the contractor to a right which the municipality might have had if it had completed the abandoned work when in fact it did not so complete it.⁸³ A lien for materials furnished a contractor for public work for an amount greater than the amount due the lienor will not be declared wholly void where the same is not fraudulently padded.⁸⁴

§ 1957. Enforcing lien.

Failure to institute suit and give notice of pendency thereof within the time provided by statute will defeat the lien.⁸⁵ Where the statute provides no remedy, it has been held that the lien may be enforced by a bill in chancery.⁸⁶

§ 1958. Assignment by contractor.

In the absence of anything to the contrary in the contract, and before any notice is filed, the contractor may assign to his creditors, in payment of his debt, the whole or any portion of the moneys due or to become due

82.— *Seattle v. Turner*, 29 Wash. 515, 69 Pac. 1083.

83. *Pierson v. Haddonfield*, 66 N. J. Eq. 180, 57 Atl. 471.

84. *Camden Iron Works v. Camden*, 60 N. J. Eq. 211, 47 Atl. 220; *Garrison v. Borio*, 61 N. J. Eq. 236, 47 Atl. 1060.

85. *Hazard v. Board of Education* (N. J. Eq., 1910), 75 Atl. 237, *aff'd* in 80 Atl. 456.

"Proceedings to enforce" mu-

nicipal liens as provided for by statute, held to refer to proceedings after the claim has been duly perfected, and does not include the filing of the claim itself with the officers designated by statute. *Howell Lumber Co. v. New Brunswick* (N. J. Eq., 1910), 75 Atl. 750.

86. *National Bank of La Crosse v. Petterson*, 102 Ill. App. 501, *aff'd* in 200 Ill. 215, 65 N. E. 687.

under the contract, and the assignee acquires a preference over a subsequent lienor.⁸⁷ The assignment by a materialman of his claim, as collateral security, does not defeat his lien, on a balance due the contractor.⁸⁸ A lien on funds due a contractor for municipal work may be enforced by an assignee if the assignment is not prohibited.⁸⁹

A charter provision forbidding the assignment of contracts for public work does not prevent the contractor from assigning his claim against the city for money due or to become due under the contract.⁹⁰

e. *Bond.*

§ 1959. Bond for performance of work.

A bond is generally required conditioned on proper performance of the contract, and, among other things, that the contractor shall pay for all materials and labor furnished on the improvement. Sometimes the requirement is mandatory; sometimes it is left to the discretion of the municipal officers.⁹¹ Unless restricted the bond

87. *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270.

88. *McDonald v. New York*, 85 N. Y. S. 1096, 89 App. Div. 131.

89. *Episcopo v. New York*, 72 N. Y. S. 140, 35 Misc. Rep. 623.

90. *Dickson v. St. Paul*, 97 Minn. 258, 106 N. W. 1053.

91. Requirement of bond, held valid. *Wilson v. Whitmore*, 36 N. Y. S. 550, 92 Hun 466.

Statute requiring a bond, held mandatory. *Barker v. Southern Construction Co.*, 20 Ky. L. Rep. 796, 47 S. W. 608.

Security for the performance of the contract is not always required. *Carey v. East Saginaw*, 79 Mich. 73, 44 N. W. 168; *Eaton v. Monroe*, 63 Mich. 525, 29 N. W. 885.

Although the charter requires

a bond for the faithful performance of the contract, the giving of the bond is not an essential condition to the making of the contract. *Curran Printing Co. v. St. Louis*, 213 Mo. 22, 111 S. W. 812.

A statute requiring contractor to give bond for the construction of improvements which the city was authorized to pay for in whole or in part, does not apply to the construction of sidewalks, the cost of which is placed wholly on property owners. *Tennessee Paving Brick Co. v. Barker*, 119 Ky. 654, 22 Ky. L. Rep. 1069, 59 S. W. 755.

If the charter or statute leaves the question of the requirement of a bond to the discretion of the municipal authorities, the fact that no bond was required in a given case cannot affect the lia-

may be taken either before or after the contract is made.⁹² Bond may also be required to indemnify the municipality against claims arising from the negligence of the contractor in the performance of the work.⁹³

Non-essential irregularities in the execution of the bond or *errors* or *misrecitals* therein will be disregarded, as for example, a recital that it is taken as a common law bond, when it contains all material statutory conditions,⁹⁴ or a provision against public policy that a named officer shall not be liable for personal delinquency,⁹⁵ or a mere mistake in the date,⁹⁶ or in the name of the obligee, as the city instead of the state,⁹⁷ or a slight departure from the terms of the ordinance,⁹⁸ or where a bond to secure laborers and materialmen exceeds the requirements of the ordinance,⁹⁹ or where

bility of the municipality under the contract. *Carey v. East Saginaw*, 79 Mich. 73, 44 N. W. 168.

92. *Red Wing Sewer Pipe Co. v. Donnelly*, 102 Minn. 192, 113 N. W. 1.

Under Ohio laws, contracts for public work can not be awarded until bond is given, and upon the failure of the lowest bidder to act promptly in giving such bond, the next lowest bidder who gives bond is entitled to the award. *State v. Licking County Commissioners*, 26 Ohio St. 531.

Where the first payment under the contract is not due until the completion of the work, a bond given on the completion of the work is sufficient. *Hallock v. Lebanon*, 215 Pa. 1, 64 Atl. 362.

In the absence of law providing for the amount of the bond, or as to its form or whether it should be furnished with the bid or after its acceptance, the regulation of such matters is left to the discretion of the municipal officer re-

ceiving the bids. *Selpho v. Brooklyn*, 39 N. Y. S. 520, 5 App. Div. 529, aff'd in 158 N. Y. 673, 52 N. E. 1126.

93. *Morris v. Salt Lake City*, 35 Utah 474, 101 Pac. 373.

94. *Baum v. Whatcom County*, 19 Wash. 626, 54 Pac. 29.

95. *Byrne v. Luning Co. (Cal., 1894)*, 38 Pac. 454.

96. *Byrne v. Luning Co. (Cal., 1894)*, 38 Pac. 454.

97. *Alpena v. Title Guaranty & Surety Co.*, 158 Mich. 678, 123 N. W. 536, 16 Det. Leg. N. 783.

Name. Bonds to secure performance of contract made by board of water commissioners may be taken in the name of board. *Morton v. Power*, 33 Minn. 521, 24 N. W. 194.

98. *Dashiell v. Baltimore*, 45 Md. 615.

99. Such bond may be enforced according to its terms, if voluntarily given. *Philadelphia v. Harry C. Nichols Co.*, 214 Pa. 265, 63 Atl. 886.

the penalty in such bond is less than the amount required by statute.¹

§ 1960. Bond to secure laborers, materialmen and subcontractors.

A bond may be required to secure laborers, materialmen and subcontractor,² even under general powers,³ or according to a few decisions as an incident to the authority to contract for the improvement,⁴ or as an obligation which the local corporation is bound to discharge to those who furnish labor or materials on the work;⁵ however, some cases assert that express authority is necessary since such bond is for the benefit of third persons.⁶ Statutory and charter provisions ex-

1. *Waterous Engine Wks. Co. v. Clinton*, 110 Minn. 267, 125 N. W. 269.

A municipal contractor's bond to secure laborers and materialmen is sufficient to protect a materialman where it incorporates the provisions of the ordinance requiring same. *Philadelphia v. Wiggins*, 227 Pa. 343, 76 Atl. 31.

2. *Hamilton v. Gambell*, 31 Ore. 328, 48 Pac. 433.

3. *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531; *American Surety Co. v. Ralder*, 15 Ohio Cir. Ct. Rep. 47, 8 O. C. D. 684.

A municipal corporation having power under its charter to require contractors for public work to give bond to secure the proper performance of the work, may require contractor to give security for the protection of subcontractors and materialmen. *Philadelphia v. Stewart*, 195 Pa. St. 309, 45 Atl. 1056.

4. Municipal corporations are charged with the moral duty of protecting persons who labor upon, or furnish materials for, its public improvements, and the right to require contractors to pay for labor and materials expended on the work, although not prescribed by any positive law, belongs to them as an incident to the power to contract for the improvement. *State ex rel. v. Liebes*, 19 Wash. 589, 54 Pac. 26.

5. The duty which a city owes to those who labor upon, or furnish materials for its public streets creates such a privity between them as would entitle the laborers and materialmen to the benefits of a bond given to the city by a contractor, conditioned on the payment of all amounts due for labor and material. *St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. Rep. 695.

6. *Lyth v. Hingston*, 43 N. Y. S. 653, 14 App. Div. 11; *Park Brothers & Co. v. Sykes*, 67 Minn. 153, 69 N. W. 712.

ist expressly requiring the municipality to compel the contractor for public work to give bond to secure laborers, mechanics and materialmen,⁷ and this is held to be a legitimate exercise of legislative power.⁸

Sometimes the bond is required to be taken only where the work to be done is such that if done for an individual a lien would attach in favor of laborers and others. Such bond is not required in street improvements for in such case no lien for labor performed on a street exists.⁹ Such bond, it has been held, does not protect persons who furnish labor and materials to one who is not an obligor in the bond, such as the contractor, or in some relation of privity with the contractor, as a subcontractor.¹⁰ Day laborers will be protected.¹¹ But it has

7. Such bonds authorized by statute in Minnesota. *Waterous Engine Works Co. v. Clinton*, 110 Minn. 267, 125 N. W. 536; *St. Paul v. Butler*, 30 Minn. 459, 16 N. W. 362.

Knowledge of conditions. *E. I. Dupont, etc. Co. v. Culgin Pace Contracting Co.*, 206 Mass. 585, 92 N. E. 1023.

Statutory provisions incorporated in bond by reference. *E. I. Dupont, etc. Co. v. Culgin Pace Contracting Co.*, 206 Mass. 585, 92 N. E. 1023.

Bankruptcy of contractor does not destroy claim of materialmen. *Empire State Surety Co. v. Des Moines (Ia., 1911)*, 131 N. W. 870.

8. *Wilson v. Whitmore*, 36 N. Y. S. 550, 92 Hun 466; *Wilson v. Webber*, 157 N. Y. 693, 51 N. E. 1094.

9. *Clough v. Spokane*, 7 Wash. 279, 34 Pac. 934.

10. *Board of Education v. United States Fid. & G. Co.*, 155 Mo. App. 109, 134 S. W. 18.

Such bond will protect one who

allows dirt to be taken from his land by the contractor for filling purposes on condition that the contractor would grade the lots from which the dirt was removed. The fact that the person furnishing the dirt was not to receive his pay therefor in money is immaterial. *Kansas City v. Davidson*, 154 Mo. App. 269, 133 S. W. 365.

11. Day laborers are entitled to the protection of a bond given by municipal contractor to secure the payment of claims for labor and materials. *Philadelphia v. McLinden*, 205 Pa. 172, 54 Atl. 719.

Where ordinance required contractors for city work to give additional bonds to the city for the use of laborers and materialmen, a bond to the city conditioned for the completion of the work in a satisfactory manner and for the payment of laborers and materialmen does not authorize a recovery to the use of laborers and materialmen. *Lancaster v. Frescoln*, 192 Pa. 452, 43 Atl. 961, 30 Pittsb. L. J. (N. S.) 535.

been held that persons performing labor in repairing dredges, pumps and machinery used in the construction of public work are not within the terms of the contractor's bond to secure the payment of claims for "labor and materials furnished under the contract."¹²

Whether subcontractors and their materialmen are protected by such bond depends upon the terms of the bond, and its reasonable construction in the light of the statute or charter requiring it to be given.¹³ Accordingly it has been held that certain bonds given to secure payment for all labor and materials used on the work secure subcontractors,¹⁴ and materialmen employed by subcontractors,¹⁵ and the contrary has also been held in

12. *Alpena v. Title Guaranty & Surety Co.*, 159 Mich. 329, 123 N. W. 1126, 16 Det. Leg. N. 911; *Alpena v. Muray Co.*, 159 Mich. 336, 123 N. W. 1128, 16 Det. Leg. N. 913.

The claims of sub-contractors and materialmen against the surety on the contractor's bond can not be affected by any action of the municipality taken after the claims have accrued. *Empire State Surety Co. v. Des Moines* (Ia., 1911), 131 N. W. 870.

Assent of sureties. Where municipality makes payment to contractor for work done under a municipal contract with the understanding that he and his sureties will pay off and discharge all claims for labor and material secured by the bond, the assent of the sureties thereto may be implied from their being present at the time the payment is made. *Devers v. Howard*, 88 Mo. App. 253.

13. *Spalding Lbr. Co. v. Brown*, 171 Ill. 487, 49 N. E. 725; *Sepp v.*

McCann, 47 Minn. 364, 50 N. W. 246

14 *Hipwell v. National Surety Co.*, 130 Iowa 656, 105 N. W. 318; *Pershing v. Swenson*, 58 Minn. 310, 59 N. W. 1084; *Sepp v. McCann*, 47 Minn. 364, 50 N. W. 246; *Salisbury v. Keigher*, 47 Minn. 367, 50 N. W. 246; *People v. Collins*, 112 Mich. 605, 71 N. W. 153, 4 Det. Leg. N. 130.

15. *Combs v. Jackson*, 69 Minn. 336, 72 N. W. 565; *Bowditch v. Gourley*, 24 Pa. Super. Ct. 342; *Philadelphia v. Wiggins*, 227 Pa. 343, 76 Atl. 31; *Philadelphia v. Harry C. Nichols Co.*, 214 Pa. 265, 63 Atl. 886.

Contractors' bond, held to protect those who furnish material or labor under a sub-contractor. *Ihrig v. Scott*, 5 Wash. St. 584, 32 Pac. 466.

Materialman and sub-contractor distinguished. *People for use, etc. v. Finn*, 162 Mich. 481, 127 N. W. 704, 17 Det. Leg. N. 666; *People for use, etc. v. National Construction Co.*, 159 Mich. 133, 123 N. W. 801, 16 Det. Leg. N. 828.

construing particular bonds and laws.¹⁶ Those furnishing material and labor in the making of a public improvement may sue on a bond given to protect them,¹⁷ that is, where it was executed for their di-

Sub-contractors are not bound to perfect their claims against funds due the contractor but may rely on the security afforded by the bond. *Hipwell v. National Surety Co.*, 130 Iowa 656, 105 N. W. 318; *Whitehouse v. American Surety Co.*, 117 Iowa 328, 90 N. W. 727.

16. *Spalding Lbr. Co. v. Brown*, 171 Ill. 487, 49 N. E. 725; *Beardsley v. Brown*, 71 Ill. App. 199; *People to use, etc. v. Cottoral*, 119 Mich. 207, 77 N. W. 312, 5 Det. Leg. N. 700; *Kansas City v. McDonald*, 80 Mo. App. 444; *Philadelphia v. Malone*, 214 Pa. 90, 83 Atl. 539, 23 Pa. Co. Ct. 39.

Under a Michigan statute requiring bond to be given by a contractor for public improvement work to secure the payment of claims for labor and materials, it is held that a sub-contractor is not protected. *People for use, etc. v. Powers*, 108 Mich. 339, 66 N. W. 215; *Avery v. Board of Supervisors*, 71 Mich. 538, 39 N. W. 742.

A manufacturer of brick who supplies a contractor, who has agreed to furnish the materials and erect a public building at an agreed price, with the brick used, is not a sub-contractor within such statute. *Staffon v. Lyon*, 104 Mich. 249, 62 N. W. 354.

17. *Williams v. Markland*, 15 Ind. App. 669, 44 N. E. 562; *Lyman v. Lincoln*, 38 Neb. 795, 57 N. W. 531; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *St. Paul v. Butler*,

30 Minn. 459, 16 N. W. 362; *Morton v. Power*, 33 Minn. 521, 24 N. W. 194; *Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. C. 363, 42 S. E. 858.

A lienor has a direct interest in such bond which gives him a standing to enforce it against the city the moment judgment is entered against the contractor. *Smith v. New York*, 66 N. Y. S. 686, 32 Misc. Rep. 380.

In an action to enforce a claim for labor performed the city is not a necessary party. *Sepp v. McCann*, 47 Minn. 364, 50 N. W. 246; *Salisbury v. Keigher*, 47 Minn. 367, 50 N. W. 246.

It is sufficient that laborers and materialmen of municipal contractor be designated as a class in the contractor's bond to entitle them to maintain an action on the bond. *American Surety Co. v. Thorn-Halliwell Cement Co.*, 9 Kan. App. 8, 57 Pac. 237; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398.

Where the bond runs to the municipality instead of to the people as required by statute, action thereon must be brought in the name of the municipality. *People for use, etc. v. Laidlaw*, 120 Mich. 358, 79 N. W. 576, 6 Det. Leg. N. 163.

Third persons can not sue on contractor's bond, when. *Kansas City ex rel. v. O'Connell*, 99 Mo. 357, 12 S. W. 791.

rect and primary benefit and such was the manifest intent of the parties thereto,¹⁸ although not in terms parties to the bond or mentioned therein.¹⁹

In a bond for the benefit of a city the sureties guaranteed that the contractor who has a contract with the city after the construction of a sewer shall pay for all materials furnished. Held the persons furnishing materials cannot sue on the bond, as the city is not liable for material and has no power to make such provision for the benefit of other persons. *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218, 25 S. W. 522.

Laborers and materialmen cannot sue on the bond in their own name under a law authorizing the city, in case of default, to sue on the bond for all damages sustained in the premises. *State Bank of Duluth v. Heney*, 40 Minn. 145, 41 N. W. 411.

One who furnishes material for the construction of a county road cannot enforce his claim therefor against the county where the contractor for the work has given a bond to the county to secure laborers and materialmen. *Baum v. Whatcom County*, 19 Wash. 626, 54 Pac. 29.

School commissioners who are the obligees in a bond given by a contractor for the construction of a school building cannot subrogate their rights under the bond to a materialman so as to entitle him to maintain an action on the bond. *Townsend v. The Cleveland Fireproofing Co.*, 18 Ind. App. 568, 47 N. E. 707.

18. *Parker v. Jeffery*, 26 Ore. 186, 37 Pac. 712.

Laborers and materialmen cannot sue on a bond given by municipal contractor to the city unless there was an intent on the part of the city to take the bond for their benefit and a privity of interest between them and the city. *Lyth v. Hingston*, 43 N. Y. S. 653, 14 App. Div. 11; *Electric Appliance Co. v. United States Fid. & G. Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609.

19. *Wilson v. Whitmore*, 36 N. Y. S. 550, 92 Hun 466, *aff'd* in *Wilson v. Webber*, 157 N. Y. 693; 51 N. E. 1094; *St. Louis to use v. Von Phul*, 133 Mo. 561, 34 S. W. 843; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *School District ex rel. v. Livers*, 147 Mo. 580, 49 S. W. 507.

Contra. *Lyth v. Hingston*, 43 N. Y. S. 653, 14 App. Div. 11.

Action on the bond will not lie in favor of a person not a party to it, where the law cannot give him the right to a lien, as in street grading. *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280.

A city may sue in its own name on bond to secure laborers and materialmen. *Philadelphia v. Stewart*, 195 Pa. St. 309, 45 Atl. 1056.

Where bond is given by municipal contractor to the city to secure laborers and materialmen, materialmen may sue thereon in the name of the city to their own use, or the city may bring an action thereon to the use of such ma-

§ 1961. Liability on bond.

The illegality of the contract does not affect the bond unless the bond and contract are united either in consideration or promise. Hence, the bond will stand, although the contract is invalid, if the former is *conditioned that the contractor shall pay all indebtedness incurred for labor and material*. The theory is that the contracts of materialmen and laborers are independent of the principal contract, and the bond is given to secure payment under these contracts.²⁰ But where the bond is *conditioned upon the faithful performance by the contractor of the terms of the contract* the invalidity of the latter renders the bond inoperative. Here the contract is an illegal thing which ought not to be performed, and as the sureties stand for its performance, no liability attaches to them in the absence of a provision to that effect.²¹

terialmen, but not otherwise. *Bethany v. Howard*, 149 Mo. 504, 51 S. W. 94.

Where the bond of a municipal contractor is properly conditioned, but running to the municipality, any one beneficially interested in the bond may maintain an action thereon without the consent of the municipality. *Stephenson v. Monmouth Min. & Mfg. Co.*, 84 Fed. 114, 28 C. C. A. 292.

Notice of claim. *Grant v. Berisford*, 94 Minn. 45, 101 N. W. 940; *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. 112.

The property owner may by action against the city compel the latter to enforce a bond given for the performance of a contract for local improvements where such bond has been forfeited in consequence of the contractor's failure to perform, and the money collected in such suit may be ap-

plied in diminution of assessments before imposing an assessment for the work. *Eno v. New York*, 68 N. Y. 214.

Time of bringing suit. *Kansas City v. McDonald*, 73 Mo. App. 437.

20. *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, 167 Fed. 496.

21. *Kansas City v. O'Connor*, 82 Mo. App. 655.

In Kansas it has been held that persons supplying labor and material for an improvement with full knowledge of the facts which render void all proceedings and the contract relative thereto, cannot maintain an action therefor against the sureties on a bond conditioned that the contractor shall pay all indebtedness incurred for labor and material. *National Surety Co. v. Kansas City Hydraulic P. B. Co.*, 73 Kan. 196, 84

Ordinarily the sureties are severally as well as jointly liable with the contractor.²² The liabilities of sureties to secure the municipality against judgment for mechanics' liens does not cease when the lien is discharged.²³ Liability on the bond cannot be transferred by assignment of the contract in the absence of the consent of the parties entitled to sue thereon.²⁴

Sureties can be released only by some positive act done by the municipality to their prejudice,²⁵ or some negligent act which will imply connivance amounting to fraud.²⁶ Extension of time for the completion of the work obviously is no ground for complaint on the part of the surety where he assents thereto.²⁷

Pac. 1034; *Atkin v. Wyandotte Coal & Lime Co.*, 73 Kan. 768, 84 Pac. 1040.

22. *Milbank v. Western Surety Co.*, 21 S. D. 261, 111 N. W. 561.

Liability of sureties on bond in particular case. *New York v. Crawford*, 111 N. Y. 638, 19 N. E. 501, aff'g 14 N. Y. St. Rep. 891.

Where individual contractor does business under a corporate name, a bond signed with the corporate name as principal to secure performance of the work is enforceable against the sureties for the default of the individual. *Milbank v. Western Surety Co.*, 21 S. D. 261, 111 N. W. 561.

23. *Smith v. New York*, 66 N. Y. S. 686, 32 Misc. Rep. 380.

24. *French v. Powell*, 135 Cal. 636, 68 Pac. 92.

25. The payment by a city on work accepted by it under an honest belief that it was done in the manner required by the contract will not release a surety. *New-*

ark v. New Jersey Asphalt Co., 68 N. J. L. 458, 53 Atl. 294.

Not relieved because the condition of the bond is more comprehensive than is required by ordinance. *Bowditch v. Gourley*, 24 Pa. Super. Ct. 342.

Not released by the fact that the city consented to an assignment of moneys due the contractor where the contract provided for the giving of such consent. *New Rochelle v. Cortright*, 115 N. Y. S. 135, 131 App. Div. 140.

Notice to the municipality not to pay the contractor will not exonerate the sureties on contractor's bond to secure laborers and materialmen, if the city is under no obligation to pay them or see that they are paid. *Philadelphia v. McLinden*, 205 Pa. 172, 54 Atl. 719.

26. *Newark v. New Jersey Asphalt Co.*, 68 N. J. L. 458, 53 Atl. 294.

27. *Empire State Surety Co. v. Des Moines (Ia., 1911)*, 131 N. W. 870.

It has been held that sureties are entitled to have funds due from the municipality to the contractor under the contract applied to claims secured by the bond.²⁸

§ 1962. Same—for what liable.

Concerning the liability of sureties on a bond for material furnished to perform the contract a distinction is sometimes drawn between *materials which go into and become a part of the improvement* and *materials which become a part of the machinery and equipment* used by the contractor in the construction of the improvement. Sureties are held liable for the former, but not for the latter.²⁹ Thus, a bond to secure payment of “materials” used on the work does not cover tools and appliances used to perform the work which did not enter into and become a part thereof.³⁰ But under a bond conditioned to secure payment for “any work of any kind” performed in the excavation of a tunnel contracted for, one who furnished a teamster and horses and scraper for the work, it has been held, is entitled to recover therefor on the bond.³¹ A bond to secure payment of materials furnished or services rendered “in or about the execution of such contract” authorizes a recovery thereon for coal used as fuel in producing the power to do the work.³² A bond for labor and materials covers the cost, it has been held, of making repairs on machinery used in the performance of the work.³³ The municipality cannot recover on a contractor’s bond the ex-

28. *Gastonla v. McEntee-Peter-son Eng. Co.*, 131 N. C. 359, 42 S. E. 857.

29. *Empire State Surety Co. v. DesMoines* (Ia., 1911), 132 N. W. 837; *Kansas City to use, etc. v. Youmans*, 213 Mo. 151, 180, 181, 112 S. W. 225.

30. *Beals v. Fidelity & Deposit Co. etc.*, 78 N. Y. S. 584, 76 App.

Div. 526, 178 N. Y. 581, 70 N. E. 1095.

31. *French v. National Surety Co.*, 135 Cal. 636, 68 Pac. 92.

32. *Zipp v. Fidelity & Deposit Co. etc.*, 76 N. Y. S. 386, 73 App. Div. 20.

33. *Fidelity & Deposit Co. etc. v. Charles Hegewald Co.*, 144 Ky. 790, 139 S. W. 975.

pense of repairing the work where the contract has been substantially performed.³⁴

A surety on the bond of a municipal contractor will not usually be held liable in a sum in excess of the penalty specified therein. However, if the surety is in default for the payment of interest on the amount due, a judgment therefor is not excessive.³⁵ Counsel fees paid by the municipality in defending actions by creditors of the contractor are not recoverable on a bond conditioned for the proper performance of the work.³⁶

§ 1963. Same—on abandonment of work.

On abandonment of the work by the contractor sureties are liable only for the amount required to complete the work in excess of the contract price.³⁷ The value of extra work performed by the contractor should be added to the contract price and the sum so found deducted from the amount the municipality was compelled to pay to complete the work.³⁸ If the cost of completing work abandoned by the contractor is enhanced by reason of a material departure from the terms of the original contract the contractor's surety is released.³⁹ Where a city issued taxbills in excess of the contract price of the work to pay a contractor who completed the work after it had been abandoned by the original contractor, it cannot recover the excess in an action on the contractor's bond either in its own name or as trustee for the special taxpayers injured thereby.⁴⁰

34. The question as to whether the substitution of loose earth for sand in laying a sewer was a substantial performance of the contract, held a question for the jury in an action on the contractor's bond. *St. Louis v. Ruecking*, 232 Mo. 325, 134 S. W. 657.

35. *Spokane v. I. Lumber Co.*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

36. *Gastonla v. McEntee-Peter-*

son Eng. Co., 131 N. C. 363, 42 S. E. 858.

37. *Nick Peay Const. Co. v. Miller* (Ark., 1911), 139 S. W. 1107.

38. *Fergus Falls v. Illinois Surety Co.*, 113 Minn. 33, 128 N. W. 820.

39. *Fergus Falls v. Illinois Surety Co.*, 113 Minn. 33, 128 N. W. 820.

40. *St. Louis v. Anderson*, 229 Mo. 181, 129 S. W. 528; *St. Louis*

Assignment by the contractor of moneys due him under the contract is not an alteration of the contract, so as to release the surety on the contractor's bond from the obligation to complete the work after it had been abandoned by the contractor.⁴¹

§ 1964. Same—personal liability of officers.

A statute requiring municipal officers to let certain contracts "to the lowest responsible bidder giving adequate security," it is held, imposes a judicial duty on such officers in so far as their determination of the adequacy of such security is concerned, and hence they are not personally liable for error in judgment in accepting security wholly inadequate.⁴² In Michigan failure of the municipal authorities to exact bond, for the protection of laborers and materialmen as directed by statute renders them liable in their individual capacity to the persons injured,⁴³ but the contrary has been held in Minnesota.⁴⁴ However, if the officers require the bond, they are not liable for error in judgment as to the sufficiency of the security. The distinction as mentioned is that the act of requiring a bond as provided by statute is a ministerial act, while fixing the amount and passing upon the sufficiency of the sureties involve discretion which render them judicial acts.⁴⁵

§ 1965. Defenses.

It is not a defense to an action on a bond that the plaintiff is not entitled to the protection of the bond be-

v. G. H. Wright Contracting Co., 202 Mo. 451, 101 S. W. 6; St. Louis v. G. H. Wright Construction Co., 210 Mo. 491, 109 S. W. 6.

41. New Rochelle v. Cortright, 115 N. Y. S. 135, 131 App. Div. 140.

42. East River Gas Light Co. v. Donnelly, 93 N. Y. 557.

43. Alpena to use, etc. v. Title Guaranty & Security Co., 158

Mich. 678, 123 N. W. 536, 16 Det. Leg. N. 783; Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547; Wells v. Board of Education of West Bay City, 78 Mich. 260, 44 N. W. 267.

44. Ihk v. Duluth, 58 Minn. 182, 59 N. W. 960.

45. Huebner v. Nims, 132 Mich. 657, 94 N. W. 180.

cause he is a day laborer, or that the laborers were aliens employed in violation of a statute.⁴⁶

In an action against the sureties on the bond an allegation in the answer that the contract provided for a system of grading that would impair the drainage of the city was held no defense to the action.⁴⁷

In an action by the municipal corporation for a sum due from the contractor to one furnishing materials it is no defense that the corporation has in its hands sufficient funds withheld from the contractor to pay such claim.⁴⁸

Where a municipal contract is assigned to the surety on the contractor's bond, and the surety undertakes to complete the work thereunder, it is no defense in an action on the bond that the surety was compelled to pay out more money than was due him from the city by reason of the contract.⁴⁹

In an action on a municipal contractor's bond given as an indemnity against defective work under the contract a plea in bar which simply alleges that the city has accepted and paid for the work is not good. It must allege that the work was accepted and paid for by the city with knowledge of the facts alleged as breaches in the declaration.⁵⁰

In an action on a municipal contractor's bond for materials furnished, an affidavit of defense averring that the plaintiff agreed to give the contractor a bond to indemnify him against defects in workmanship and materials, and that such bond had not been given was held insufficient, in the absence of averment that the contractor had exacted the bond or that he was prejudiced by the failure to give same.⁵¹

46. *Philadelphia v. McLinden*, 205 Pa. St. 172, 54 Atl. 719.

47. *Board of Commissioners, etc. v. Shields*, 4 Mo. App. 579 (memorandum).

48. *West Duluth v. Norton*, 57 Minn. 72, 58 N. W. 829.

49. *Spokane & I. Lumber Co. v. Boyd*, 28 Wash. 90, 68 Pac. 337.

50. *Newark v. New Jersey Asphalt Co.*, 68 N. J. L. 458, 53 Atl. 294.

51. *Philadelphia v. Pierson*, 211 Pa. 388, 60 Atl. 699.

The failure of a laborer to file his statutory lien will not release the surety on the contractor's bond given to secure the payment of all claims for labor and material, etc.⁵²

§ 1966. Construction.

Municipal contractor's bond "must be construed in accordance with the general rules for the construction of written instruments, guided in their application by the further rule that sureties are not liable beyond the strict letter of their contract."⁵³ A contract for public work will be construed strictly in favor of the surety on the contractor's bond where there is any uncertainty or ambiguity in its provisions.⁵⁴ If the contract and bond are made an entire instrument, they must be construed together.⁵⁵ Such bonds, defective as statutory bonds, will be construed as common law bonds.⁵⁶

5. DAMAGES.

§ 1967. Scope of subdivision

The kind of *damages considered in this subdivision are such as result indirectly or consequentially to private property by reason of the construction of public improvements, or the vacation of streets and alleys*, by a municipal corporation, and does not include damages for the taking or actual invasion of such property, nor municipal liability for negligence in the execution of

52. *Read v. American Surety Co. etc.*, 117 Iowa 10, 90 N. W. 590. "work." *Fort Madison v. Moore*, 109 Ia. 476, 80 N. W. 527.

53. *Union Sewer Pipe Co. v. Olson*, 82 Minn. 187, 84 N. W. 756; 54. *American Surety Co. v. Thorn-Halliwell Cement Co.*, 9 Kan. App. 8, 57 Pac. 237.

Winona v. Jackson, 92 Minn. 453, 100 N. W. 368. 55. *Jordan v. Kavanaugh*, 63 Ia. 152, 18 N. W. 851.

A municipal contractor's bond conditioned to secure the performance of the "contract" has the same effect as if conditioned to secure the performance of the 56. *Stephenson v. Monmouth Mining & Mfg. Co.*, 84 Fed. 114, 28 C. C. A. 292; *American Radiator Co. v. American Bonding & T. Co.*, 72 Neb. 100, 100 N. W. 138.

the work, except, as the question is involved incidentally.^{56a}

§ 1968. Liability for consequential damages.

It is well settled that a municipal corporation is not liable for consequential injuries to property resulting from a public improvement duly authorized and constructed in pursuance of legal provisions, without negligence or want of skill, unless such liability is imposed by constitution, or statute, or charter,⁵⁷ as consequen-

56a. Taking of property and necessity of compensation therefor, see Chapter 32, Eminent Domain, *ante*, this volume.

See chapter on Municipal Liability for Torts, *post*, vol. 5, and chapter on Municipal Liability for Defective Streets, *post*, vol. 5.

57. *Arkansas*. *Simmons v. Camden*, 26 Ark. 276, 7 Am. Rep. 620.

California. *Houghton's Appeal*, 42 Cal. 35.

Connecticut. *Durand v. Ansonia*, 57 Conn. 70, 17 Atl. 283; *Burritt v. New Haven*, 42 Connecticut, 174.

Florida. *Bowden v. Jacksonville*, 52 Fla. 216, 42 So. 394.

Indiana. *Princeton v. Gieske*, 93 Ind. 102; *Platter v. Seymour*, 86 Ind. 323; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Weiss v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12.

Iowa. *Creal v. Keokuk*, 4 G. Greene (Ia.) 47.

Louisiana. *Thibodeaux v. Maggioli*, 4 La. Ann. 73.

Maryland. *Cumberland v. Wilison*, 50 Md. 138, 33 Am. Rep. 304.

Michigan. *Fuller v. Grand*

Rapids, 105 Mich. 529, 63 N. W. 530.

Missouri. *Wegman v. Jefferson*, 61 Mo. 55.

New York. *Linton Pharmacy v. McDonald*, 96 N. Y. S. 675, 48 Misc. Rep. 125.

Ohio. *Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73.

Pennsylvania. *Green v. Reading*, 9 Watts. (Pa.) 382, 36 Am. Dec. 127.

Texas. *Taylor v. Houston & T. C. R. Co.* (Tex. Civ. App.), 80 S. W. 260.

Wisconsin. *Alexander v. Milwaukee*, 16 Wis. 247; *Walish v. Milwaukee*, 95 Wis. 16, 69 N. W. 818; *Colclough v. Milwaukee*, 92 Wis. 182, 65 N. W. 1039; *Drummond v. Eau Claire*, 85 Wis. 556, 55 N. W. 1028.

When the legislature authorizes something to be done in the neighborhood of a person's land which diminishes its value, but which would not be actionable at common law if done by a neighboring owner, if the statute provides no compensation, the owner cannot claim any under the constitution, because what is done does not amount to a taking.

tial damages to lots contiguous to a street or sidewalk which has been graded in a careful manner,⁵⁸ or in the authorized change of the grade of a street,⁵⁹ or in paving and curbing streets,⁶⁰ or in establishing a grade for a street and adopting plans for its improvement,⁶¹ or in filling a ditch and cutting down a street,⁶² or in cutting down trees in repairing streets.⁶³ But where the improvement is made by the municipality without authority,⁶⁴ or where the proceeding is not in accordance with

Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. 489.

"For injuries resulting from reasonable and ordinary or usual change and improvement of the street by the municipality the abutting owner cannot recover, provided the change or improvement is made in a careful and skillful manner for the benefit of the public." Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789, 24 L. R. A. 392, 46 Am. St. Rep. 273.

58. Montgomery v. Townsend, 84 Ala. 478, 4 So. 780; Snyder v. Rockport, 6 Ind. 237; Terre Haute v. Turner, 36 Ind. 522; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821; St. Louis v. Gurno, 12 Mo. 414, following Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; Tate v. Missouri, K. & T. Ry. Co., 64 Mo. 149; Radcliff's Ex'rs v. Brooklyn, 4 N. Y. (4 Comst.) 195, 53 Am. Dec. 357.

59. Dore v. Milwaukee, 42 Wis. 108.

§ 1844 *ante*.

60. Kavanagh v. Brooklyn, 38 Barb. (N. Y.) 232.

61. The council in establishing a grade for a street and adopting plans for its improvement acts judicially, hence no recovery can be had for the inconvenience

thereby occasioned. Watson v. Kingston, 114 N. Y. 88, 21 N. E. 102.

62. Damages for filling ditch or cutting down the street cannot be recovered against the city by owners of unimproved lots adjoining unmade streets. The law presumes that the lots were purchased with a view to reasonable improvement. Crawford v. Delaware, 7 Ohio St. 459.

63. § 2001 *post*.

Destroying trees. In the absence of negligence or wantonness damages which result to an abutting owner from the cutting down of his trees in repairing streets cannot be recovered against the city. Tate v. Greensborough, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671.

If the *locus in quo* is within the limits of the city no liability arises in repairing a street. This is the execution of a public trust and for a public benefit, where it is within the municipal powers if done without negligence. Quinn v. Paterson, 27 N. J. L. 35.

64. Delphi v. Evans, 36 Ind. 90, 10 Am. Rep. 12; Loyd v. Columbus, 90 Ga. 20, 15 S. E. 818; Lemon v. Newton, 134 Mass. 476; Phelps

law,⁶⁵ or where the work is negligently or unskillfully performed,⁶⁶ the liability of the municipality for damages resulting therefrom is not necessarily dependent upon constitutional or legislative provisions. If in the construction of a public improvement, ordered by the municipality, a trespass or a nuisance is committed on private property, the municipality is, of course, liable.⁶⁷

v. Detroit, 120 Mich. 447, 79 N. W. 640, 6 Det. Leg. N. 199.

Defective exercise of power creates liability, when. *Chicago v. Spoor*, 190 Ill. 340, 60 N. E. 540; reversing 91 Ill. App. 472; *Blanden v. Fort Dodge*, 102 Ia. 441, 71 N. W. 411; *Haubner v. Milwaukee*, 124 Wis. 153, 102 N. W. 578; *Meinzer v. Racine*, 70 Wis. 561, 36 N. W. 260.

65. *Haubner v. Milwaukee*, 124 Wis. 153, 102 N. W. 578.

66. *Colorado*. *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

Georgia. *East Rome v. Omberg*, 28 Ga. 46, 73 Am. Dec. 748; *Roll v. Augusta*, 34 Ga. 326.

Indiana. *Fort Wayne v. Coombs*, 107 Ind. 75; *Davis v. Crawfordsville*, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; *Indianapolis v. Huffer*, 30 Ind. 235.

Oregon. *Davis v. Silverton*, 47 Ore. 171, 82 Pac. 16.

United States. *Johnston v. Dist. of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75.

The doctrine of *damnum absque injuria* is not applicable where loss to property results from the negligent employment of unsafe methods in making public improvements. *The Maling*, 110 Fed. 227; *The S. A. Macaulley, Id.*, modified 116 Fed. 107.

67. Illustrations of municipal

liability. City is liable for damages to property or property rights resulting from the erection and maintenance of a nuisance by it in the street. *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

The owner of a lot abutting a street is entitled to damages sustained by reason of a fill made upon the lot by the city in making street improvements. *Ludlow v. Froste, etc.*, 20 Ky. L. Rep. 216, 45 S. W. 661; *Tegeler v. Kansas City*, 95 Mo. App. 162, 68 S. W. 953.

If earth used in grading a street under a contract with the city be permitted to roll down upon the premises of an adjoining proprietor, to his damage, the city will be liable. *Broadwell v. Kansas City*, 75 Mo. 213, 42 Am. Rep. 406. See *Ludlow v. Mackintosh*, 21 Ky. L. Rep. 924, 53 S. W. 524.

Injury so done is a taking of private property within the meaning of the constitution which forbids the taking of private property without just compensation. *Broadwell v. Kansas City*, 75 Mo. 213, 42 Am. Rep. 406; *Wegmann v. Jefferson City*, 61 Mo. 55; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Soulard v. City of St. Louis*, 36 Mo. 546. See *Hannon v. St. Louis County*, 62 Mo. 313.

Where property abutting a street

§ 1969. Constitutional provisions.

As stated and explained in an earlier chapter, in many of the states there are constitutional and statutory provisions requiring compensation to be made to property owners where property is taken or damaged for public use.⁶⁸ Under such provisions, the municipality is generally held liable for consequential damages resulting from the grading of a street to the *first grade*,⁶⁹

is directly damaged in consequence of public improvements made in the street, the city is liable. *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290.

If, in grading a street, the city builds an embankment beyond the limits of the street on private property, it is liable. *Payne v. The Kansas City, St. J. & C. B. Ry. Co.*, 112 Mo. 6, 18, 20 S. W. 322, 17 L. R. A. 628.

One whose well is drained by the maintenance of a sewer constructed near it by a municipal corporation is entitled to compensation under the statute, although no land is taken. *Bickford v. Hyde Park*, 173 Mass. 552, 54 N. E. 343, 73 Am. St. Rep. 320.

The rule that a municipal corporation is not liable for consequential damages resulting from its authorized acts in grading streets has no application to the stoppage of water in a channel so as to cause the water to back up on the land of another. *Larabee v. Cloverdale*, 131 Cal. 96, 63 Pac. 143.

Where a municipality in grading an alley made a fill on private property between a fence thereon and the alley line, and knocked down and covered up a portion of

the fence, held the owner was entitled to recover damages therefor. *Tegeler v. Kansas City*, 95 Mo. App. 162, 68 S. W. 953.

A municipal officer who takes earth from private property and uses it in improving a street without any charter or statutory provision authorizing the improvement is a trespasser and he alone is liable. *Rowland v. Gallatin*, 75 Mo. 134, 42 Am. Rep. 395.

See § 537 *ante*, vol. 2.

A city is responsible to the owner of land through which its agents have unlawfully made a sewer. *Hildreth v. Lowell*, 77 Mass. (11 Gray) 345.

68. See the constitutions of the various states, and chapter 32, *Eminent Domain, ante*.

69. *California*. *Reardon v. California*, 66 Cal. 492, 56 Am. Rep. 109.

Georgia. *Atlanta v. Green*, 67 Ga. 386; *Moore v. Atlanta*, 70 Ga. 611.

Illinois. *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *Marshall v. Chicago*, 77 Ill. App. 351; *Shawneetown v. Mason*, 82 Ill. 337.

Missouri. *Householder v. Kansas City*, 83 Mo. 488; *Werth v. Springfield*, 78 Mo. 107; *Sheehy v. Kansas City Cable R. Co.*, 94 Mo.

or for an *alteration from the established grade*.⁷⁰

§ 1970. Statutory and charter provisions.

Often statutes expressly limit the right to recover damages resulting from improvements.⁷¹ To recover a

574, 7 S. W. 579, 4 Am. St. Rep. 396.

Nebraska. Harman v. Omaha, 17 Neb. 548, 23 N. W. 503; Schaller v. Omaha, 23 Neb. 325, 36 N. W. 533.

South Dakota. Searle v. Lead, 10 S. Dak. 312, 73 N. W. 101.

Texas. Cooper v. Dallas, 83 Tex. 239, 18 S. W. 565; Texarkana v. Talbot, 7 Tex. Civ. App. 202, 26 S. W. 451.

West Virginia. Hutchinson v. Parkersburg, 25 W. Va. 226; Johnson v. Parkersburg, 16 W. Va. 402.

United States. McElroy v. Kansas City, 21 Fed. 257. See Blanchard v. Kansas City, 16 Fed. 444.

Contra. In Colorado it has been held that a constitutional provision that "Private property shall not be taken or damaged for public or private use without just compensation" does not render a municipality liable for injuries resulting from reasonable and ordinary or usual change and improvement of a street, provided the change or improvement is made in a careful and skillful manner for the benefit of the public.

Colorado. Pueblo v. Strait, 20 Colo. 13, 17, 36 Pac. 789, 24 L. R. A. 392, 46 Am. St. Rep. 273; Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Leiper v. Denver, 36 Colo. 110, 118, 85 Pac. 849, 7 L. R. A. (N. S.) 108, 118 Am. St. Rep. 101.

Where a municipal corporation

has taken land by legal proceeding for a street and made compensation therefor it will not be liable for an injury incidentally and necessarily caused to the adjoining land by the grading and working of the street in the proper manner. *Fellowes v. New Haven*, 44 Ky. 240, 26 Am. Rep. 447.

70. *Denver v. Bonesteel*, 30 Colo. 107, 69 Pac. 595; *Less v. Butte*, 28 Mont. 27, 72 Pac. 140; *Whittaker v. Deadwood*, 12 S. Dak. 608, 82 N. W. 202; *Fort Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059.

When property is damaged by establishing the grade of a street or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of a constitutional provision that "private property shall not be taken or damaged for public use without just compensation," and the owner is entitled to damages. *Gibson v. Owens*, 115 Mo. 258, 21 S. W. 1107; *Sheehy v. Kansas City Cable Ry.*, 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396; *Householder v. Kansas City*, 83 Mo. 488; *State ex rel. v. Kansas City*, 89 Mo. 34; *Werth v. Springfield*, 78 Mo. 107.

The constitutional provision is self-enforcing. See *Householder v. Kansas City*, 83 Mo. 488.

71. A statute providing for damages for street improvements

property owner must bring himself within the provisions of the statute relating to the ascertainment and assessment of damages.⁷² A statute allowing compensation to land owners when a new street is "opened,"

to the owner of lands "upon which any house or other building stands," is held to limit the right to recover damages to the building or buildings fronting, or having an entrance, upon the street improved. Delaware, etc. R. Co. v. Summit, 77 N. J. L. 438, 72 Atl. 83.

Limiting recovery. A statute which requires viewers "to determine the damages for property taken, injured or destroyed" by a municipality means the actual and physical appropriation of, or injury to, the property and does not cover indirect and consequential damages that may result from the construction of a new sewer system to the business of a sewerage company with which the municipality had no contract. Olyphant Sewerage Drainage Co. v. Olyphant Boro., 211 Pa. 526, 61 Atl. 72.

"Alter" of street. In a statute allowing damages for the closing or altering of a street the term "alter" is held to include any change in the structural formation of such street either by changing the grade or by changing its location. Paris Mountain Water Co. v. City Council, 53 S. C. 82, 30 S. E. 699.

72. *Triest v. New York*, 193 N. Y. 525, 86 N. E. 549.

The right of an abutting owner to damages for a public improvement follows by necessary implication from the duty cast by law upon assessors of passing upon

claims and awarding such damages. *Re Grade Crossing Com'rs*, 154 N. Y. 550, 49 N. E. 127.

What law governs. A property owner who constructs buildings on abutting lands before a change of grade is entitled to have his damages ascertained and determined under the laws in force at the time the change of grade was made. *Mayer v. New York*, 193 N. Y. 535, 86 N. E. 553.

General law. A statute allowing interest on awards of damages sustained by a change of grade of any street, held not to be a private or local act, but applies to such awards made anywhere within the state. *People ex rel. v. Prendergast*, 129 N. Y. S. 428, 70 Misc. Rep. 593.

Gift. A statute which allows damages for a change of grade to one who acquired the property after the grade was changed is unconstitutional as making a gift of municipal funds. *People v. Stillings*, 119 N. Y. S. 298, 134 App. Div. 480, *aff'd* in 200 N. Y. 525, 93 N. E. 1128. See also *People ex rel. v. Phillips*, 85 N. Y. S. 200, 88 App. Div. 560.

But a statute passed after the grade has been changed allowing compensation to the parties who owned the property when it sustained the damage is valid. *Re Borup*, 182 N. Y. 222, 74 N. E. 838, 108 Am. St. Rep. 796; *People ex rel. v. Pendergast*, 202 N. Y. 188, 95 N. E. 715.

it has been held, does not render the municipality liable to an abutting owner for raising the sidewalk in front of his property.⁷³ Where the charter provides for the assessment of benefits and damages to property before a change in the grade of a street shall be made a change of grade made by the municipality without such assessment entitles an abutting owner injured thereby to damages.⁷⁴

§ 1971. Retroactive provisions.

Constitutional and statutory provisions allowing damages for injuries resulting from public improvements, it has been held, may be made retroactive. But where the municipality has become liable for such damages, the right of property owners thereto cannot be destroyed by a subsequent statute.⁷⁵

§ 1972. Authorization or ratification of improvement by municipality.

Unless the municipality authorizes the construction of an improvement,⁷⁶ or ratifies the acts of its officers

73. *Bramlett v. Laurens*, 58 S. C. 60, 36 S. E. 444.

74. *Jorgenson v. Superior*, 111 Wis. 561, 87 N. W. 565.

75. *Lawton v. New Rochelle*, 100 N. Y. S. 771, 51 Misc. Rep. 184.

Laws providing for damages in change of grade, held not to be retroactive. *Folkenson v. Easton*, 116 Pa. 523, 8 Atl. 869.

76. *Maudlin v. Trenton*, 67 Mo. App. 452; *Stuebner v. St. Joseph*, 81 Mo. App. 273; *Murphy v. Boston*, 120 Mass. 419.

If the municipality grades a street without an ordinance therefor and without taking steps to ascertain and pay the damages, it is a trespasser and those actively participating in the work are

co-trespassers. *Rives v. Columbia*, 80 Mo. App. 175, 177; *Abercrombie v. Kansas City*, 149 Mo. App. 539, 131 S. W. 129; *Reed v. Peck*, 163 Mo. 333, 63 S. W. 734; *Faust v. Pope*, 132 Mo. App. 294, 111 S. W. 878.

Municipal authority. The vacation of a street or a change of its grade can only be done by the authority of the municipality. *Brown v. Scranton*, 231 Pa. 593, 80 Atl. 1113.

Notwithstanding the recommendation of the property owners authorizing the change of grade is not given as required liability for damages resulting from change of grade exists. *Crossett v. Janesville*, 28 Wis. 420.

Not liable for the unauthorized

in constructing it without such authority,⁷⁷ the municipality will not be liable for damages resulting therefrom. Accordingly a municipality is not liable for damages resulting from a change of street grade unless the change is duly authorized by the proper corporate authority, as by ordinance, when so required.⁷⁸ The con-

action of a board of health in causing a dam to be built on plaintiff's land to abate a nuisance. *Cavanaugh v. Boston*, 139 Mass. 426, 1 N. E. 834, 52 Am. Rep. 716.

Not liable for unauthorized act of council committee relating to the grading of a street. *Thomson v. Boonville*, 61 Mo. 282.

An authorized grant of a license from the municipality to a railroad company to construct a railroad in the streets will not render the municipality liable for damages occasioned thereby. *Green v. Portland*, 32 Me. 431.

Evidence. Resolution of the municipality authorizing the improvement and the specifications for the work are competent evidence as to authority for making the improvement. *Payson v. Milan*, 144 Ill. App. 204.

No evidence that the change in the grade had been authorized by the municipality or subsequently adopted by it. *Jenkins v. Minersville Boro.*, 44 Pa. Super. Ct. 423.

It will be presumed, in the absence of evidence to the contrary, that the work of improving a street within the corporate limits by officers and agents of the city was done under municipal authority. *Dixon v. Allemand*, 136 Ill. App. 449.

77. Although an officer ex-

ceeds his authority to make improvements, the city may, by the adoption of his acts, become liable for damages resulting therefrom. *Brown v. Webster City*, 115 Ia. 511, 88 N. W. 1070; *Omaha v. Croft*, 60 Neb. 57, 82 N. W. 120.

Where a private individual dumped dirt in the street without authority of, or subsequent ratification by, the municipality, the municipality cannot be held liable to a land owner for damages resulting therefrom. *Nyhart v. Taylor Boro.*, 31 Pa. Super. Ct. 635.

78. *Stewart v. Clinton*, 79 Mo. 603; *Maudlin v. Trenton*, 67 Mo. App. 452; *McQuarter v. St. Joseph*, 134 Mo. App. 640, 114 S. W. 1140; *Gehling v. St. Joseph*, 49 Mo. App. 430; *Beatty v. St. Joseph*, 57 Mo. App. 251; *Rives v. Columbia*, 80 Mo. App. 173; *Thomson v. Boonville*, 61 Mo. 282; *Gardner v. St. Joseph*, 96 Mo. App. 657, 71 S. W. 63; *Werth v. Springfield*, 22 Mo. App. 12, 78 Mo. 107.

Ordinance authorizing work. An ordinance establishing the grade of a street does not authorize the city to change the existing grade to the grade so established, so as to render the city liable for changing the grade. *Kroffe v. Springfield*, 86 Mo. App. 530.

An ordinance authorizing a railroad company to change the grade

trary has also been held.⁷⁹ In New Jersey a municipal ordinance is necessary to effect a change in the street grade, and a contract of the municipality, with a railroad company for the elevation of railroad tracks over a street is held not to operate *ex proprio vigore* to

of its tracks on a street which necessarily involves changes in the grade of the street will be construed as an ordinance authorizing a change of grade in the street for which an abutting owner is entitled to damages from the municipality. *Lewis v. Homestead*, 194 Pa. St. 199, 45 Atl. 123.

A contract by the municipality with a railway company which necessarily resulted in a change of grade of a highway was construed to be an ordinance authorizing such change so as to render the municipality liable for damages. *Marcoz v. Wilmerding*, 37 Pa. Super. Ct. 185.

The municipality is not liable for damages resulting from an improvement constructed under a void ordinance. *McQuarter v. St. Joseph*, 134 Mo. App. 640, 114 S. W. 1140.

If there is a valid ordinance authorizing the improvement, and the work is done without taking measures to ascertain and pay the damages, the city is liable. *Rives v. Columbia*, 80 Mo. App. 173; *Rome v. Rome Hotel Co.*, 132 Ga. 337, 63 S. E. 830.

The purpose of an ordinance authorizing a change of grade is immaterial on the question of the municipality's liability to a property owner for damages sustained by the change. *Clark v. Elizabeth*, 61 N. J. L. 565, 40 Atl. 616.

79. Absence of ordinance. Sometimes the city will be held liable for the change of grade of a street notwithstanding the change was not sanctioned by an ordinance as required, especially where the change has been recognized by the public and by the officers of the corporation. *Chattanooga v. Geller*, 81 Tenn. (13 Lea) 611.

The construction of a viaduct on a street under an order of the council instead of by ordinance is no defense for the city in an action for damages by an abutting owner, where the city has authority to make the improvement. *Chicago v. Spoor*, 190 Ill. 340, 60 N. E. 540, rev'g 91 Ill. App. 472.

Where city grades a street without complying with an ordinance requiring the work to be ordered by the affirmative vote of two-thirds of the council, it is liable to abutting owners for damages resulting therefrom. *Blandon v. Fort Dodge*, 102 Iowa 441, 71 N. W. 411.

Liability when change of grade is authorized by the committee on streets without ordinance. *Page v. Belvin*, 88 Va. 985, 14 S. E. 843.

Liable when ordered by resolution. *Wallenberg v. Minneapolis*, 111 Minn. 471, 127 N. W. 422.

change the grade, so as to render the city liable for damages resulting from such change.⁸⁰ The mere fact that the municipality passes an ordinance establishing a new grade for a street does not authorize the street commissioner to change the existing grade so as to create municipal liability therefor.⁸¹

§ 1973. Estoppel of municipality to deny liability.

Mere defects and irregularities in proceedings for the construction of public improvements ordinarily cannot be urged by the municipality to defeat a recovery of damages by a land owner.⁸² However, where the city or town had no authority to make compensation for damages sustained by a change of grade in a street, its promise to do so will not estop it from denying its liability for such damages.⁸³ And as municipal authorities have no power to grant express permission to use the streets for private purposes, the municipality cannot be estopped by conduct from using the streets for public purposes, even though such use may be destructive to private privileges, nor is it liable in damages therefor.⁸⁴

§ 1974. Agreement fixing amount of damages.

If liability exists for consequential damages, the amount thereof may be fixed by agreement between the municipality and the persons entitled thereto.⁸⁵ And if a statute gives an abutting owner the right to compensation for such damages, the repeal of the statute will not destroy that right as to one whose rights accrued

80. *Clark v. Elizabeth*, 61 N. J. L. 565, 40 Atl. 616.

81. *Kroffe v. Springfield*, 86 Mo. App. 530.

82. *Saunders v. Lowell*, 131 Mass. 387; *Haskell v. Bristol County Com'rs*, 75 Mass. (9 Gray) 341; *Schumacher v. St. Louis*, 3 Mo. App. 297; *Second Cong. Church Soc. v. Omaha*, 35 Neb. 103, 52 N.

W. 829; *Church v. Milwaukee*, 31 Wis. 512.

83. *Healey v. New Haven*, 47 Conn. 305.

84. *Bennett v. Mt. Vernon*, 124 Ia. 537, 100 N. W. 349.

85. *Foster v. Boston*, 22 Pick. (Mass.) 33; *Aspinwall v. Boston*, 191 Mass. 441, 78 N. E. 103.

by virtue of a contract between him and the municipality while the statute was in force.⁸⁶ But obviously a contract between municipal officers and property owners to make compensation for damages in a manner not authorized by law, or not within the scope of authority of such officers will not bind the municipality.⁸⁷

§ 1975. Damages for change of street grade.

At common law a municipal corporation was not liable for damages to property resulting from a change of grade of a highway or street unless the work was negligently or unskillfully done.⁸⁸ Accordingly, the rule

86. *Lawton v. New Rochelle*, 100 N. Y. S. 771, 51 Misc. Rep. 184.

The owner's consent to the appropriation of his property for street purposes will be inferred from his bringing an action to recover damages therefor. *Cahill v. Dist. of Columbia*, 10 Dist. of Col. (3 McArthur) 419.

The offer of an owner of land to allow the city to take land for a highway without compensation includes the consent of such owner to the removal of the buildings thereon. *Foster v. Boston*, 39 Mass. (22 Pick.) 33.

87. An agreement of the mayor with a property owner that, if the city is allowed to tear down a portion of a building and use the land for street purposes, it will repair the damage done to the rest of the building, is without authority and city is not liable for repairs. *Sceery v. Springfield*, 112 Mass. 512.

A contract by a city with a land owner to construct a sewer with a valve so as to prevent the flooding of such owner's prem-

ises, in consideration of land to be given the city for sewer purposes held void. *Nashville v. Sutherland*, 92 Tenn. 335, 21 S. W. 674.

88. *Florida*. *Selden v. Jacksonville*, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370, 29 Am. St. Rep. 278.

Indiana. *Macy v. Indianapolis*, 17 Ind. 267; *Baker v. Shoals*, 6 Ind. App. 319, 33 N. E. 664.

Iowa. *Kepple v. Keokuk*, 61 Ia. 653, 17 N. W. 140; *Cole v. Muscatine*, 14 Ia. 296.

Kansas. *Methodist Episcopal Church South v. Wyandotte*, 31 Kan. 721, 3 Pac. 527.

Massachusetts. *Brown v. Lowell*, 8 Metc. (49 Mass.) 172.

Missouri. *Hoffman v. St. Louis*, 15 Mo. 651.

New Jersey. *Plum v. Morris Canal & Banking Co.*, 10 N. J. Eq. 256.

United States. *Hoe v. Alexandria*, 12 Fed. Cas. No. 6667, 1 Cranch C. C. 98.

Common liability. A municipal corporation, acting within the scope of its powers, and with rea-

has been declared often that a municipal corporation is not liable for damages to adjacent property which results from a change in the grade of a public street, provided such change is legally made, that is, where the law authorizing it is substantially followed, and there is no negligence in making the change.⁸⁹ The principle

sonable care and skill, in the opening, grading and improving of its streets, is not liable to abutting owners whose lands are not taken, for consequential damages to their premises unless made so by charter or statute. *Smith v. Alexandria*, 33 Gratt (Va.) 208; *Kehrer v. Richmond City*, 81 Va. 745.

In changing the grade of a street it has been declared that the municipal corporation is bound by the rule *sic utere tuo ut non alienum laedas* to the same extent that individuals would be bound thereby and that the liability does not go beyond it. *Waddell v. New York*, 8 Barb. (N. Y.) 95.

89. *Colorado*. *Denver v. Vernia*, 8 Colo. 399, 8 Pac. 656.

Connecticut. *Fellows v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447.

Georgia. *Fuller v. Atlanta*, 66 Ga. 80.

Illinois. *Roberts v. Chicago*, 26 Ill. 249; *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321.

Indiana. *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12.

Iowa. *Burlington v. Gilbert*, 31 Ia. 356, 7 Am. Rep. 143; *Russell v. Burlington*, 30 Ia. 262.

Maine. *Hovey v. Mayo*, 43 Me. 322.

Massachusetts. *Underwood v. Worcester*, 177 Mass. 173, 58 N.

E. 589; *Callender v. Marsh*, 1 Pick. (Mass.) 418, 430.

Michigan. *Cummings v. Dixon*, 139 Mich. 269, 102 N. W. 751; *Pontiac v. Carter*, 32 Mich. 164.

Missouri. *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. '89; *Schattner v. Kansas City*, 53 Mo. 162.

Pennsylvania. *Allentown v. Kramer*, 73 Pa. (23 P. F. Smith) 406; *Appeal of Norris*, 3 Walk. (Pa.) 146.

North Carolina. *Dorsey v. Henderson*, 148 N. C. 423, 62 S. E. 547; *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894; *Woefe v. Pearson*, 114 N. C. 621, 19 S. E. 264; *Meares v. Wilmington*, 31 N. C. (9 Ired.) 73, 49 Am. Dec. 412.

New York. *Johns v. Salamanca*, 114 N. Y. S. 707, 129 App. Div. 717; *Radcliffe v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Smith v. Boston, & A. R. Co.*, 91 N. Y. S. 412, 99 App. Div. 94, aff'd 181 N. Y. 132, 73 N. E. 679; *Re Greer*, 56 N. Y. S. 938, 39 App. Div. 22; *Hosmer v. Gloversville*, 59 N. Y. S. 559, 27 Misc. Rep. 669; *Fuller v. Mt. Vernon*, 171 N. Y. 247, 63 N. E. 964; *Rauenstein v. N. Y. Lakawanna, etc. R. Co.*, 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768; *Flomsbee v. Amsterdam*, 142 N. Y. 122, 36 N. E. 821; *Carll v. Northport*, 42 N. Y. S. 576, 11 App. Div. 120.

Tennessee. *Humes v. Knoxville*,

upon which this rule rests is that "in making the improvement, the municipality is the agent of the state, and that these agencies authorized by law to make or improve public highways are not answerable for consequential damages, if they act within their jurisdiction and with due care and skill."⁹⁰

Owners of property abutting on a street who make improvements and adjust their lands with reference to the established grade of the street *by virtue of constitutional or statutory or charter provisions* usually are entitled to damages for injuries to their property resulting from a change of such grade.⁹¹ However, if the lot owner makes improvements without reference to the existing street grade, he is not entitled to damages for a change of grade which is reasonable and made with authority, and without negligence.⁹² So the owners of

20 Tenn. (1 Humph.) 403, 34 Am. Dec. 657.

Wisconsin. Walsh v. Milwaukee, 95 Wis. 16, 69 N. W. 818.

United States. Smith v. Washington, 61 U. S. (20 How.) 135, 15 L. Ed. 858; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336.

90. Harper v. Lenoir, 152 N. C. 723, 68 S. E. 228; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336.

91. McCombs v. Akron, 15 Ohio 474; Akron v. McCombs, 18 Ohio 229, 51 Am. Dec. 453; Cincinnati, etc. R. Co. v. Cummins ville, 14 Ohio St. 523; O'Brien v. Philadelphia, 150 Pa. St. 589, 24 Atl. 1047.

92. McGee v. Avondale, 31 Wkly. Law Bul. (Ohio) 163; Groff v. Philadelphia, 150 Pa. 594, 24 Atl. 1048.

No damages exist for consequential injuries. O'Connor v. Pitts-

burg, 18 Pa. 187; Re Ridge St., 29 Pa. St. 391.

A statute relating to the grading of streets and assessment of damages therefor, held not to apply to the grading of a street upon which the grade had been previously established. Saxton National Bank v. Bennett, 138 Mo. 494, 40 S. W. 97.

Under a statute providing that where improvements have been made on a lot according to the established grade of the street on which it abuts, the city shall pay the amount of damage thereto caused by a change of the grade, one who constructs his building with respect to a convenient use of the street may recover damages for a change in the grade; he is not required to erect such building exactly at grade or at any invariable elevation above or below it. Stevens v. Cedar Rapids, 128 Ia. 227, 103 N. W. 363.

buildings erected on lots abutting a street after a change of the grade in the street has been established are not entitled to damages for injuries thereto resulting from the actual change of the grade.⁹³ But if improvements on property are erected or changed to conform to a newly ordained grade, damages thereto resulting from the actual change of the grade may be recovered by the owner.⁹⁴

Where an order of location prescribes a grade for a street, the damages are to be assessed upon the assumption that the street will be constructed to that grade throughout its entire width. *Como v. Worcester*, 177 Mass. 543, 59 N. E. 444.

Under the charter of greater New York, the city is not liable to abutting owners for damages for originally establishing a grade or for changing a grade once established by lawful authority, except where such owners have erected their improvements in conformity with a grade previously established and damage thereto results from the subsequent change of the grade. *Triest v. New York*, 193 N. Y. 525, 86 N. E. 549.

Existence of liability. Under laws providing that there shall be no liability to abutting owners for changing a grade once established by lawful authority, except where the owner has, subsequently to the establishment, and before the change, built upon or improved the property in conformity with the established grade, an owner, in order to recover damages for a change of grade must show that his building was erected in con-

formity with an established grade. *People v. Muh*, 92 N. Y. S. 22, 101 App. Div. 423, aff'd 183 N. Y. 540, 76 N. E. 1105.

93. *Colorado*. *Denver v. Verina*, 8 Colo. 399.

Iowa. *Collins v. Iowa Falls*, 146 Ia. 305, 125 N. W. 226; *Walters v. Marshalltown*, 145 Ia. 457, 120 N. W. 1046; *Reilly v. Fort Dodge*, 118 Ia. 633, 92 N. W. 887; *Farmer v. Cedar Rapids*, 116 Ia. 322, 89 N. W. 1105.

Louisiana. *Manning v. Shreveport*, 119 La. 1044, 44 So. 882, 13 L. R. A. (N. S.) 452.

Missouri. *Davis v. Missouri Pacific R. Co.*, 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648.

Montana. *Smith v. Butte*, 40 Mont. 445, 107 Pac. 409.

Nebraska. *Omaha v. Williams*, 52 Neb. 40, 71 N. W. 970.

New York. *Re Opening East 187th St.*, 79 N. Y. S. 1031, 78 App. Div. 355; *Re West Farms Rd.*, 95 N. Y. S. 94, 47 Misc. Rep. 216.

West Virginia. *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837.

94. *York v. Cedar Rapids*, 130 Ia. 453, 103 N. W. 790.

§ 1976. Same—created by constitution, statute or charter.

Damages for a change of grade of a street are created solely by constitution, statute or charter and are supported by the consideration that there is a moral obligation on the part of the municipal corporation changing the grade to pay the damage resulting to abutting owners.⁹⁵ Accordingly in the absence of constitutional, statutory or charter provision requiring compensation for *property damaged or injured, as distinguished from property taken*, no damages can be recovered by abutting owners for consequential injuries or damages resulting from the elevation or the depression of a street where the work and the change are legally authorized and necessary for the public safety and convenience.⁹⁶

It is well settled that consequential damage for injuries to abutting property, resulting from a change of the street grade, do not come within constitutional provisions forbidding the *taking* of private property for public use without compensation.⁹⁷ But under a consti-

95. *People v. Stillings*, 119 N. Y. S. 298, 134 App. Div. 480, *aff'd* in 200 N. Y. 525, 93 N. E. 1128.

96. *Florida. Selden v. Jacksonville*, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370, 29 Am. St. Rep. 278.

Georgia. Hurt v. Atlanta, 100 Ga. 274, 28 S. E. 65.

Indiana. Morris v. Indianapolis (Ind., 1911), 94 N. E. 705.

Massachusetts. Hyde v. Boston, etc. Co., 194 Mass. 80, 80 N. E. 517.

Minnesota. Robinson v. Great Northern Ry. Co., 48 Minn. 445, 51 N. W. 384; *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322.

New Jersey. Willets Mfg. Co. v. Mercer Co., 62 N. J. L. 95, 40 Atl. 782.

New York. Willson v. New York, etc. R. Co., 2 N. Y. S. 65; *Uline v. New York, etc. R. Co.*, 101 N. . 98, 103, 4 N. E. 536, 54 Am. Rep. 661; *Conklin v. New York, etc. R. Co.*, 102 N. Y. 107, 6 N. E. 663; *Smith v. Boston, etc. R. Co.*, 181 N. Y. 132, 73 N. E. 679.

97. *Florida. Selden v. Jacksonville*, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370, 29 Am. St. Rep. 228.

Indiana. Macy v. Indianapolis, 17 Ind. 267; *Wabash v. Alber*, 88 Ind. 428; *Kokomo v. Mahan*, 100 Ind. 242; *Morris v. Indianapolis* (Ind., 1911), 94 N. E. 705.

Massachusetts. Callender v. March, 1 Pick. (Mass.) 418.

Michigan. Pontiac v. Carter, 32 Mich. 164.

tution which declares that private property shall not be taken or *damaged* for public use except on due compensation, a municipal corporation is liable for damages to abutting property for materially altering a street grade, especially after valuable improvements have been put on the lot according to the prior established grade.⁹⁸

Ohio. Scovill v. Geddings, 7 Ohio 211.

Pennsylvania. O'Conner v. Pittsburg, 18 Pa. 187.

South Carolina. Bramlett v. Greenville, 88 S. C. 110, 70 S. E. 450.

United States. Smith v. Washington, 20 How. (U. S.) 135, 15 L. Ed. 858.

98. Vicksburg v. Herman, 72 Miss. 211, 16 So. 434.

"*Damaged.*" A municipal corporation is liable to a lot owner for such damages as he may sustain by filling in the street in front and above the level of his lot, when the buildings were erected on the lot before any grade was established, under a section of the constitution which declares that no private property shall be taken or *damaged* for public use without just compensation therefor. Harmon v. Omaha, 17 Neb. 548, 23 N. W. 503, 52 Am. Rep. 420; Hammond v. Harvard, 31 Neb. 635, 48 N. W. 462.

In Missouri prior to the adoption of the constitutional provision of 1875, "that private property shall not be taken or damaged for public use without just compensation," it was uniformly held that any damages resulting to an abutting property owner from a change of grade of a street was *damnum absque injuria* for which

the municipality was not liable, unless the injury could be shown to have resulted from the negligent or improper manner in which the work was done. Swenson v. Lexington, 69 Mo. 157; Wegman v. Jefferson City, 61 Mo. 55; Imler v. Springfield, 55 Mo. 119; Schattner v. Kansas City, 53 Mo. 162; Hoffman v. St. Louis, 15 Mo. 656; Taylor v. St. Louis, 14 Mo. 23, 55 Am. Dec. 89; St. Louis v. Gurno, 12 Mo. 415; Stewart v. Clinton, 79 Mo. 603; Soulard v. St. Louis, 36 Mo. 546; Tate v. M., K. & T. Ry. Co., 64 Mo. 149; Rude v. St. Louis, 93 Mo. 408, 6 S. W. 257. This doctrine was vigorously attacked in Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463. To uproot it and provide for compensation when property is damaged, as well as when it is taken for public use, the eminent domain clause in the constitution of 1865 was amended by the constitution of 1875, and since it has been the settled law of this state that when property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the constitution; art. 2, § 21, Werth v. Springfield, 78 Mo. 107; State ex rel. v. Kansas City, 89 Mo. 34; Julia Building Assn. v. Bell Tel.

So under a constitution requiring a corporation to "make just compensation for property taken, *injured* or destroyed by the construction or enlargement of its works, highways or improvement" a municipality was

Co., 88 Mo. 258, 57 Am. Rep. 398; *Householder v. Kansas City*, 83 Mo. 488; *Sheehy v. K. C. Cable Ry. Co.*, 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396; *Gibson v. Owens*, 115 Mo. 258; *Stewart v. Clinton*, 79 Mo. 603; *Martin v. R. R. Co.*, 47 Mo. App. 452; *Hulett v. M., K. & T. Ry. Co.*, 80 Mo. App. 87. And resort may be had to any action at common law which will afford the injured party means of redress, although no legislation may have been enacted providing a mode for the ascertainment of and payment of compensation to him. *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683; *Hickman v. Kansas City*, 120 Mo. 110. The act of the legislature of March 26, 1885, amended by the act of March 31, 1887, providing for proceedings to ascertain damages caused to an abutting owner's property by grading of a street is not exclusive of the remedy to which the owner is entitled by the constitution for taking land for public use. *Markowitz v. Kansas City*, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498. The land owner may also bring his common law action, for damages founded on the constitutional provision (Const., art. 2, § 21). *Markowitz v. Kansas City*, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498. The St. Louis charter provision of 1870 that the city shall be liable for damages sustained by the property owners by

reason of any change of the grade of a street, applies to a case where the change does not extend to the whole width of the roadbed, if the alteration is such as to raise or lower the principal current of travel and transportation. *Stickford v. St. Louis*, 7 Mo. App. 217, 75 Mo. 309. The city is liable to an abutting property owner for damages caused by changing the natural surface of a street to a grade established for the first time. *Hickman v. Kansas City*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; *Cole v. St. Louis*, 132 Mo. 633, 34 S. W. 469; *Smith v. St. Joseph*, 122 Mo. 643, 122 S. W. 643; *Davis v. Mo. Pac. Ry. Co.*, 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648. If in changing the grade of a street the city should so negligently perform its work as to practically destroy the street as a highway, it would be liable in damages, while it would not be liable for the simple act of permitting the street to be out of repair, if no special injury ensued therefrom. *Werth v. Springfield*, 78 Mo. 107. See *Rives v. Columbia*, 80 Mo. App. 173; *Hulett v. M., K. & T. Ry. Co.*, 80 Mo. App. 87. Material change of grade of street from natural surface is a damage for public use. *Fred v. K. C. Cable R. Co.*, 65 Mo. App. 121; *Davis v. Mo. Pac. R. R. Co.*, 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648; *Hickman v. Kansas*

held liable in damages to adjoining property by a change in the grade of the adjacent sidewalk, notwithstanding there was no actual taking of the property.⁹⁹

Changing the grade of an established street grade, without compensating property owners for damages resulting therefrom as provided by constitution, statute, or charter, of course, creates municipal liability.¹ A

City, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; Waldron v. Kansas City, 69 Mo. App. 50.

Change of grade of street as "taking." § 1472 *ante*.

99. *Montgomery v. Maddox*, 89 Ala. 181, 7 So. 433.

1. *Connecticut*. *Haley v. New Haven*, 49 Conn. 394.

Illinois. *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146, aff'g 38 Ill. App. 133; *Whaples v. Waukegan*, 95 Ill. App. 29; *Barlington v. Meyer*, 103 Ill. App. 124.

Indiana. *Jeffersonville v. Myers*, 2 Ind. App. 532, 28 N. E. 999.

Minnesota. *McCarthy v. St. Paul*, 22 Minn. 527.

Missouri. *Mitchell v. St. Louis*, 14 Mo. App. 600 (Mem.); *Thompson & Son v. Macon City*, 106 Mo. App. 84, 80 S. W. 1.

New York. *People v. Green*, 64 N. Y. 606; *Re Smiddy*, 19 N. Y. S. 949, 65 Hun (N. Y.) 620.

Texas. *Houston v. Hutchins* (Tex. Civ. App.), 33 S. W. 269.

Washington. *Fletcher v. Seattle*, 43 Wash. 627, 88 Pac. 843.

Wisconsin. *Filer & Stowell v. Milwaukee*, 146 Wis. 221, 131 N. W. 345.

The changing of a street grade by a city, resulting in damages to property is not *damnum absque injuria* if the statute provides

for compensation therefor. *Paris Mountain Water Co. v. City Council*, 53 S. C. 82, 30 S. E. 699.

In one case an ordinance fixed permanently the grade of certain streets and pledged the faith of the city that no alterations should be made to the damage of persons building thereon without the payment of just compensation. Subsequently the grade was altered. Held, damages could be recovered. *Goodall v. Milwaukee*, 5 Wis. 32.

The fact that the change of street grade was ordered to enable the municipal corporation to establish a system of sewers designed to abate a nuisance does not relieve it from the constitutional obligation to make compensation to abutters for all damages caused thereby. *Rudderow v. Philadelphia*, 166 Pa. St. 241, 31 Atl. 53.

It is immaterial that the change was necessary to carry on the traffic of the street. *Mitchell v. St. Louis*, 14 Mo. App. 600.

The fact that the final grade is on a line with the natural surface of a street is immaterial. *Rassegieu v. Sioux City*, 94 Ia. 543, 63 N. W. 184, 28 L. R. A. 389.

A slight injury as by reducing the level of the street below the doors of buildings, held to be *damnum absque injuria*. *Humes v. Knoxville*, 1 Humph. (20 Tenn.) 403, 34 Am. Dec. 657.

statute allowing damages for the "closing up, use or obstruction" of streets, it has been held, does not authorize a recovery for injuries to property resulting from a change of grade.²

§ 1977. Change of grade must be of a grade legally established.

To entitle an abutting lot owner to damages resulting from grading a street under laws allowing damages for a change of grade, usually he must show that there had been a prior established grade, and that the damage resulted by reason of a change thereof.³ How-

2. *Smith v. Eau Claire*, 78 Wis. 457, 47 N. W. 830.

3. *Anderson v. Bain*, 120 Ind. 254, 22 N. E. 323.

The grade changed must have been established in the manner provided by law. *Almy v. Coggeshall*, 19 R. I. 549, 36 Atl. 1124; *Aldrich v. Providence*, 12 R. I. 241; *Cummings v. Dixon*, 139 Mich. 269, 102 N. W. 751; *Mattingly v. Plymouth*, 100 Ind. 545.

Under a law which permitted the recovery of damages upon the altering of the "established" grade of a street, held the establishment must be by ordinance or proper legislative action. *Kepple v. Keokuk*, 61 Iowa 653, 17 N. W. 140.

Where no legally established grade had before existed although a futile attempt to establish a grade had been previously made, damages are not recoverable. *Gardiner v. Johnston*, 16 R. I. 94, 12 Atl. 838. To same effect, *Sargent v. Tacoma*, 10 Wash. 212, 38 Pac. 1048.

Change of a grade established by the surveyor of highways, held

to give ground for damages in like manner as if the grade had been established by the council. *Aldrich v. Providence*, 12 R. I. 241.

Under a charter providing for damages to abutting owners for the change of any street grade which "has been established" by the common council, held the establishment of such grade need not have been by any formal action of the common council to entitle lot owner to damages for a change thereof. *Lawrence v. Corning*, 125 N. Y. S. 682, 140 App. Div. 720.

Construction of an ordinance establishing grade. *Church v. Milwaukee*, 34 Wis. 66.

Laws providing for damages for a change in the grade of streets, held to contemplate a change of the natural grade, or of a grade established by the municipal authorities. *Re Greer*, 56 N. Y. S. 938, 39 App. Div. 22.

Estoppel. Where the ordinance fixing a street grade recited that it was passed for the purpose of permanently establishing such grade the city was held estopped

ever, some laws are construed to apply to streets the grades of which had been established by long user—and street grades, it is held, may be established⁴—as well

from denying the establishment of the grade, even though the ordinance was in other respects insufficient. *Goodrich v. Milwaukee*, 24 Wis. 422.

A mistake on part of the municipality in assuming that a road was a city street, and attempting to establish the grade thereof, held not to give landowner a right of action for a change of such grade. *Huckestein v. Alleghany City*, 165 Pa. 367, 30 Atl. 982.

Irregularities in laying out a street do not affect abutting owner's right to damages for a subsequent change of grade. *Ryan v. Boston*, 118 Mass. 248.

In the city of New York maps showing a proposed change of the grade of a street are binding on the property owners when filed, and property owners erecting buildings after the filing without conforming thereto are not entitled to damages. *Re Vyse St.*, 95 N. Y. S. 893; *Re Rogers Place*, 72 N. Y. S. 459, 65 App. Div. 1; *Re 187th St.*, 79 N. Y. S. 1031, 78 App. Div. 355.

"Before this rule can be invoked the map filed must clearly and unmistakably indicate the grade of the street." *Re Mayor, etc. of New York*, 82 N. Y. S. 575, 84 App. Div. 312. But a city cannot file a map giving notice of an intended regulation and grade, and then lie by for a long period of years without making the contemplated improvement, thereby depriving an abutting owner of his

land, without being liable to such owner for damages. *Re Opening of Tiffany St.*, 82 N. Y. S. 852, 84 App. Div. 525.

4. *Mayer v. New York*, 193 N. Y. 535, 86 N. E. 553; *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837.

User. The adoption of a highway as a street and use of same without change of grade for more than thirty years affords basis for damages on behalf of property owner who has improved his property with reference to such street if thereafter the grade is changed to his injury. *Youngstown v. Moore*, 30 Ohio St. 133.

In one case the street had been laid out and used for sometime but no grade had been established by the corporate authorities. Plaintiff built a house on property abutting on the street. Held, that change of grade justified damages. *Lambertville v. Clevinger*, 30 N. J. L. (1 Vroom.) 53.

The fact that the street was a public street before the change and that the municipal corporation did not fix its grade will not affect proceedings to recover damages. *Bartlett v. Tarrytown*, 5 N. Y. S. 240, 52 Hun 380.

The term "grade" in a statute relating to street grades is held to refer "not alone to those established by engineers and municipalities, but also to the grades of highways and streets in common use." *Detroit v. Snyder*, 156 Mich.

as to those whose grades had been officially fixed by the proper corporate authorities by ordinance or other legislative act, or by resolution, or order, if the law so permits.⁵

§ 1978. Nature and extent of change of grade.

The recovery of damages for the change of a grade of a street depends not only on the particular law applicable but the nature and extent of the change is to be considered.⁶ By change or alteration of the grade of a

511, 121 N. W. 258, 16 Det. Leg. N. 220.

5. *Bartlett v. Tarrytown*, 8 N. Y. S. 739, 55 Hun 492; *Re Church of our Lady of Mercy*, 10 N. Y. S. 683, 57 Hun 590; *Folmsbee v. Amsterdam*, 21 N. Y. S. 42, 66 Hun 214; *aff'd* 142 N. Y. 118, 36 N. E. 821.

6. **Kind and extent of changes.** Where, from natural causes both a street and abutting land fall away, the city is not liable for damages resulting from raising the street again to its established grade under a law providing for compensation for change of grade. *Garrity v. Boston*, 161 Mass. 530, 37 N. E. 672.

Damages estimated on basis that lots must be used and occupied with reference to the new grade. *McCarthy v. St. Paul*, 22 Minn. 527.

A law authorizing compensation applies whether the entire width of a street or only a portion thereof is lowered. *Dore v. Milwaukee*, 42 Wis. 108; *Stickford v. St. Louis*, 75 Mo. 309, *aff'g* 7 Mo. App. 217.

Particular work done on street, held not to be a change of grade within the meaning of the particular statute allowing compensa-

tion. *Whitmore v. Tarrytown*, 137 N. Y. 409, 33 N. E. 489, *rev'g* 16 N. Y. 740, 62 Hun 619.

Raising a street, held not to be change of grade within the meaning of a statute allowing compensation. *Brady v. Fall River*, 121 Mass. 262; *Lane v. Boston*, 125 Mass. 519.

Liability exists for damages to real estate caused by change of grade of adjacent sidewalks. *Montgomery v. Townsend*, 84 Ala. 478, 4 So. 780; *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000; *Kokomo v. Mahan*, 100 Ind. 242; *Fall River Print Works v. Fall River*, 110 Mass. 428; *Nicholay v. Newark*, 130 N. Y. S. 1033.

Damages cannot be recovered for making the street a few inches lower at the curb where the level of the curb itself remains unchanged. *Coates v. Dubuque*, 68 Iowa 550, 27 N. W. 750.

Where the grade of a street railway was established and fixed by the municipality on one side of a street, the subsequent alteration of the grade of the traveled portion of the street to conform to the grade of the street railroad entitles an abutting owner to dam-

street is meant actual physical change in the surface of the street, and no claim for damages arises on any other account than for an injury done by work actually performed.⁷ An elevation or depression of the surface of a street, resulting from an attempt to establish a grade, is a change of grade, which, if damages result, will support an action.⁸

A change need not be of the whole width of the street, or of the whole part previously wrought, in order to entitle an abutting owner to damages. A substantial change of a part is sufficient.⁹ If there is a difference in the level of the ground on the two sides of a street, and a grade on one side has been established, no material change from such grade can be made on the oppo-

ages. *Hurley v. South Thomaston*, 105 Me. 301, 74 Atl. 734.

Where the whole of a road is found necessary for public travel the municipality has the right to improve it to correspond with the old traveled portion without being responsible to an abutting property owner for any change in the surface of the ground where his property abuts the road. *Cincinnati v. Roth*, 20 Ohio Cir. Ct. Rep. 317, 11 O. C. D. 95.

Viaduct. Where the city changes the grade of a street by the erection of a viaduct it is liable for damages to adjacent property, although the property is not actually taken. *Re Grade Crossing Com'rs*, 154 N. Y. 550, 49 N. E. 127. See § 1980 *post*.

Statutes providing for damages to property sustained by a change of street grade, and for the reduction of such damages by offsetting the benefits accruing therefrom, held to entitle an abutting owner only to such actual damage as occurred from the grading, with

the abatement of incidental benefits arising from the improvement. *Acker v. Knoxville*, 117 Tenn. 224, 96 S. W. 973.

A bridge built by a municipal corporation along the roadway is a change of grade of the street for which there is only a statutory liability. *Dyer v. St. Louis* (mem.), 11 Mo. App. 590. See § 1980 *post*.

The construction of an elevated approach to a viaduct, occupying the entire width of the street is merely a change of the grade of the street, for which an adjacent owner cannot recover consequential damages unless same are allowed by statute. *Colclough v. Milwaukee*, 92 Wis. 182, 65 N. W. 1039; *Walish v. Milwaukee*, 95 Wis. 16, 69 N. W. 818. See § 1980 *post*.

7. *Meardon v. Iowa City*, 148 Ia. 12, 126 N. W. 939.

8. *McGae v. Bristol*, 71 Conn. 652, 42 Atl. 1000.

9. *Hinckley v. Franklin*, 69 N. H. 614, 45 Atl. 643,

site side without liability for damages to abutting owners.¹⁰ Any change in the grade of a street whereby access to private property is obstructed, it has been held, is a damage to the property for which the owner is entitled to compensation.¹¹ And under some laws it is held a municipality is liable for damages sustained by property holders by reason of the change of grade of a street so as to divert the current of travel, though the change does not extend to the whole road bed.¹²

A change in the grade of a street made under an ordinance, for the construction of a street railway, does not entitle an abutting owner to damages under a statute giving a right to recover damages sustained by repairing the highway.¹³ Under a statute providing for damages to abutting owners for a change of the street grade when the change is more than three feet, such owner is entitled to damages only when the change of grade exceeds three feet, and then only for the injury caused by such excess.¹⁴

§ 1979. Damages in bringing street to first established grade.

Some cases hold that a municipal corporation is not liable for injuries to property caused by changing the natural surface of a street in bringing it to the first established grade, where the change is a reasonable one and is made in a careful manner.¹⁵ While in others it

10. *Quinn v. Columbia*, 152 Mo. App. 511, 133 S. W. 663.

11. *Shrader v. Cleveland, etc.* R. Co., 242 Ill. 227, 89 N. E. 997, aff'g 147 Ill. App. 252.

12. *Mitchell v. St. Louis*, 14 Mo. App. 600 (mem.).
See § 1998 *post*.

13. *Underwood v. Worcester*, 177 Mass. 173, 58 N. E. 589; *Laroe v. Northampton St. Ry. Co.*, 189 Mass. 254, 75 N. E. 255.

14. *Fairbanks et al. v. Rockingham*, 75 Vt. 221, 54 Atl. 186.

15. *Colorado. Durango v. Luttrell*, 18 Colo. 123, 31 Pac. 853; *Leipner v. Denver*, 36 Colo. 110, 85 Pac. 849, 7 L. R. A. (N. S.) 108, 118 Am. St. Rep. 101.

Indiana. Jeffersonville v. Meyers, 2 Ind. App. 532, 28 N. E. 999.

Iowa. Wilbur v. Ft. Dodge, 120 Iowa 555, 95 N. W. 186.

Kentucky. Owensboro v. Hope, 128 Ky. 524, 108 S. W. 873, 33 Ky. L. Rep. 375, 15 L. R. A. (N. S.) 996. See *Ewing v. Louisville*, 140 Ky. 726, 131 S. W. 1016.

is held that damages for such injuries are recoverable under constitutional provisions forbidding the taking or *damaging* of private property without just compensation.¹⁶

Ohio. Ross v. Cincinnati, 24 Ohio Cir. Ct. Rep. 43; Akron v. Huber, 78 Ohio St. 372, 85 N. E. 583; Akron v. Chamberlain, 34 Ohio St. 328, 32 Am. Rep. 367.

Pennsylvania. Deolin v. Philadelphia, 206 Pa. St. 518, 56 Atl. 21.

Rhode Island. O'Donnell v. White, 24 R. I. 483, 53 Atl. 633.

Washington. Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 478.

A city is not liable for damage to property resulting from a change of rural lands to urban property, where there is no negligence in making such change. Strauss v. Allentown, 215 Pa. 96, 63 Atl. 1073.

16. *California.* Eachus v. Los Angeles, etc. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

Illinois. Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 146; Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412.

Missouri. Werth v. Springfield, 78 Mo. 107.

Montana. Less v. Butte, 28 Mont. 27, 72 Pac. 140, 61 L. R. A. 601.

Nebraska. Harmon v. Omaha, 17 Neb. 548, 23 N. W. 503, 52 Am. Rep. 420.

Pennsylvania. New Brighton v. United Presby. Church, 96 Pa. St. 331; Hendrick's Appeal, 103 Pa. St. 358; O'Brien v. Philadelphia, 150 Pa. St. 589, 24 Atl. 1047, 30 Am. St. Rep. 832.

South Dakota. Whittaker v. Deadwood, 12 S. D. 608, 82 N. W.

202; Searle v. Lead, 10 S. D. 312, 73 N. W. 101, 20 L. R. A. 345.

Texas. Cooper v. Dallas, 83 Tex. 239, 18 S. W. 565; Fort Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059; Texarkana v. Talbot, 7 Tex. Civ. App. 202, 26 S. W. 451.

Where there is a valid ordinance for the grading of a street and the grading is done without taking measures to ascertain and pay the damages, the city is liable to property owners injured thereby. Schrod v. St. Joseph, 109 Mo. App. 627, 83 S. W. 543.

Under the statutes of Utah a city may establish grades and make the streets and sidewalks conform thereto, subject only to an action for damages. Morris v. Salt Lake City, 35 Utah 474, 101 Pac. 373.

When abutting property is actually damaged by the grading of a street to the first or original grade established, the owner is entitled to damages. Sallden v. Little Falls, 102 Minn. 358, 113 N. W. 884, 13 L. R. A. (N. S.) 790, 120 Am. St. Rep. 635. See Ewing v. Louisville, 140 Ky. 726, 131 S. W. 1016.

Where damage necessarily results from the grading of a street, a right to recover same is not affected by the fact that some other plan could have been adopted by which the damage could have been avoided. Robinson v. Borough of Norwood, 27 Pa. Super. Ct. 481.

Negligence in making changes in the natural surface of streets resulting in damages to adjacent lots, renders the municipality liable.¹⁷ And a municipality may be liable for damages caused by the grading of a street, even though done in accordance with the provisions of a grade ordinance, if thereby the *natural drainage is destroyed*, and no adequate means is provided for the escape of surface water.¹⁸ Sometimes the municipality will be held liable for damages caused in grading a street if abutting lands are thereby deprived of *lateral support*.¹⁹ In such case the right of the owner to damages, it has been held, cannot be affected by the fact that the grade to which the street was wrought was not legally established by the municipality.²⁰

§ 1980. Bridges, viaducts and other structures in streets.

Damages resulting to adjoining private property arising from the construction and use of a *viaduct* in

. If the municipality opens and uses a street upon the natural surface, it adopts the surface as a grade line and a change of such grade renders it liable for damages to abutting owners. *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837.

If no legal grade has been established by ordinance as required by law, the municipality is liable for damages to abutters for grading a street. *Richardson v. Webster City*, 111 Ia. 427, 82 N. W. 920; *Caldwell v. Nashua*, 122 Ia. 179, 97 N. W. 1000; *Millard v. Webster City*, 113 Ia. 220, 84 N. W. 1044; *Markham v. Anamosa*, 122 Ia. 689, 98 N. W. 493; *Millard v. Webster City*, 113 Ia. 220, 84 N. W. 1044; *Wilbur v. Fort Dodge*, 120 Ia. 555, 95 N. W. 186; *Eckert v. Walnut*, 117 Ia. 629, 91 N. W. 929; *Kepple v. Keokuk*, 61 Ia. 653,

17 N. W. 140; *Blanden v. Fort Dodge*, 102 Ia. 441, 71 N. W. 411.

17. *Cotes v. Davenport*, 9 Ia. 227; *Ellis v. Iowa City*, 24 Ia. 229; *Wallace v. Muscatine*, 4 Greene (Ia.) 373; *Aurora v. Reed*, 57 Ill. 30, 11 Am. Rep. 1.

18. *Wilbur v. Ft. Dodge*, 120 Iowa 555, 95 N. W. 186.

See § 2002 *post*.

19. *Parke v. Seattle*, 5 Wash. 1, 31 Pac. 310, 34 Am. St. Rep. 839; *Smith v. Seattle*, 20 Wash. 613, 56 Pac. 389.

20. *Wallenberg v. Minneapolis*, 111 Minn. 471, 127 N. W. 422.

Excavation. The owner of property abutting upon a public street may recover of the municipality damages for injuries to his property sustained by reason of the excavation of a street in front of the property for the purpose of grading it. *Louisville v. Hegan*, 20 Ky. L. Rep. 1532, 49 S. W. 532.

the street by a municipality may be recovered.²¹ But the construction of a bridge by the municipality in the street does not entitle an abutting owner to damages if the property was thereby increased in value.²² The erection of a bridge in a street is not a "taking" of abutting property, though the ingress and egress there-to may have been rendered less convenient.²³

The legislature, it is held, may authorize the building of a *tunnel* in the street without making compensation to the owners of the fee.²⁴ Where a municipal corporation had a legal right to improve a street by constructing a tunnel under a river where it crossed the street, it was held not liable for damages unavoidably caused thereby to adjoining property, in the absence of the imposition of such liability by statute.²⁵

To recover damages resulting from the construction of public improvements the plaintiff must show *special injury*.²⁶ A municipality is liable for damages to property resulting from the erection and maintenance of a nuisance by it in the adjoining street.²⁷

21. "If private property has sustained material physical damage by the making and using of a public improvement in a public highway, the owner may recover such damages, and this rule applies to damages to private property, caused by the building and use of a viaduct in a highway adjoining thereto." *Burcky v. Lake*, 30 Ill. App. 23; *Culbertson & Blair Packing & Prov. Co. v. Chicago*, 111 Ill. 651; *Chicago v. McDonough*, 112 Ill. 85.

22. *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65.

23. *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65.

24. *Fifty Associates v. Boston*, 201 Mass. 585, 88 N. E. 427.

A city in constructing a tunnel pursuant to legislative au-

thority is not liable to an adjoining lot owner where property has received no physical injury, and the work was done in proper manner and without unreasonable delay. *Chicago v. Rumsey*, 87 Ill. 348.

25. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

26. Where the erection of a platform and steps in the street prevented an abutting lot owner from driving his wagons thereon, the city was not liable for damages therefor, there being no special injury. *Hobson v. Philadelphia*, 155 Pa. St. 131, 25 Atl. 1040.

27. *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

In an action against the city by

If the municipality has power to provide for the passage of railways through its streets it may permit a *railroad track* to be laid on a street or highway, and in doing so will not be liable for any damages which may accrue to abutting property owners unless liability is imposed by statute.²⁸ The railroad company alone is liable in such case, but only for damages actually sustained, and not for nominal damages.²⁹ The owners of land to the center of the street are not entitled to damages from the municipality for permitting a railroad company to build its track on the side of the street outside of their line.³⁰ If a municipal corporation wrongfully permits a railroad company to construct a side track above the grade of the street, whereby surface water is caused to overflow and inundate adjacent property, it will be liable.³¹

a lot owner for damages caused by the closing of a portion of a street and the erection of a viaduct on a strip of land adjoining the street, the closing of the street and the erection of the viaduct will be considered as a whole. *Burcky v. Lake*, 30 Ill. App. 23.

28. *Dillenbach v. Xenia*, 41 Ohio St. 207; *Murphy v. Chicago*, 29 Ill. 516; *Olney v. Wharf*, 115 Ill. 519, 5 N. E. 366, 56 Am. Rep. 178; *Hedrick v. Olathe*, 30 Kan. 348, 1 Pac. 118; *Swenson v. Lexington*, 69 Mo. 157; *Tate v. Missouri, K. & T. R. Co.*, 64 Mo. 149. *Contra*, *Pekin v. Brereton*, 67 Ill. 477, 16 Am. Rep. 629.

29. *Burkam v. Ohio & M. Ry. Co.*, 122 Ind. 344, 23 N. E. 799; *Frith v. Dubuque*, 45 Iowa 406; *Hedrick v. Olathe*, 30 Kan. 348, 1 Pac. 118.

"The abutting owner may well be presumed to have taken into consideration the fact that the grade of the street might be

raised or lowered, that pavements might be laid and bridges and culverts constructed, and that a street railroad even might be built and operated thereon; and it may fairly be presumed that in purchasing he anticipated and allowed for the possible or probable damages to result from these and similar changes, or that he signified his consent thereto, and thus deprived himself of any right to compensation therefor." But these presumptions attach only so long as the purpose of the change is to render the street more convenient and useful as a highway. *Denver v. Bayer*, 7 Colo. 113, 117, 2 Pac. 6, 10.

30. *Acker v. Knoxville*, 117 Tenn. 224, 96 S. W. 973.

31. *Torpey v. Independence*, 24 Mo. App. 288; *Zanesville v. Fannan*, 53 Ohio St. 605, 42 N. E. 703, 53 Am. St. Rep. 664.

See § 2002 *post*.

The construction by the municipality of a bridge over railroad tracks at a street crossing without authority renders it liable for damages sustained by abutting property owners.³² However, it has been held that the municipality is not liable to a lot owner for damages resulting from a railroad constructed in the streets under license from it which it had no power to grant.³³ The granting by a municipality to a bridge company the right to construct a bridge approach in a public street, it has been held, will render it liable to abutting owners for damages sustained thereby.³⁴

§ 1981. Damages for vacating street.

As considered elsewhere in this work the rule is well settled that owners of lands abutting a street are entitled to damages for the vacation of such street by the municipality,³⁵ and generally it is the only remedy.³⁶

32. *Phelps v. Detroit*, 120 Mich. 447, 79 N. W. 640, 6 Det. Leg. N. 199.

33. *Green v. Portland*, 32 Me. 431.

A city is not liable to a property owner for damages sustained by reason of the construction of a bridge and approaches thereto at the intersection of a street with the tracks of a railroad company, where same are constructed by the city and railroad company under a void agreement, requiring the city to build the approaches, and the company, the bridge. The railroad company alone is liable. *Burritt v. New Haven*, 42 Conn. 174.

34. *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619.

35. § 1405 ante, vol. 3.

"The jurisdiction given to the municipalities to close and vacate

streets, or any portion thereof is coupled with the requirement that they shall *first* make due compensation to abutting property owners. When they act without authority, their action is no more forceful than if done by a wholly unauthorized person or body of persons." *Alabama, etc. R. Co. v. Turner* (Miss., 1910), 52 So. 261.

In *Pennsylvania* the liquidation or payment of damages is not a prerequisite to a legal vacation or narrowing of a street. *Morris v. Philadelphia*, 199 Pa. 357, 49 Atl. 70.

Where the right of passage over a private way is appurtenant to land, and is the only means of access to a street, the owner of the land is entitled to damages for the closing of such way by the raising of the street into which it runs. *Cutter v.*

Ordinarily one whose property does not abut on any part of the street vacated is not entitled to damages for the vacation.³⁷ But where the effect of the vacation of part of a street is to create a *cul de sac* whereby abutting owners are deprived of access to their property from that direction, usually such owners are entitled to damages.³⁸

§ 1982. Construction of sewers and drains.

There is no municipal liability for injuries resulting to private property incident to the construction of necessary or desirable sewers and drains in the absence of negligence in the execution of the work.³⁹ Sometimes

Boston, 200 Mass. 400, 86 N. E. 798.

Where a street or alley is necessary to the free and convenient access to the premises, the owner's right to use same is appurtenant to his premises and cannot be taken away without the payment of damages. *Ridgway v. Osceola*, 139 Ia. 590, 117 N. W. 794.

An owner of land abutting on a street vacated by the municipality and a railroad company is entitled to recover from the municipality and the company for a depreciation in the value of his property caused by the diversion of travel and business from his property as a result of vacating the street. *Schimmelmänn v. Lake Shore, etc. R. Co.*, 83 Ohio 356, 94 N. E. 840.

36. *Moore v. Meroney*, 154 N. C. 158, 69 S. E. 638.

Injunction denied. *Murphy v. Chicago, etc. R. Co.*, 247 Ill. 614, 93 N. E. 381.

37. *Re West 151st St.*, 123 N. Y. S. 343; § 1408 *ante*, vol. 3.

38. *Chicago v. Burcky*, 158 Ill. 103, 42 N. E. 173, 29 L. R. A. 568, 49 Am. St. Rep. 142; *Newark v. Hatt*, 79 N. J. L. 548, 77 Atl. 47; 30 L. R. A. (N. S.) 637; *Re Mellon St.*, 182 Pa. St. 397, 38 Atl. 482, 38 L. R. A. 275; *Alabama, etc. R. Co. v. Turner* (Miss., 1910), 52 So. 261.

See § 1409 *ante*, vol. 3.

Where a street was vacated at a place adjoining a railroad crossing, owners of lots abutting on the street on the other side of the railroad were held not entitled to recover damages therefor in the absence of a showing that such crossing was a public one. *Siddal v. Philadelphia*, 225 Pa. 55, 73 Atl. 1013.

39. *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Bennett v. Mt. Vernon*, 124 Iowa 537, 100 N. W. 349; *Cooper v. Cedar Rapids*, 112 Ia. 367, 83 N. W. 1050; *Arn v. Kansas City*, 14 Fed. 236.

Negligence in construction resulting in nuisance. *Langley v.*

under particular circumstances the municipal corporation will be held liable for negligence in devising a plan for a public improvement as well as for negligence in the execution of the plan; however, the general rule is that the local corporation is not liable for mere errors of judgment in devising plans for improvements.⁴⁰

Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Nevins v. Fitchburg, 174 Mass. 545, 55 N. E. 321, 47 L. R. A. 312.

Liability in construction of sewer in the absence of negligence. *Bloomington v. Costello*, 65 Ill. App. 407.

Constructing a drain over private land creates municipal liability. *Driscoll v. Taunton*, 160 Mass. 486, 36 N. E. 495.

Plan of construction, observance or non-observance. *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

A municipal corporation constructing a sewer is not liable for injuries to property occasioned by the settling of adjacent ground where there is no negligence in doing the work. *Uppington v. New York*, 58 N. Y. S. 533, 41 App. Div. 370.

Where a street is filled up by the city and the catch basins of sewers are raised causing the drainage of adjacent property to be destroyed and rendering the property unwholesome and untenable, the municipality is liable for damages to the property and for injury to the owner's health. *Toledo v. Lewis*, 17 Ohio Cir. Ct. Rep. 588, 9 O. C. D. 451. But see *Taylor v. Houston & T. C. R. Co.* (Tex. Civ. App., 1904), 80 S. W. 260.

A land owner who constructs improvements without reference to a proper use to be made of the alley for sewer purposes is not entitled to damages for the construction of a sewer in the alley in a proper manner, though it results in the caving in of the foundation walls. *Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73.

Diversion of surface water from its natural course so as to flow in another direction onto a lot owner's land in destructive quantities through a drain or channel, renders the municipality liable for the damage. *Hoffman v. Muscatine*, 113 Ia. 332, 85 N. W. 17; *Mount Sterling v. Jephson*, 21 Ky. L. Rep. 1028, 53 S. W. 1046; *Carll v. Northport*, 42 N. Y. S. 576, 11 App. Div. 120.

See § 2002 *post*.

40. *Mt. Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821.

A city is not liable for damages to property caused by defects in a plan for a sewerage system duly adopted and executed by the city, when no unconstitutional taking is involved. *Hart v. Neillsville*, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952.

Defective hydrant of waterworks causing flooding of plaintiff's property. City alone liable.

As fully considered in a subsequent chapter, there is no municipal liability for neglect to make public improvements. However, if the duty is not governmental or state but ministerial and absolute as distinguished from legislative, discretionary, judicial or *quasi*-judicial, the municipal corporation is liable for omission to perform it or for negligence in its execution.⁴¹

§ 1983. Who liable.

Citizens who request the construction and use of public improvements are not liable for the negligence of the municipality in their construction or operation, because they have no command or control of the construction or management thereof. The power of control is the test of liability.⁴² So *public officers* who perform the physical acts required to make a public improvement, which, though irregularly made, is performed pursuant to the direction of the municipality, and is one which it is within the authority of the municipality to order, are not trespassers or personal wrongdoers.⁴³ The rules as to the personal liability of municipal officers for negligence in the performance of official duties and for negligence resulting in damages to persons and property in the execution of public work are stated in a prior volume.⁴⁴

§ 1984. Same—liability as between the municipality and contractor.

When the municipality lets a contract for an improvement which it has authority to make, it assumes the responsibility of paying all damages necessarily caused to private property by the improvement;⁴⁵ and liabil-

Rice v. St. Louis, 165 Mo. 636, 65 S. W. 1002.

See chapter on Municipal Liability for Torts, *post*, vol. 5.

41. See chapter on Municipal Liability for Torts, *post*, vol. 5.

42. Carmichael v. Texarkana, 54 C. C. A. 179, 116 Fed. 845, 58 L. R. A. 911.

43. Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422.

44. §§ 536, 537 *ante*, vol. 2.

45. Eachus v. Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147. See also Engebretsen v. Gay, 158 Cal. 27, 30, 775, 109 Pac. 879.

ity to property owners for damages resulting from improvements properly made cannot be imposed on the contractor under the improvement contract so as to deprive such owners of their rights against the municipality.⁴⁶

The prevailing rule is that the contractor making a public improvement is not liable for damages occasioned thereby unless he does the work in a negligent manner or in such a way as to create a nuisance.⁴⁷ Accordingly a contractor who changes a street grade is not liable for damages unless he departs from the line of the official grade.⁴⁸ But if the ordinance providing for the improvement of a street is void, the municipality, it has been held, is not liable for damages sustained by property owners; the contractor alone is liable.⁴⁹ An ordinance for street improvements which provides that all loss or damage arising from the nature of the work to be done under the specifications shall be sustained by the contractor is not invalid as tending to increase the cost of the work to the property owners by requiring the contractor to assume an obligation resting on the municipality.⁵⁰

§ 1985. Same—liability as between municipality and other parties.

Exacting indemnity from other parties interested in the improvement by the municipality prior to proceeding does not change the relative rights and responsibilities of an abutting owner and the municipality as to damages.⁵¹

46. *Engelbrechtsen v. Gay*, 158 Cal. 27, 30, 775, 109 Pac. 879; *Morris v. Salt Lake City*, 35 Utah 474, 101 Pac. 373.

47. *Bennett v. Mount Vernon*, 124 Ia. 537, 100 N. W. 349.

Negligence on the part of the contractor in doing the work may create liability to the owner without any express provision in the contract imposing such liability.

Gay v. Engelbrechtsen, 158 Cal. 21, 109 Pac. 876.

48. *Eachus v. Los Angeles*, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147.

49. *McQuarter v. St. Joseph*, 134 Mo. App. 640, 114 S. W. 1140.

50. *Gay v. Engelbrechtsen*, 158 Cal. 21, 109 Pac. 876.

51. Evidence tending to show the ultimate liability of a railroad

In some jurisdictions municipal liability is the same whether the improvement, (as in grading a street) was legally authorized or merely permitted to be done;⁵² for example, the change of a street grade by a railroad company under authority from the municipality.⁵³ But the contrary has also been held in declaring that the company alone is liable.⁵⁴ And a railroad company aiding and assisting the municipality in the construction of street improvements renders it liable in damages to an abutting owner as a joint wrongdoer.⁵⁵

Compelling a railroad to elevate its tracks does not create municipal liability to abutters.⁵⁶ Nor is there municipal liability for damages occasioned by the laying of tracks in the street by a street railroad.⁵⁷ In

company on a bond of indemnity given to the municipality is inadmissible. *Brown v. Scranton*, 231 Pa. St. 593, 80 Atl. 1113.

52. *Knoxville v. Harth*, 105 Tenn. 436, 80 Am. St. Rep. 901, 58 S. W. 650; *Denison & P. Suburban Ry. Co. v. James*, 20 Tex. Civ. App. 358, 49 S. W. 660; *Laager v. San Antonio* (Tex. Civ. App., 1900), 57 S. W. 61.

53. *Re Stack*, 3 N. Y. S. 231, 50 Hun 385; *Clark v. Elizabeth*, 61 N. J. L. 565, 40 Atl. 616, dissenting opinion, 61 N. J. L. 565, 40 Atl. 737; *Denison & P. Suburban Ry. Co. v. James*, 20 Tex. Civ. App. 358, 49 S. W. 660.

54. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Shrader v. Cleveland, etc. R. Co.*, 242 Ill. 227, 89 N. E. 997, aff'g 147 Ill. App. 252.

55. *Sweeting v. New York, etc. R. Co.*, 112 N. Y. S. 225, 127 App. Div. 880, aff'd in 194 N. Y. 565, 88 N. E. 1133.

Raising of a street by a rail-

way company under an ordinance granting the company the right to build its railway thereon does not render the city liable to property owners under a statute providing for damages to the owners of property injured by specific repairs or alterations in a highway. *Vigeant v. Marlboro*, 175 Mass. 459, 56 N. E. 708.

56. *Chicago v. Webb*, 102 Ill. App. 232; *Osborn v. Chicago*, 105 Ill. App. 217.

57. *California*. *Bancroft v. San Diego*, 120 Cal. 432, 82 Pac. 712.

Colorado. *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6.

Illinois. *Murphy v. Chicago*, 29 Ill. 516; *Olney v. Wharf*, 115 Ill. 519, 5 N. E. 366, 56 Am. Rep. 178.

Kansas. *Hedrick v. Olathe*, 30 Kan. 348, 1 Pac. 118.

Massachusetts. *Purinton v. Somers*, 174 Mass. 556, 55 N. E. 461.

Missouri. *Swenson v. Lexington*, 69 Mo. 157; *Tate v. Missouri, Kan. & Tex. R. Co.*, 64 Mo. 149.

Ohio. *Dillenchbach v. Xenia*, 41 Ohio St. 207.

such case the railroad company alone is liable, but only, however, for damages actually sustained and not for nominal damages.⁵⁸ The fact that the closing of a street by a railroad company was authorized by ordinance does not deprive property owners of their right to recover from the company damages sustained thereby.⁵⁹ Nor is there municipal liability for damages resulting from improvements made by commissioners at the expense of property owners benefited thereby.⁶⁰

§ 1986. Who may recover damages.

Damages for injuries to property resulting from public improvements are personal to the owner of the property, and do not pass with a subsequent sale of the land.⁶¹ Accordingly the right of action of a property owner for damages from a change of grade is complete when the change is made, and is not affected by a subsequent conveyance of the property without reservation.⁶²

Contra. *Pekin v. Brereton*, 67 Ill. 477, 16 Am. Rep. 629, and see *Jarboe v. Carrollton*, 73 Mo. App. 347.

58. *Burkham v. Ohio & Miss. R. Co.*, 122 Ind. 344, 23 N. E. 799; *Frith v. Dubuque*, 45 Ia. 406; *Hedrick v. Olathe*, 30 Kan. 348, 1 Pac. 118.

59. *Com. v. Illinois Cent. R. Co.*, 138 Ky. 749, 129 S. W. 96.

60. *Astoria Heights Land Co. v. New York*, 179 N. Y. 579, 72 N. E. 1139, aff'g 86 N. Y. S. 651, 89 App. Div. 512.

61. *Indiana. Stein v. Lafayette*, 6 Ind. App. 414, 33 N. E. 912.

Maryland. Ortwine v. Baltimore, 16 Md. 387.

New York. People ex rel. v. Stillings, 119 N. Y. S. 298, 134 App. Div. 480; *Johnson v. Pettit*, 105 N. Y. S. 730, 120 App. Div. 774; *King v. New York*, 102 N. Y. 171,

6 N. E. 395; *Re Grote Street*, 123 N. Y. S. 619, 139 App. Div. 69.

Pennsylvania. Losch's Appeal, 109 Pa. St. 72; *Campbell v. Philadelphia*, 108 Pa. St. 300; *Moore v. Lancaster* (Pa. St., 1904), 58 Atl. 890.

United States. Re Torchia, 185 Fed. 576; *Chicago v. Baker*, 86 Fed. 753, 30 C. C. A. 364.

62. *New Hampshire. Hodgman v. Concord*, 69 N. H. 349, 41 Atl. 287.

New York. Re Grade Crossing Com'rs, 169 N. Y. 605, 62 N. E. 1096, aff'g 71 N. Y. S. 674, 64 App. Div. 71.

Pennsylvania. Robinson v. Norwood, 27 Pa. Super. Ct. 481; *Re Fifth St.*, 22 Pa. Super. Ct. 214.

Washington. Re Seattle, 26 Wash. 602, 67 Pac. 250.

In New York the one entitled to recover for damages to property

So the conveyance of land through which a ditch has been cut by the municipality does not give the vendee a right of action for damages occasioned by the cutting.⁶³ If property is sold after a public improvement has been ordered the purchaser is entitled to damages caused by constructing the improvement after the sale.⁶⁴ But a mere vendee under an executory contract for the sale of a lot, who is not entitled to the possession, or the rents and profits, until the final execution of the contract, cannot maintain an action for damages occasioned by a change of the street grade prior to his right to possession.⁶⁵

resulting from the closing of a street is the person who owned the property when the final map showing the closing and discontinuance of the street was filed in the proper office. *Re Richard Street*, 123 N. Y. S. 438, 138 App. Div. 821.

Where the bed of a street is dedicated to the city by an abutting owner, a purchaser of the abutting property is not entitled to damages for the grading of the street in conformity with the official grade established at the time of the dedication. *Uhle v. Philadelphia*, 30 Pa. Super. Ct. 480.

63. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

Where a house was built according to an erroneous grade given to the owner by the city engineer, and subsequently sold, the purchaser had no right of action for damages sustained by reason of cutting down the street to the legal grade. *Moore v. Lancaster* (Pa. St., 1904), 58 Atl. 890.

64. *Pickles v. Ansonia*, 76 Conn. 278, 56 Atl. 552.

65. *Hoffmann v. Columbia*, 76 Mo. App. 553.

The owner of abutting property is not estopped from claiming damages sustained by reason of the closing of the street by the fact that he had executed a bond for deeds to the property and had joined in the petition to the city to vacate the street, where the evidence showed the grantor in the bond had not complied with his contract and that notice of forfeiture had been served on him. *Bloomington v. Winslow*, 71 Ill. App. 340.

One having only a leasehold interest in property occupied by him cannot recover damages for the obstruction of the street in front of his premises, caused by the construction of a viaduct, without showing that there had been a direct physical disturbance of some right which he had in connection with the property, and which gave to it an additional value, and that by reason of such disturbance he had sustained a special damage in respect to his property in excess of that sus-

A *tenant*, although he has no estate in the land, is entitled to damages for any injury to his use of the premises, occasioned by the erection and maintenance of a public nuisance in the street adjacent to, or in the immediate neighborhood of, the premises.⁶⁶ So *one who has a right of way over a street* is entitled to maintain an action for the assessment of damages for a discontinuance of the street, although his land reverts to other persons who are not parties to the action.⁶⁷ And *a railroad company* is entitled to damages for structural changes in its road bed rendered necessary by the opening of a street.⁶⁸ There is no municipal liability for disturbance by the local corporation of a gas or water company's pipes, drains, conduits or like appliances in the public streets when made necessary by public considerations.⁶⁹

tained by the public generally. *Hohmann v. Chicago*, 41 Ill. App. 41.

66. *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

A *tenant at will* under a parol lease is entitled to damages for injuries to the property resulting from a change of grade in the street, where statute provides compensation for all damages sustained by any person in his property by the alteration of the street grade. *Sheehan v. Fall River*, 187 Mass. 356, 73 N. E. 544.

A *tenant for life or for years* or from year to year is an owner within the meaning of a statute giving damages to abutting owners for injuries caused by a change of grade in highways. *Gilligan v. Providence*, 11 R. I. 258.

Where changes in a building made necessary by the widening of a street were made at the expense of the tenants of the build-

ing and the tenants paid an increased rental thereafter, the life tenant in possession was held not entitled to damages from the city for the widening. *Himes v. Pittsburgh*, 213 Pa. St. 362, 63 Atl. 126.

Abandonment. The lessee of premises can have no more right to damages for the abandonment of partially completed improvements on the sidewalk than the owner would have were he the occupant. *Highland v. Galveston*, 54 Tex. 527.

67. *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54.

68. *Paterson N. & N. Y. R. Co. v. Nutley*, 72 N. J. L. 123, 59 Atl. 1032; *Baltimore & O. R. Co. v. Baltimore*, 98 Md. 535, 56 Atl. 790; *Baltimore v. Cowan*, 88 Md. 447, 41 Atl. 900, 71 Am. St. Rep. 433; *Northern Central R. Co. v. Baltimore*, 46 Md. 425.

69. *Scranton Gas Co. v. Scranton*, 214 Pa. St. 586, 64 Atl. 84, 6

§ 1987. Estoppel.

Usually one who petitions for an improvement is estopped from claiming damages resulting therefrom.⁷⁰ However, if property should be deprived of *lateral support* by the grading of a street, the owner is not estopped from claiming damages therefor, merely because he signed the petition for the grading.⁷¹

Property owners may be estopped from claiming damages resulting from the construction of a public improvement, by standing by without objecting while the work is being done and allowing it to proceed without interference.⁷² But the doctrine will be invoked solely to promote justice; it will never be applied in any case if it appears unfair, inequitable or wrong to do so.⁷³

L. R. A. (N. S.) 1033; Natick Gaslight Co. v. Natick, 175 Mass. 246, 56 N. E. 292; Anderson v. Fuller, 51 Fla. 380, 41 So. 684, 6 L. R. A. (N. S.) 1026, 120 Am. St. Rep. 170; Brunswick Gaslight Co. v. Brunswick Village, 92 Me. 493, 43 Atl. 104.

See § 1677 *et seq.*, *ante* and § 1846 *ante*.

70. Collins v. Grand Rapids, 95 Mich. 286, 54 N. W. 889; Vaille v. Independence, 116 Mo. 333, 22 S. W. 695; Cross v. Kansas City, 90 Mo. 13, 1 S. W. 749, 59 Am. Rep. 1; Re Tiffany St., 82 N. Y. S. 852, 84 App. Div. 525; Texarkana v. Talbot, 7 Tex. Civ. App. 202, 26 S. W. 451.

Evidence. Taylor v. Jackson, 83 Mo. App. 641.

71. Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422.

One who signed the petition for the construction of a pavement before the plans therefore had been made, upon the assurance of the village trustees that no appreciable

change in the grade of the street would be caused by the construction, was not estopped from claiming damages for injuries resulting from a change of grade of the street. Stillman v. North Ocean, 126 N. Y. S. 728, 142 App. Div. 300.

A land owner who united with others in a petition for the laying out of a street across his land is not thereby estopped from claiming compensation for land taken therefor. Turner v. Stanton, 42 Mich. 506, 4 N. W. 204.

72. Yingst v. Harrisburg, 43 Pa. Super. Ct. 418.

73. Estoppel not applicable.

Where a street is graded by the city without authority, an abutting owner who received no benefit therefrom is not estopped from claiming damages by the fact that he stood by and saw the work being done without interposing an objection. Jorgenson v. Superior, 111 Wis. 561, 87 N. W. 565; Indianapolis v. Gilmore, 30 Ind. 414.

The grantors of an easement in

Accordingly mere silence on the part of an abutter while his property is being damaged by street improvements, will not estop him from claiming damages for the injury where it does not appear that the municipal officers relied on his silence in doing the work or had been misled thereby.⁷⁴ And an abutting owner is not estopped by mere silence from asserting a claim for damages resulting from a change of street grade made by the municipality without authority.⁷⁵

Whether certain acts and words on the part of the abutter⁷⁶ constitute an estoppel so as to prevent re-

the bed of a lake are not estopped from asserting a claim for damages caused by overflowing their premises after abandonment of the easement, from the fact that without protest the public were permitted to enjoy the waters and the city to improve with reference to it, for a period of more than twenty years prior to the abandonment. *Albert Lea v. Davies*, 80 Minn. 101, 82 N. W. 1104, 81 Am. St. Rep. 242.

Where a resolution of the council authorizing the cutting of a ditch through private lands provided that the damage occasioned thereby should be paid by private parties, a property owner through whose land the ditch is run is not estopped from claiming damages on the ground that he did not notify the city that he would not look to the private parties for his damages. *Dallas v. Beeman*, 23 Tex. Civ. App. 315, 55 S. W. 762.

One is not estopped from recovering damages for a reduction of grade in the highway by the fact that the reduction could have been reasonably foreseen by him and the damage avoided. *McGar*

v. Bristol, 71 Conn. 652, 42 Atl. 1000.

74. *Dixon v. Allimand*, 136 Ill. App. 449.

The fact that plaintiffs suffered and permitted a street to be improved and made no objection until after the work was completed is no defense to an action of trespass. *Indianapolis v. Gilmore*, 30 Ind. 414.

75. *Jorgenson v. Superior*, 111 Wis. 561, 87 N. W. 565.

76. **Estoppel by acts and words.** Where buildings are erected after the change of the street grade has been established the owner is precluded from asserting a claim for damages caused by the change. *Re West Farms Road*, 95 N. Y. S. 894, 47 Misc. Rep. 216.

"To work an estoppel upon land owners who have constructed buildings fronting upon the street, so as to preclude them from the recovery of damages which they have sustained by reason of the changed grade of the street, the proof ought to be clear and conclusive of the existence of facts charging them with notice of the

covery of damages must be determined from the circumstances in deciding the ultimate question whether it is just to invoke the doctrine in the given case.

§ 1988. Waiver of damages.

The right of a property owner to recover damages resulting from a public improvement may be waived,⁷⁷

intended regulation and change of the grade." *Re Opening of Tiffany St.*, 82 N. Y. S. 852, 84 App. Div. 525.

An abutting owner who requested the municipality to remove earth from the alley and place it in the street was held estopped from claiming damages. *District of Columbia v. Atchison*, 31 App. D. C. 250.

It is no defense to an action for damages for a change of grade that the plaintiff purchased the property with knowledge that the order establishing such grade had already been made. He had the right when so purchasing, to expect that when the street was actually worked to such established grade he would be paid for any special damage to his property caused by the change. *Pickles v. Ansonia*, 76 Conn. 278, 56 Atl. 552.

In an action for damages for injury to, and removal of, shade trees while lowering the grade of a street under invalid council proceedings, the plaintiff is not estopped from recovering by the fact that he consulted members of the council, with a view of saving the trees, and urged them to make as little cut in the street as possible and allow him to lower the trees. *Blanden v. Fort Dodge*, 102 Iowa 441, 71 N. W. 441.

An oral declaration of a land

owner that he would claim no damages from the laying out of a street across his land is merely a license which will be binding when acted upon by proceeding to take the land, and may be revoked at any time previous. *Turner v. Stanton*, 42 Mich. 506, 4 N. W. 204.

An agreement by the abutter that the grade of the street should be changed in consideration that the contractor should raise the foundation of his house and his lot to the level of the new grade, estops him from claiming damages against the city. *Carson v. St. Joseph*, 91 Mo. App. 324.

The dedication of land to a municipality for street purposes does not give the municipality the right to so construct the street as to materially damage the property of the dedicator or his vendees. *Louisville v. Harbin*, 22 Ky. L. Rep. 1865, 61 S. W. 1011.

A property owner who deeds land to the city for street purposes is not estopped from claiming damages to abutting property caused by the extension of a bridge over the street, where the bridge could have been built without damage to the property. *Bartels v. Houston*, 32 Tex. Civ. App. 389, 74 S. W. 326.

77. *German Sav., etc. Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89;

as where he fails to follow statutory provisions in making his claim,⁷⁸ or where he fixes the amount claimed, which is a waiver of further claim.⁷⁹ But an abutter who petitions for a change of the street grade, and waives damages therefor, does not necessarily waive damages for the act of grading the street to the new grade.⁸⁰ So a property owner who petitions for a change of grade of the street does not thereby waive damages resulting from a change of grade in the pavement.⁸¹

§ 1989. When damages accrue.

Under some laws the right to damages arising from the alteration of a street grade accrues to a property

Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

"One who gives land for the purposes of a public way is supposed to contemplate all the same contingencies, and to make the gift on the supposition that the incidental benefits will equal or exceed all possible incidental injuries." *Pontiac v. Carter*; 32 Mich. 164, 173.

Delay for ten years, held waiver. *Nyhart v. Taylor Boro.*, 31 Pa. Super. Ct. 635.

Securing a modification of a proposed change of street grade does not bar damages for change actually made. *Klaus v. Jersey City*, 69 N. J. L. 127, 54 Atl. 220.

An agreement by the owner of land taken for a street, which provided that the owner shall not claim compensation, and that the street need not be completed until it be deemed expedient to do so, held not to preclude the owner from claiming compensation allowed by statute for a change of grade, where the change was made

after the street had been completed. *Fernald v. Boston*, 66 Mass. (12 Cush.) 574.

78. Lot owners who do not petition for compensation, as the statute provides, waive same. *German Sav., etc. Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89.

And where such owners fail to claim damages they will be held to have waived any right to object on that ground to the proceedings for a change of grade. *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661.

Failure to appear when notified, held waiver. *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513.

79. Filing claim for fixed sum is waiver of further claim. *Cleveland v. Hyland*, 18 Ohio Cir. Ct. Rep. 868, 6 O. C. D. 242.

80. *Fairbanks v. St. Joseph*, 102 Mo. App. 425, 76 S. W. 718.

81. *New Decatur v. Scharfenberg*, 147 Ala. 367, 41 So. 1025; *Same v. Smith* (Ala., 1906), 41 So. 1028.

owner as soon as the alteration becomes legally determined and fixed.⁸² A right of action for damages caused by a change of street grade, it has been held, is not complete until the municipality has failed to perform its duty in ascertaining the damages in the manner prescribed by law.⁸³ When the damages arising from street improvements have been assessed and the proceedings perfected, the right to recover the damages becomes fixed and vested, and cannot be taken away by the legislature.⁸⁴

The owner of land across which a street has been plotted has no right to recover damages until some act is done or notice or demand is made affecting or relating to the possession or appropriation of the land by the

82. *McCarthy v. St. Paul*, 22 Minn. 527; *Re Fifth & Sixth Sts.*, 12 Phila. (Pa.) 587.

In Pennsylvania the right to damages for the vacation of a street arises when the street is stricken from the city plan by the department of public works in obedience to an ordinance, and is not postponed until the street is physically closed. *Re Butler St.*, 19 Pa. Super. Ct. 48.

Under the statute of Pennsylvania, the owner of property taken for street purposes is entitled to recover damages therefor as soon as the ordinance directing the work has been passed and notice thereof has been given as provided by statute, although there has been no actual opening of the street. *Philadelphia v. Dickson*, 38 Pa. 247.

Where a municipality, acting under an ordinance, does work in raising the surface of a street, and brings it to a level long before the expiration of the time prescribed and then ceases operations

for such a length of time as to make it appear the work has been completed, a right of action exists for injuries occasioned by what was done, but for nothing more. *Buser v. Cedar Rapids*, 115 Ia. 683, 87 N. W. 404.

The maintenance of a bridge constructed by a city without authority is a continued wrong or nuisance, for which a property owner may recover damages, though the right of recovery for the original construction is barred. *Phelps v. Detroit*, 120 Mich. 447, 79 N. W. 640.

83. *Gilpin v. Ansonia*, 68 Conn. 72, 35 Atl. 777.

An appeal by property owners from an appraisal of damages on account of the construction of a street, does not suspend the right of other owners, who have not appealed, to recover the amount of damages appraised to them. *Roper v. New Britain*, 70 Conn. 459, 39 Atl. 850.

84. *Daley v. St. Paul*, 7 Minn. 300.

municipality.⁸⁵ The mere adoption of an ordinance changing a grade, it has been held, gives no right of action to a property owner.⁸⁶ It is the physical change, and not the mere establishment of a grade on the official plans, in some jurisdictions, it is held, that gives a right of action, and no damages are recoverable for the establishment of the grade until the actual work of grading is begun.⁸⁷ A property owner damaged by a change of grade is entitled to recover, although the grading has not been completed.⁸⁸

§ 1990. Nature and location of property.

The right to recover damages and the amount thereof is to be determined in some measure from the character of the property affected and its location with reference to the improvement.⁸⁹ One whose property does not abut

85. *Re Volkmar St.*, 124 Pa. 320, 16 Atl. 867, 23 Weekly Notes Cas. 364; *Busch v. McKeesport*, 166 Pa. 57, 30 Atl. 1023.

86. *Buser v. Cedar Rapids*, 115 Ia. 683, 87 N. W. 404; *Hempstead v. Des Moines*, 63 Ia. 36, 18 N. W. 676; *Stritesky v. Cedar Rapids*, 98 Ia. 373, 67 N. W. 271; *Ressegieu v. Sioux City*, 94 Ia. 543, 63 N. W. 184, 28 L. R. A. 389; *Tyson v. Milwaukee*, 50 Wis. 78, 5 N. W. 914.

The mere passage of an ordinance selecting a site for a courthouse, without any execution thereof, does not entitle the owner of property on such site to damages for unreasonable delay on part of the city in acquiring his interest in the property. *Shanfelder v. Baltimore*, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648.

87. *Devlin v. Philadelphia*, 206 Pa. 518, 520, 56 Atl. 21; *Re Plan 166*, 143 Pa. 414, 22 Atl. 669; *Ogden v. Philadelphia*, 143 Pa. 430,

22 Atl. 694; *Howley v. Pittsburg*, 204 Pa. 428, 54 Atl. 347; *Clark v. Philadelphia*, 171 Pa. 30, 33 Atl. 124; *Page v. Boston*, 106 Mass. 84; *Brown v. Lowell (Mass.)* 8 Metc. 172; *York v. Cedar Rapids*, 130 Ia. 453, 103 N. W. 790.

The legislature may provide that damages and benefits under an ordinance providing for the opening and reduction of a street shall be assessed before the actual physical opening and reduction. *Re Winter Ave.*, 23 Pa. Super. Ct. 353.

88. *Como v. Worcester*, 177 Mass. 543, 59 N. E. 444; *Schumacher v. St. Louis*, 3 Mo. App. 297; *Comesky v. Suffern*, 81 N. Y. S. 1049, 83 App. Div. 137, rev'd in 179 N. Y. 393, 72 N. E. 320.

89. *Re Grade Crossing Com'rs of Buffalo*, 61 N. Y. S. 748, 46 App. Div. 473, aff'd 166 N. Y. 69, 59 N. E. 706; *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706.

upon the street is not entitled to damages for injuries thereto resulting from a change of the street grade,⁹⁰ nor usually for the vacation of a street.⁹¹ A non-abutting owner whose property is left in a *cul de sac* by the vacation of a street, it has been held, is not entitled to damages where he had access to the property by the non-vacated portion of the street and by other streets.⁹²

Where part of a person's land is taken for a sewer, the owner will be allowed damages for such taking and for injuries to the other part of the land due to proximity secured by the taking, though he would not be entitled to damages for similar injuries if no land had been taken. *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. 489.

Raising street grade. Where a municipal corporation raises the grade of a street, thereby making abutting property lower than the street, it is liable to the owner for damages. *Sharp v. Cincinnati*, 16 Ohio Cir. Dec. 50.

90. *Re Grade Crossing Com'rs*, 61 N. Y. S. 748, 46 App. Div. 473, *aff'd* 166 N. Y. 69, 59 N. E. 706.

91. *Re West*, 151st St., 123 N. Y. S. 343.

92. *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 Pac. 316.

Access cut off. Under the statutes the right to recover for injuries to private property resulting from the vacation of a street is not confined to the owners of abutting property, but extends to one whose property is left in a *cul de sac*, shut off from access to the system of streets. *Re Melon St.*, 182 Pa. St. 397, 38 Atl. 482, 38 L. R. A. 275, 41 W. N. C. 153.

The discontinuance of part of a street in a city whereby the value of land abutting on other parts of the street is lessened, is not a ground of action against the city by the owner of such lands if the same are still accessible by other public streets. *Smith v. Boston*, 7 Cush. 254; *Cram v. Laconia*, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282; *Davis v. Hampshire Co.*, 153 Mass. 218, 11 L. R. A. 750, 26 N. E. 848; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625; *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. Rep. 343; *Buhl v. Fort St. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829, 23 L. R. A. 392.

Access by other streets, bars damages. *Reis v. New York*, 99 N. Y. S. 291, 113 App. Div. 464, *aff'd* in 188 N. Y. 58, 80 N. E. 573; *Re Cincinnati, etc. Ry. Co.*, 19 Ohio Cir. Ct. Rep. 582, 10 O. C. D. 286; *Beutel v. West Bay Sugar Co.*, 132 Mich. 587, 94 N. W. 202; *Gardner v. St. Joseph*, 96 Mo. App. 657, 71 S. W. 63.

See §§ 1408-1410 *ante*, vol. 3; §§ 1998, 1999 *post*.

Property owners in the vicinity of the street vacated are not entitled to damages for possible injury to their property by the use to which the street is to be put

The inconvenience suffered by such owners is also suffered by the general public and comes under the rule *damnum absque injuria*.⁹³ In Pennsylvania it has been held that a constitutional provision that municipalities shall make compensation for private property injured or destroyed by the construction or enlargement of its highways is not limited to abutting property, but applies to any property sufficiently near to sustain a substantial and proximate injury.⁹⁴

A non-abutting owner is entitled to damages resulting from a landslide caused by the negligence of a municipality in excavating a street, where part of his land and the land of an intervening abutting owner subsided and fell into the street.⁹⁵

Damages to a land owner by the draining of his well through the construction of a sewer by the municipality may be recovered under a statute allowing damages done to a party "whether by taking his property or injuring it in any manner."⁹⁶ One whose lot is below the street grade cannot recover against the municipality for the flooding of his lot resulting from improvements of the streets, if the injury would not have occurred had the lot been on a level with the street.⁹⁷

§ 1991. Measure of damages.

The measure of damages resulting to property from a change of grade of the street or other public improve-

after its vacation. *Re Cincinnati*, etc. R. Co., 19 Ohio Cir. Ct. 582, 10 O. C. D. 286.

93. *Re Cincinnati*, etc. Co., 19 Ohio Cir. Ct. Rep. 582, 10 O. C. D. 286.

94. *Re Chatham St.*, 191 Pa. St. 604, 43 Atl. 365.

Owner of property abutting on a street is entitled to damages, although the property does not abut at the point where the grade has been changed. *Lewis v. Homestead*, 194 Pa. St. 199, 45 Atl. 123.

95. *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706.

96. *Bickford v. Inhabitants of Hyde Park*, 173 Mass. 552, 54 N. E. 343, 73 Am. St. Rep. 320.

97. *Hoffman v. Muscatine*, 113 Ia. 332, 85 N. W. 321; *Sharp v. Cincinnati*, 16 O. C. D. 59.

Where charter or statute does not give non-abutting owner right to damages for alteration of a street none can be recovered. *Cherry v. Fewell*, 48 S. C. 553, 26 S. E. 798.

ment is the difference between the fair market value of the property just before the work was done and such value thereafter,⁹⁸ less any special benefit and advantage thereto resulting from the improvement.⁹⁹ Some-

98. *Alabama.* Smith v. New Decatur, 166 Ala. 334, 51 So. 984.

Georgia. East Rome v. Loyd, 124 Ga. 852, 53 S. E. 103; Roughton v. Atlanta, 113 Ga. 948, 39 S. E. 316.

Illinois. De Mange v. Bloomington, 155 Ill. App. 49; Wheeler v. Bloomington, 105 Ill. App. 97; Chicago v. Anglum, 104 Ill. App. 188; Barrington v. Meyer, 103 Ill. App. 124; Joliet v. Schroeder, 92 Ill. App. 68; Ross v. Chicago, 91 Ill. App. 416; Joliet v. Adler, 71 Ill. App. 456; Jacksonville v. Loar, 65 Ill. App. 218.

Iowa. Richardson v. Webster, 111 Ia. 427, 82 N. W. 920; Preston v. Cedar Rapids, 95 Ia. 71, 63 N. W. 577; Stewart v. Council Bluffs, 84 Ia. 61, 50 N. W. 219.

Kentucky. Covington v. Taffee, 24 Ky. L. Rep. 373, 68 S. W. 629; Henderson v. Winstead, 109 Ky. 328, 58 S. W. 777, 22 Ky. L. Rep. 828; Louisville v. Harbin, 22 Ky. L. Rep. 1865, 61 S. W. 1011; Louisville v. Bohlsen, 22 Ky. L. Rep. 1864, 61 S. W. 1014.

Massachusetts. Beale v. Boston, 166 Mass. 53, 43 N. E. 1029; Driscoll v. Taunton, 160 Mass. 486, 36 N. E. 495.

Mississippi. Warren County v. Rand, 88 Miss. 395, 40 So. 481.

Missouri. McMillen v. Columbia, 122 Mo. App. 34, 97 S. W. 953; Robinson v. St. Joseph, 97 Mo. App. 503, 71 S. W. 465; Tegeler v. Kansas City, 95 Mo. App. 162, 68

S. W. 953; Rives v. Columbia, 80 Mo. App. 173.

New York. Re Grade Crossing Com'rs, 169 N. Y. 605, 62 N. E. 1096, aff'g 71 N. Y. S. 674, 74 App. Div. 71.

Pennsylvania. Campbell v. Philadelphia, 230 Pa. St. 516, 79 Atl. 718; Re 62d St., 214 Pa. St. 137, 63 Atl. 426; Philadelphia Ball Club v. Philadelphia, 192 Pa. St. 632, 44 Atl. 265, 46 L. R. A. 724, 73 Am. St. Rep. 835; Whitehead v. Manor Boro., 23 Pa. Super. Ct. 314; Grier v. Homestead, 6 Pa. Super. Ct. 542, 28 Pittsb. Leg. J. (N. S.) 362, 42 W. N. C. 18.

Tennessee. Acker v. Knoxville, 117 Tenn. 224, 96 S. W. 973.

West Virginia. Blair v. Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837; McCray v. Fairmont, 46 W. Va. 442, 33 S. E. 245.

Wyoming. Rawlins v. Murphy (Wyo., 1911), 115 Pac. 436.

99. Chicago v. McShane, 102 Ill. App. 239; Garvey v. Revere, 187 Mass. 545, 73 N. E. 664; Kent v. St. Joseph, 72 Mo. App. 42; Blair v. Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837; Seattle v. Board of Home Missions, etc., 138 Fed. 307, 70 C. A. 597.

The rules for estimating damages in condemnation suits are applicable in actions for damages from a municipal improvement.

times the measure of damages to property from a change of the street grade is limited by statute to the damage done to buildings as distinguished from damage to the fee.¹

§ 1992. Proceedings to assess damages.

The method of assessing damages depends on the local laws (which are variant),² the constitutional provi-

Sanitary District, etc. v. McGuirl, 86 Ill. App. 392.

Where property is condemned for the purpose of widening a street with a well established grade, the damages for the construction of the improvement, in the absence of a showing to the contrary, will be such as will be caused by the construction of a grade corresponding to the grade as established. *Tenney v. Cincinnati*, 24 Ohio Cir. Ct. Rep. 237.

The measure of damages from excavation of a street is the difference between the market value of the property affected just before it became known that the street grade would be lowered and its market value after the street was made. *Louisville v. Hegan*, 20 Ky. L. Rep. 1532, 49 S. W. 532; *Henderson v. Crowden*, 28 Ky. L. Rep. 1255, 91 S. W. 1120.

Instruction that the damage to property, caused by the erection of a viaduct, was the difference between the value of the property just before the erection and after, held error, as ignoring the probable fact that there had been a general increase in the value of city property from other causes. *Butler v. East St. Louis*, 74 Ill. App. 649.

Interest on damages. *Rawlins v. Murphy* (Wyo., 1911), 115 Pac. 436.

Measure of damages adopted in the lower court will not be changed on appeal. *Drake v. Bosworth*, 140 Mo. App. 37, 124 S. W. 570.

1. *Re Vyse St.*, 95 N. Y. S. 893.

2. Proceedings for the assessment of damages must be brought within the time prescribed by statute, or court has no jurisdiction. *Sisson v. New Bedford*, 137 Mass. 255; *Shute v. Boston*, 99 Mass. 236; *Loring v. Boston*, 12 Gray (Mass.) 209; *Russell v. New Bedford*, 5 Gray (Mass.) 31; *Philadelphia v. Wright*, 100 Pa. St. 235; *Re Ridge Ave.*, 99 Pa. St. 469; *Re Tabor Street*, 25 Pa. Super. Ct. 355; *Lancy v. Boston*, 185 Mass. 219, 70 N. E. 88.

Statutory proceeding. *Porter v. Newton*, 133 Mass. 56; *Dunn v. Tarentum*, 23 Pa. Super. Ct. 332; *Re Fisher*, 178 Pa. St. 325, 35 Atl. 922; *Re Grab*, 52 N. Y. S. 395, 31 App. Div. 610, appeal dismissed, 157 N. Y. 69, 51 N. E. 398.

Failure to appoint commissioners to assess damages as required by statute renders void the proceeding. *Zelda Forsee Inv. Co. v. Phoenix Brick & Const. Co.*, 143 Mo. App. 357, 126 S. W. 788.

sions of the particular state, the nature of the improvement and the character and location of the property af-

A grade lawfully established cannot be legally changed without proceedings to determine the damages and benefits. *Filer v. Milwaukee*, 146 Wis. 221, 131 N. W. 345.

Damages determined by injunction instituted by municipality. *Bramlett v. Greenville*, 88 S. C. 110, 70 S. E. 450.

Estimate of damages based on report of council committee. *Gilpin v. Ansonia*, 68 Conn. 72, 35 Atl. 777.

Adopting report of street commissioner—appeal. *Roper v. New Britain*, 70 Conn. 459, 39 Atl. 850.

Proceedings for widening street is no bar to damages for grading two years thereafter. *Rogers v. Philadelphia*, 181 Pa. St. 243, 37 Atl. 339.

Where widening and grading of a street are both done at same time damages may be assessed in one proceeding. *Higgins v. Sharon*, 5 Pa. Super. Ct. 92, 41 W. N. C. 9.

Opening and grading of street may be regarded as integral parts of a single improvement. *Re Winter Ave.*, 23 Pa. Super. Ct. 353.

Assessed in a single proceeding, although different owners are interested. *Corey v. Edgewood Boro.*, 18 Pa. Super. Ct. 228.

Discretionary to allow separate juries to each land owner. *Re Seattle*, 52 Wash. 226, 100 Pac. 330.

Two contiguous lots treated as one. *Kavan v. South Omaha*, 88 Neb. 469, 126 N. W. 77.

A tract of land through which a highway has been constructed is properly treated by the municipality as a single contiguous tract in assessing the benefits and damages arising from a change of the highway grade. *Peck v. Bristol*, 74 Conn. 483, 51 Atl. 521.

Land and building thereon constitute but one piece of property, and both the benefits and damages to accrue by reason of a change of grade in the street must be estimated by considering the effect upon the property as a whole, and not upon the lot alone. *Seattle v. Board of Home Missions, etc.*, 138 Fed. 307, 70 C. C. A. 597.

Amount may be agreed upon, thus dispensing with formal proceedings. *Shelby v. Burlington*, 125 Ia. 343, 101 N. W. 101.

Review by *certiorari* denied. *People v. Phillips*, 85 N. Y. S. 200, 88 App. Div. 560; *People v. Leonard*, 84 N. Y. S. 341, 87 App. Div. 269.

Proper to consider feasible methods of using the property in assessing damages for change of grade. *Stone v. Heath*, 135 Mass. 561; *Beale v. Boston*, 166 Mass. 53, 43 N. E. 1029; *Dana v. Boston*, 176 Mass. 97, 57 N. E. 325.

Evidence of value. *Shaffer v. Reynoldsville Boro.*, 44 Pa. Super. Ct. 1.

Cannot take into consideration evidence *de hors* the record obtained by personal view or by personal inquiries. *People v. Stillings*, 123 N. Y. S. 349, 138 App. Div. 168.

fect. The ascertainment of damages is sometimes a condition precedent to the exercise of the power to order the improvement, as in grading a street.³ Thus under the constitution of Missouri the owner of property which will be damaged by a proposed improvement is entitled to have compensation for such damages adjudged to him before the beginning of the improvement.⁴ But failure to make compensation to lot owner for damages before improvements are made, it is held in California, does not render an assessment void.⁵ Compensation for damages that may be incurred by a change of grade is not a condition precedent to the right to make such change unless required by statute or charter.⁶ And where the city proceeds with the work without having the damages assessed, property owners may secure their damages by an ordinary action.⁷

§ 1993. Review of assessment proceedings.

The method of review of proceedings for the assess-

Appeal to court; notice. Appeals of Newton, 84 Conn. 234, 79 Atl. 742.

Appeal, waiver of irregularities. Kavan v. South Omaha, 88 Neb. 469, 126 N. W. 77.

A bill of particulars of the items composing the aggregate award or a statement of the methods by which the conclusion of damages is reached need not be given. People ex rel. v. Gilon, 22 N. Y. S. 238, 67 Hun 652; People v. Stillings, 124 N. Y. S. 929, 68 Misc. Rep. 55.

The opinions of the commissioners of estimate and assessment appointed under the Greater New York charter, when returned by them as part of their proceedings and decision correspond rather to the findings of fact and conclusions of law in an equity suit than to the opinions of the

lower courts upon an appeal in a civil action. People v. Stillings, 124 N. Y. S. 929, 68 Misc. Rep. 55.

Fraud or improper influence on the part of commissioners for the appraisal of damages in making an award will not be presumed. Johns v. Salamanca, 122 N. Y. S. 488, 67 Misc. Rep. 521.

3. John v. Connell, 61 Neb. 267, 85 N. W. 82.

4. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115.

5. German Savings & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

6. Gilpin v. Ansonia, 68 Conn. 72, 35 Atl. 777; McQuiddy v. Smith, 67 Mo. App. 205.

7. McQuiddy v. Smith, 67 Mo. App. 205; Rogers v. Attica, 98 N. Y. S. 665, 113 App. Div. 603, aff'd in 188 N. Y. 625, 81 N. E. 1174.

ment of damages is controlled by local laws which greatly vary.⁸ *Certiorari* is often the appropriate writ.⁹ In some jurisdictions the award assessing damages for improvements will not be disturbed except for error in law or a clear abuse of discretion.¹⁰ So the general rule is that damages not asked for in petition to the lower tribunal cannot be considered on appeal.¹¹

§ 1994. Payment of damages.

Legal provisions relative to the payment of damages to property owners for improvements should be substantially followed.¹² Acceptance of payment of an award of damages by the property owner precludes him

8. *Porter v. Newton*, 133 Mass. 56; *Cambridge v. Middlesex County Com'rs*, 117 Mass. 79; *St. Louis v. Frank*, 9 Mo. App. 579, aff'd 78 Mo. 41.

Board of revision of assessments may review assessment of damages but it cannot be reviewed by *certiorari*. *People ex rel. v. Muh*, 92 N. Y. S. 22, 101 App. Div. 423, aff'd in 183 N. Y. 540, 76 N. E. 1105.

Court of appeals, when. *Re Grab*, 157 N. Y. 69, 51 N. E. 398; dismissing appeal, 52 N. Y. S. 395, 31 App. Div. 610.

No appeal allowed, when. *Re Nepperhahn*, 75 N. Y. S. 923, 71 App. Div. 534.

9. *Rogge v. Elizabeth*, 64 N. J. L. 491, 46 Atl. 164.

By *certiorari* or other direct proceeding and not on a rule to show. cause. *Murray v. Newark* (N. J. Sup., 1905), 60 Atl. 38.

An award made by commissioners for a change of grade may be reviewed by *certiorari*. *People v. Stillings*, 78 N. Y. S. 333, 75 App. Div. 569.

See § 2016 *post*.

10. *Re East 182d St.*, 70 N. Y. S. 373, 34 Misc. Rep. 592; *People v. Coler*, 61 N. Y. S. 345, 45 App. Div. 463.

11. *Hinckley v. Franklin*, 69 N. H. 614, 45 Atl. 643.

See § 2015 *post*.

12. *Holden v. Crawfordsville*, 143 Ind. 558, 41 N. E. 370.

Under some charters an ordinance for changing the grade and constructing sidewalks on a street which has been built upon it is void unless it provides for the adjustment and payment of damages. *State v. Long Branch Com'rs*, 54 N. J. L. (25 Vroom.) 484, 24 Atl. 368.

Law forbids grading or regrading of streets unless the property owners petitioned therefor or the council provided for the assessment of damages. Held an ordinance for grading and macadamizing a previously graded street where no change in the grade was made need not provide for compensation. *Gibbons v. Owens*, 115 Mo. 258, 21 S. W. 1107.

Assessment of a betterment for the expense of widening a street

from thereafter complaining that it is inadequate.¹³ But the payment of the amount of an award after an action therefor has been brought does not affect the right of the plaintiff to judgment and to costs of the action.¹⁴

§ 1995. Deduction of benefits.

Damages to property occasioned by public improvements cannot be recovered if the benefits resulting from the improvement exceed the damage.¹⁵ Accordingly in an action for damages the value of benefits to the property arising by reason of the improvement may be set off and deducted.¹⁶ In a number of jurisdictions the courts have made a distinction between general benefits, that is, such as the landowner receives from the

held valid, although the order for widening did not award any damages to the abutters. *Prince v. Boston*, 111 Mass. 226.

Council to appropriate damages. *St. Joseph v. Truckenmiller*, 183 Mo. 9, 81 S. W. 1116.
Interest, demand of payment. *Re New York*, 87 N. Y. S. 823, 91 App. Div. 553.

Payment of award. *Re Opening Bay 23d Street*, 46 N. Y. S. 660, 20 App. Div. 28.

13. *Keil v. St. Paul*, 47 Minn. 288, 50 N. W. 83; *Reinhardt v. Buffalo*, 15 N. Y. S. 844.

A misstatement of the name of a property owner in an assessment for a street improvement does not show that such owner has not been compensated for the damages caused by the improvement. *Gaslight & Coke Co. v. New Albany*, 158 Ind. 268, 63 N. E. 458.

14. *Bradhurst v. New York*, 52 N. Y. Super. Ct. 51.

15. *Hopkins v. Ottawa*, 59 Ill. App. 288; *Eberhard v. Chicago, etc. R. Co.*, 70 Ill. 347; *Burkham v.*

Ohio, etc. R. Co., 122 Ind. 344, 23 N. E. 799; *Himes v. Pittsburg*, 213 Pa. St. 362, 63 Atl. 126; *Olson v. Albert Lea*, 107 Minn. 127, 119 N. W. 794.

16. *Atlanta v. Green*, 67 Ga. 386; *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65; *Chicago v. Webb*, 102 Ill. App. 232; *Springer v. Chicago*, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609; *Osgood v. Chicago*, 154 Ill. 194, 41 N. E. 40; *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Meyer v. Burlington*, 52 Ia. 560, 3 N. W. 558; *Carroll v. Marshall*, 99 Mo. App. 464, 73 S. W. 1102; *Chattanooga v. Geiler*, 13 Lea (Tenn.) 611.

"That benefits resulting from the change of grade are to be considered by the jury in connection with the disadvantages resulting therefrom is the settled rule in this state." *Meardon v. Iowa City*, 148 Ia. 12, 126 N. W. 939; *McCash v. Burlington*, 72 Ia. 27, 33 N. W. 346; *Stewart v. Council Bluffs*, 84 Ia. 61, 50 N. W. 219.

The owner can only recover his real damages, to be ascertained

improvement in common with the general public, and special benefits, or such as the owner receives as an individual separate from the general public; and have held that the general benefits should be disregarded and only the special benefits taken into account in estimating the damages.¹⁷ Accordingly in an action for damages to property from the construction of a viaduct in the street on which the property abuts, the municipality

by taking into consideration the benefits conferred as well as the injuries inflicted. *Bramlett v. Greenville*, 88 S. C. 110, 70 S. E. 450.

The benefit of improvements to be paid for by a special assessment cannot be set off against a claim for damages resulting therefrom. *Garvey v. Revere*, 187 Mass. 545, 73 N. E. 664.

17. *Colorado*. *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6.

Connecticut. *Nicholson v. New York*, etc. R. Co., 22 Conn. 74, 56 Am. Dec. 390.

Massachusetts. *Donovan v. Springfield*, 125 Mass. 371.

Missouri. *Widman Investment Co. v. St. Joseph*, 191 Mo. 459, 90 S. W. 763; *Hickman v. Kansas City*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; *Smith v. St. Joseph*, 122 Mo. 643, 27 S. W. 344; *Newby v. Platte Co.*, 25 Mo. 258; *Louisiana*, etc. *Plankroad Co. v. Pickett*, 25 Mo. 535; *Pacific R. Co. v. Chyrstal*, 25 Mo. 544; *Powell v. Columbia*, 154 Mo. App. 239, 134 S. W. 76.

Nebraska. *South Omaha v. Ruthgen*, 71 Neb. 545, 99 N. W. 240; *Kavan v. South Omaha*, 86 Neb. 469, 126 N. W. 77; *Schaller v. Omaha*, 23 Neb. 325, 36 N. W. 533; *Dayton v. Lincoln*, 39 Neb.

74, 57 N. W. 754; *Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721; *Barr v. Omaha*, 42 Neb. 341, 60 N. W. 591.

New Jersey. *Sullivan v. North Hudson County R. Co.*, 51 N. J. L. 518, 18 Atl. 689.

Ohio. *Lotze v. Cincinnati*, 4 Ohio N. P. 311; *Martin v. Bond Hill*, 7 Ohio C. C. 271, aff'd in 53 Ohio St. 646, 44 N. E. 1141.

Pennsylvania. *Pennsylvania*, etc. R. Co. v. *Ziemer*, 124 Pa. St. 560, 17 Atl. 187; *Rudderow v. Philadelphia*, 166 Pa. St. 241, 31 Atl. 53; *Aswell v. Scranton*, 175 Pa. St. 173, 34 Atl. 656, 52 Am. St. Rep. 841; *Shimer v. Easton R. Co.*, 205 Pa. St. 648, 55 Atl. 769.

Texas. *Houston v. Bartels*, 36 Tex. Civ. App. 498, 82 S. W. 323; rehearing denied, 36 Tex. Civ. App. 498, 82 S. W. 469; *Haney v. Gulf*, etc. R. Co., 3 Tex. App. Civ. Cas., § 278; *Gulf*, etc. R. Co. v. *Fuller*, 63 Tex. 467; *Easton Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170, 70 S. W. 98; *Pochila v. Calvert*, etc. R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255.

Utah. *Hempstead v. Salt Lake City*, 32 Utah 261, 90 Pac. 397.

Washington. *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261; *Seattle v. Board of Home*.

cannot set off alleged benefits to other property owned by defendant and not connected with the lots for which damages are sued.¹⁸

Missions, 138 Fed. 307, 70 C. C. A. 597.

West Virginia. Blair v. Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837; Godbey v. Bluefield, 61 W. Va. 604, 57 S. E. 45.

Special benefits are the peculiar benefits that accrue to any owner by reason of a public improvement, apart from those common to the general public. Appeals of Newton, 84 Conn. 234, 79 Atl. 742; Rives v. Columbia, 80 Mo. App. 173; Powell v. Columbia, 154 Mo. App. 239, 134 S. W. 76; Landry v. Lake Charles, 125 La. 510, 51 So. 120.

Benefits accruing to property from a public improvement cannot be offset against the cost and expense of restoring the property to its former condition in appearance and usefulness. Olson v. Albert Lea, 107 Minn. 127, 119 N. W. 794.

Future increase in property value shared by the owner of the property in common with the general public by reason of the improvement of a street, cannot be set off against damages to the property resulting from a change of the street grade. Meridian v. Higgins, 81 Miss. 376, 33 So. 1.

The construction of a station on the surface of a street, whereby passengers are discharged from a subway is a benefit common to all the neighborhood and cannot be set off against the damages sustained by an abutting owner.

Fifty Associates v. Boston, 201 Mass. 585, 88 N. E. 427.

In Kentucky the increased value of property benefited by a change of the street grade, in common with all other property in the same square is to be considered in estimating the damages from a change of grade. Louisville v. Kaye, 122 Ky. 599, 29 Ky. L. Rep. 116, 92 S. W. 554.

In Minnesota the benefits to property resulting from a public improvement should be offset against the damages sustained, whether general or special. Olson v. Albert Lea, 107 Minn. 127, 119 N. W. 794.

18. Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540, rev'g 91 Ill. App. 472.

"An owner whose property is damaged is entitled to be awarded just damages, irrespective of damage done another owner, or of special benefits assessed against another owner." Appeals of Newton, 84 Conn. 234, 79 Atl. 742.

Benefits resulting from the paving of a newly graded street cannot be offset against damages done by regrading. Re Bradley, 125 N. Y. S. 142, 68 Misc. Rep. 514.

Instruction approved. Grant Park v. Trah, 115 Ill. App. 291, aff'd 218 Ill. 516, 75 N. E. 1040.

Erroneous instruction. Ficken v. Atlanta, 114 Ga. 970, 41 S. E. 58.

Evidence of an increase in the value of land resulting from cutting down a street is admissible

§ 1996. Delay in bringing action or making claim.

Actions for damages should be seasonably brought and within the period prescribed by the local laws.¹⁹ Some laws require claims for damages to be presented within a named time,²⁰ otherwise the right to compensation may be denied.²¹

in an action for damages. *Joliet v. Schroeder*, 92 Ill. App. 68.

Two lots, one on each side of an alley, used for different purposes will be considered distinct tracts, so that the damage to the one and the benefit to the other cannot be considered together in an action by the owner for damages resulting from the improvement of the alley. *Drake v. Bosworth*, 140 Mo. App. 37, 124 S. W. 570.

The existence of a highway through a tract of land does not break its continuity, and in assessing benefits and damages resulting from a change of the street grade, the tract may be treated as a single continuous piece of land. *Peck v. Bristol*, 74 Conn. 483, 51 Atl. 521.

Mitigation of damages. The fact that an alley constructed by the city renders abutting property more convenient and valuable cannot be shown in mitigation of damages to the property by the backing up of water thereon as a result of the construction. *Ewing v. Louisville*, 140 Ky. 726, 131 S. W. 1016.

Burden of proof. Plaintiff must show the amount of damages over and above the benefits accruing to the property by reason of the improvement, together with the amount assessed against the

property for such improvement. *Des Mange v. Bloomington*, 155 Ill. App. 49.

19. Four years. *East Rome v. Loyd*, 124 Ga. 852, 53 S. E. 103.

Three years. *Klaus v. Jersey City*, 69 N. J. L. 127, 54 Atl. 220.

Laches. Where a city denied its liability to abutting owners for damages resulting from a change of street grade, and was sued by one of the owners to recover such damages, the other owners were held not guilty of laches in waiting until such suit had been determined before instituting proceedings to protect their rights. *Rogge v. Elizabeth*, 64 N. J. L. 491, 46 Atl. 164.

20. *Smith v. Spokane*, 54 Wash. 276, 102 Pac. 1036.

Premature claim. Filing claim prematurely under mistake as to completion of work will not preclude a claim after completion of work. *Phipps v. North Pelham*, 70 N. Y. S. 630, 61 App. Div. 442.

Increase of claim. Claim for damages for the discontinuance of a street, though filed within six years as required by statute cannot be increased after the expiration of the limitation period. *Re Spuyten Duyvil Road*, 116 N. Y. S. 857.

21. *Re Grote St.*, 123 N. Y. S. 619, 139 App. Div. 69; *Re Walton*

§ 1997. Remedies of property owner.

As there is no common law liability,²² the remedy for consequential damages is purely statutory,²³ and such remedy is exclusive.²⁴ But where the municipality

Ave., 116 N. Y. S. 471, 131 App. Div. 714, *aff'd* in 90 N. E. 59; Re Richard Street, 123 N. Y. S. 438, 138 App. Div. 821.

22. §§ 1968, 1975, 1976 *ante*.

23. Stowell v. Board of Public Works, 184 Mass. 416, 68 N. E. 675; Holleran v. Boston, 176 Mass. 75, 57 N. E. 220; White v. Foxborough, 151 Mass. 28, 23 N. E. 652; Boston Belting Co. v. Boston, 149 Mass. 44, 20 N. E. 320; Kennison v. Beverly, 146 Mass. 467, 16 N. E. 278; Turner v. Dartmouth, 13 Allen (Mass.) 291; Flagg v. Worcester, 13 Gray (Mass.) 601; Taylor v. St. Paul, 25 Minn. 129; McCarthy v. St. Paul, 22 Minn. 527; Heiser v. New York, 104 N. Y. 68, 9 N. E. 866; McKee v. Pittsburg, 7 Pa. Super. Ct. 397.

Compensation for injuries to property inflicted by contractors in constructing a sewer is not a part of the expense of constructing the sewer but is recoverable against the city as damages. Leeds v. Richmond, 102 Ind. 372, 1 N. E. 711.

Failure of the board of public works to view premises and assess the benefits as required by charter, gives property owner a right of action for damages resulting from the grading of a street. Jorgenson v. Superior, 111 Wis. 561, 87 N. W. 565; Pittelkow v. Milwaukee, 94 Wis. 651, 69 N. W. 803.

When court will interfere.

Morris v. Salt Lake City, 35 Utah 474, 101 Pac. 373.

Delay in assessing damages. Gilpin v. Ansonia, 68 Conn. 72, 35 Atl. 777.

24. Fuller v. Mt. Vernon, 171 N. Y. 247, 63 N. E. 964, *aff'g* 72 N. Y. S. 1103, 64 App. Div. 621; Bernstein v. Mt. Vernon, 96 N. Y. S. 458, 109 App. Div. 899; Garraux v. City Council, 53 S. C. 575, 31 S. E. 597.

Compensation rests alone on statute. Newark v. Hatt, 79 N. J. L. 548, 77 Atl. 47, 30 L. R. A. (N. S.) 637.

Appeal from appraisal of damages. Almy v. Coggeshall, 19 R. I. 549, 36 Atl. 1124.

Certiorari will not lie. Borghart v. Cedar Rapids, 126 Ia. 313, 101 N. W. 1120, 68 L. R. A. 306.

See § 2016 *post*.

The action of commissioners appointed to assess damages caused by a change of grade is subject to review by a writ of *certiorari*. People v. Stillings, 123 N. Y. S. 349, 138 App. Div. 168.

Mandamus. The owner need not obtain *mandamus* to compel an assessment of his damages, and appeal from the assessment, in the event that assessment is inadequate. Jorgenson v. Superior, 111 Wis. 561, 87 N. W. 565.

Who entitled to maintain action. Tenant having the use of land for a term is entitled to action to recover damages for in-

changes a street grade without conforming to the statute, it has been held, a property owner damaged thereby need not follow the statutory remedy.²⁵ And in the absence of statutory provision the owner is entitled to have damages ascertained in an action at law.²⁶

Trespass will lie only when the damages result from the negligent execution of the work;²⁷ and an *action of tort* will lie where the damages grow out of the wrongful action of the municipality,²⁸ as where it proceeds with the work in a manner not in accord with the statute or charter from which it derives authority to act in such instance.²⁹ *Injunction* may be granted also at the suit of an owner whose property is being wrongfully damaged by the municipality, if he has no adequate remedy at law;³⁰ and in some jurisdictions a municipi-

jury to such use occasioned by the erection and maintenance of a public nuisance in the street by the city. *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013; *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290.

25. *Bernhard v. Rochester*, 112 N. Y. S. 229, 127 App. Div. 875, aff'd in 194 N. Y. 566, 88 N. E. 1114.

26. *Grant Park v. Trah*, 218 Ill. 516, 75 N. E. 1040, aff'g 115 Ill. App. 291.

27. *Lang v. Punxsutaney Borough*, 44 Pa. Super. Ct. 171; *Bartlett v. Minersville*, 38 Pa. Super. Ct. 76; *Cooper v. Scranton*, 21 Pa. Super. Ct. 17; *Hoster v. Philadelphia*, 12 Pa. Super. Ct. 224; *Porter v. Scranton*, 36 Pa. Super. Ct. 218; *Fyfe v. Turtle Creek Borough*, 22 Pa. Super. Ct. 292; *McKee v. Pittsburgh*, 7 Pa. Super. Ct. 397; *Almy v. Coggeshall*, 19 R. I. 549, 36 Atl. 1124.

28. **Nuisance.** Where a city in wrongfully changing the grade of

an alley creates a nuisance it is liable to property owners for resulting damages. *Stein v. Lafayette*, 6 Ind. App. 372, 33 N. E. 912.

29. **Violating law.** Where a municipal corporation changes the grade of a street without first instituting proceedings to determine the benefits and damages as required by charter, it will be liable in an action for damages for a tortious wrong. *Filer v. Milwaukee*, 146 Wis. 221, 131 N. W. 345.

30. *Graden v. Parkville*, 114 Mo. App. 527, 90 S. W. 115.

Injunction—setoff. *Birmingham v. Wagenseler*, 168 Ala. 344, 53 So. 289.

An abutting owner is entitled to an injunction to restrain the municipality from illegally cutting down the street without the authority of an ordinance. But such injunction should not be so broad as to interfere with the right of the city to establish such grade

pality may be enjoined from taking or *damaging* private property for public use until just compensation is made.³¹

The rules relating to the sufficiency of the pleadings, the defenses, as set off or counterclaim;³² the nature of the evidence, its admissibility, weight and sufficiency and the burden of proof;³³ the instructions, charges to the

by a proper ordinance. *Hunter v. Ottumwa*, 150 Ia. 281, 129 N. W. 961.

Where city adopted an ordinance changing the grade of a street but had not paid the damages assessed therefor to property owners, property owner could not enjoin the laying of tracks by a street railway company to whom the city granted the right to lay tracks at the new grade, where it appears that such tracks are intended to be laid at the old grade and that if so laid, no damage will result. *Aetna Iron Works v. St. Louis Transit Co.*, 95 Mo. App. 565, 69 S. W. 618.

See § 2004 *et seq.*, *post*.

31. *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *State ex rel. v. Superior*, 26 Wash. 278, 66 Pac. 385.

One whose lands have been damaged by a change of the street grade has the right to enjoin the prosecution of the work until his damages have been lawfully ascertained and paid. *Willcox v. Engbretsen*, 160 Cal. 288, 116 Pac. 750; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661.

32. Petition must show that the municipal authorities were acting in the line or scope of their authority, and that the work was

done in the city. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

Claim of an assessment of benefits against the plaintiff must be pleaded as a set off or counterclaim. *Roper v. New Britain*, 70 Conn. 459, 39 Atl. 850. But see *Pickles v. Ansonia*, 76 Conn. 278, 56 Atl. 562.

Special injury must be alleged and proved. *Re Cincinnati, N. O. & T. P. R. Co.*, 19 O. Cir. Ct. Rep. 582, 10 O. C. D. 286.

Special damages. Any direct damages peculiar to plaintiff, are special damages within the meaning of a statute authorizing a recovery of "special damages" and need not be particularly pleaded in an action against the city for a change of grade. *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000; *Platt v. Milford*, 66 Conn. 320, 34 Atl. 82.

33. *Prima facie* case in cutting down street. *Richardson v. Webster City*, 111 Ia. 428, 82 N. W. 920.

Evidence by view. *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000.

Evidence that work was authorized by the municipality. *Smith v. Los Angeles*, 136 Cal. 156, 68 Pac. 595.

Evidence as to the use of the streets to be made after the vacation is inadmissible. *Re Cincinnati*.

jury or declarations of law,³⁴ and other points of practice and procedure need not be considered here further than to mention a few cases in the notes, since these questions are to be determined, almost exclusively, by local laws.

nati N. O. & T. P. Ry. Co., 10 O. C. D. 286, 19 Ohio Cir. Ct. Rep. 308, 582.

Evidence as to damage from a change of grade other than the one in question is inadmissible. *Watson v. Columbia*, 77 Mo. App. 267.

Evidence of title. *Schrodt v. St. Joseph*, 109 Mo. App. 627, 83 S. W. 543.

Change of street grade, competent to show the value of other abutting property similarly situated. *Columbus v. McDaniel*, 117 Ga. 823, 45 S. E. 59; *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65.

Evidence as to the immediate surroundings of property is admissible in action for damages for change of grade to aid in determining how much and in what way it was affected by the change. *Morton v. Burlington*, 106 Ia. 50, 75 N. W. 662.

Change of street grade, testimony that traffic had been diverted to the opposite side of the street is proper in so far as it may be necessary to show the elements upon which experts based their opinions, but is not competent to show the amount of damage to the property. *Chicago v. Jackson*, 88 Ill. App. 130, *aff'd* in 196 Ill. 496, 63 N. E. 1013, 1135.

See § 1998 *post*.

Damages resulting from the closing of a street, proof of a decrease in the rental value of

property other than that in issue is not admissible. *Chicago v. Baker*, 86 Fed. 753, 30 C. C. A. 364, 58 U. S. App. 569.

Jury question. The question whether a change of grade in the street caused a depreciation in the market value of abutting property is for the jury. *Columbus v. McDaniel*, 117 Ga. 823, 45 S. E. 59.

Question of damages to property caused by street improvements is for the jury. *Frankfort v. Howard*, 25 Ky. L. Rep. 111, 74 S. W. 703.

Question whether retaining wall was rendered necessary to protect abutting property by excavation in the street is for jury. *Aurora v. Fox*, 78 Ind. 1.

Special benefits accruing to plaintiff's property may be inferred by the jury from the facts, and surrounding circumstances without definite evidence. *Kent v. St. Joseph*, 72 Mo. App. 42.

Burden of showing damages and the amount thereof is on the owner. *Smith v. New Decatur*, 166 Ala. 334, 51 So. 984.

Burden of showing that the municipal authorities did not comply with the statute authorizing the change is upon plaintiff. *Bernstein v. Mt. Vernon*, 96 N. Y. S. 458, 109 App. Div. 899.

34. Instruction, held bad. *Estes v. Macon*, 103 Ga. 780, 30 S. E. 246.

§ 1998. Elements of damages.

The right of the owner of land abutting on a street to recover damages because of a change of grade of the street is generally made to depend on the *question whether he has sustained special injury* or whether his property has sustained injury over and above that sustained in common with other abutting owners or the public in general;³⁵ however, relating to the obstruction or vacation of a street it has been declared not to be the rule that he must suffer a damage peculiar to himself *alone*. For example, one who is deprived of access to his property by the vacation or closing of an alley is not barred from recovering damages therefor by the fact that others whose property abutted on the alley suffered a like loss.³⁶ Concerning the right to recover for the vacation of a street, considered elsewhere in this work, the rule is stated to be, that the owner is not entitled to recover unless he has sustained an injury different in *kind* and not merely in *degree* from that suffered by the public at large.³⁷ And the same rule has been applied to damages resulting to property from other kinds of public improvements.³⁸ Any direct damages peculiar

35. *Leavenworth v. Duffy*, 10 Kan. App. 124, 62 Pac. 433; §§ 1382, 1409 *ante*, vol. 3.

36. *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843.

37. § 1408 *ante*, vol. 3.

38. **Elements—evidence.** In the opening of a street the fact that the market value of the property may be injuriously affected by the cost of future street improvements that may be charged against the property may be considered. *De Benneville v. Philadelphia*, 204 Pa. St. 51, 53 Atl. 521.

It does not necessarily follow from the grading of a street that improvements on abutting lands will be damaged in the same pro-

portion as the land itself. *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261.

Evidence as to how the excavation of a street affected the appearance of the property is admissible. *Joliet v. Adler*, 71 Ill. App. 456.

Evidence as to damage to trees, and to grass, and to a well is admissible. *Brown v. Webster City*, 115 Iowa 511, 88 N. W. 1070.

Injury to shade trees, § 2001 *post*.

Where improvements are not made necessary by a change of grade in the street the owner can not recover the value thereof in an action for damages for a

to a landowner, resulting from a change of street grade, it has been held in Connecticut, are special damages within the meaning of a statute authorizing a recovery of "special damages" in such cases.³⁹

The uses and purposes to which property is put may be considered in determining the difference in market value before and after a change of grade.⁴⁰ Accordingly in estimating damages to property due to the construction and maintenance of a pumping station, the character and extent of the business conducted on the premises may be considered in estimating the damages

change of grade. *Philadelphia Ball Club v. Philadelphia*, 192 Pa. St. 632, 44 Atl. 265, 46 L. R. A. 724, 73 Am. St. Rep. 835.

The fact that the city might have fixed a more favorable grade can not be considered. *Clark v. Philadelphia*, 185 Pa. St. 503, 39 Atl. 1104.

The building of a railroad embankment across the vacated portion of a street is not an element to be considered in assessing the damage resulting from the vacation. *Newark v. Hatt*, 79 N. J. L. 548, 77 Atl. 47, 30 L. R. A. (N. S.) 637.

The failure of the city to macadamize or gravel a street after the grade was changed can not be considered. *Henderson v. Winstead*, 109 Ky. 328, 22 Ky. L. Rep. 826, 58 S. W. 777.

Noise, smoke and soot necessarily caused by work in lowering the grade of a street. *Thompson v. Macon*, 106 Mo. App. 84, 80 S. W. 1.

Change of street grade making it impossible to haul as heavy loads over the street as before.

Davenport v. Hyde Park, 178 Mass. 385, 59 N. E. 1030.

39. *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000.

40. *Re 62nd Street*, 214 Pa. St. 137, 63 Atl. 426; *Dobson v. Philadelphia*, 9 Pa. Dist. R. 139; *Preston v. Cedar Rapids*, 95 Ia. 71, 63 N. W. 577; *Warren County v. Rand*, 88 Miss. 395, 40 So. 481. But see *Lowe v. Omaha*, 33 Neb. 587, 50 N. W. 760; *Seattle v. Board of Home Missions, etc.*, 138 Fed. 307, 70 C. C. A. 597.

Where the value of property is diminished for residence or business purposes, its market value is necessarily diminished. *Taylor v. Jackson*, 83 Mo. App. 641.

Injury to business, § 1385 *ante*, vol. 3.

One who owns property abutting on the street in connection with other property not abutting thereon, which he uses in the prosecution of a single business, is entitled to recover the damages to both pieces of property and to the buildings and machinery thereon. *Re Van Rensselaer & Roseville Streets*, 101 N. Y. S. 928, 116 App. Div. 549.

to the fee, rental or usable value of the property.⁴¹ If the market value of abutting property is enhanced by a change of street grade, the mere impairment thereof for a particular use will not necessarily entitle the owner to damages.⁴²

Loss of profits during suspension of business caused by the construction of street improvements may be recovered by the owner.⁴³ But one whose land is not taken is not entitled to damages for temporary inconvenience occasioned by the construction of a public improvement.⁴⁴ The *rental value* of property is not an element in the estimation of damages occasioned by a change of grade.⁴⁵

A municipality is not liable for the *diversion of travel and custom* from the premises of an abutting owner, resulting from the improvement of the street, as the construction of a viaduct.⁴⁶ The interruption of travel

41. *Reisert v. New York*, 174 N. Y. 196, 66 N. E. 731, rev'g 74 N. Y. S. 673, 69 App. Div. 302, 71 N. Y. S. 965, 35 Misc. Rep. 413.

42. *Seattle v. Board of Home Missions, etc.*, 138 Fed. 307, 70 C. C. A. 597.

43. *Lacour v. New York*, 3 Duer (10 N. Y. Super. Ct.) 406.

Injury to business, § 1385 *ante*, vol. 3.

44. *Re Squares*, 125 N. Y. 131, 26 N. E. 142; *Re Board of Water Supply*, 130 N. Y. S. 997, 73 Misc. Rep. 231.

45. *Joliet v. Adler*, 71 Ill. App. 456.

Rent. In estimating the damages to property from the construction of a bridge in the street, it is error to include the probable loss of rent before the commencement of the action. *Slattery v. St. Louis*, 120 Mo. 183, 25 S. W. 521.

'Rental value of property may be considered in estimating the

market value. *Acker v. Knoxville*, 117 Tenn. 224, 96 S. W. 973, 975.

Evidence as to diminution of the rental value is competent. *Strange v. Dubuque*, 62 Ia. 303, 17 N. W. 518.

46. *Hohmann v. Chicago*, 41 Ill. App. 41, 44.

See § 1980 *ante*.

Evidence of diversion of travel and trade is not competent in an action by lot owners for damages occasioned by the construction of approaches to a bridge in a public street, unless it results in a diminution of the value of the property. *East St. Louis v. Wiggins Ferry Co.*, 11 Ill. App. 254.

But evidence that the operation of the railway diverted travel from the street is admissible for the purpose of showing how the rental value of the property had become diminished. *Strange v. Dubuque*, 62 Ia. 303, 17 N. W. 518.

along a street by the municipality is a common injury for which an individual owning abutting property cannot recover.⁴⁷

§ 1999. Same—interference with access to property.

Relating to damages for the vacation of streets, elsewhere in this work considered, the general rule is stated to be that the test of recovery is not whether the property abuts on the street vacated, but whether such property or private rights therein suffer a special injury. The conflict in the decisions is there treated.⁴⁸

The owner of property abutting a street is entitled to damages for *special inconvenience* in being deprived of the means of access to the property, resulting from the vacation of a street,⁴⁹ or from the grading and improvement of the street.⁵⁰ And where a change of the street grade *impedes or interferes with the ingress and egress* to abutting property, the abutting owner is entitled to damages therefor.⁵¹ But the mere fact that the ownership and occupation of land abutting a street makes it necessary for the owner to use the street more frequently than the general public, it is held in some jurisdictions, does not entitle him to damage sustained by a change of the street grade which makes the passage over the street to and from his land *less convenient*.⁵² Likewise damages resulting from the grading of streets so

47. *Chicago v. Baker*, 86 Fed. 753, 30 C. C. A. 364, 58 U. S. App. 569, 98 Fed. 830, 39 C. C. A. 318.

Diversion of travel, §§ 1385, 1410 and 1411 *ante*, vol. 3.

48. §§ 1408 to 1410 *ante*, vol. 3.

49. *Chicago v. Baker*, 98 Fed. 830, 39 C. C. A. 318; *Acker v. Knoxville*, 117 Tenn. 224, 96 S. W. 973.

50. *Macon v. Wing*, 113 Ga. 90, 38 S. E. 392; *Munn v. Boston*, 183 Mass. 421, 67 N. E. 312.

51. § 1408 *ante*, vol. 3; *Willcox v. Engebretsen*, 160 Cal. 288, 116

Pac. 750; *Doppas et al. v. The Cincinnati N. O. & T. P. R. Co.*, 19 Ohio Cir. Ct. Rep. 582, 10 O. C. D. 286.

Right of access, § 1383 *ante*, vol. 3.

Where permanent obstruction created by public improvement interferes with access from property to the street, the city is liable to the owner for damages. *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379.

52. *Davenport v. Deetham*, 178 Mass. 382, 59 N. E. 1027.

far as they consist simply in rendering the passage to and from adjoining property more inconvenient and expensive cannot be recovered by the owner of such property.⁵³

On the other hand if it appears that lands abut upon a highway, and that *the highway supplies the only means of ingress and egress*, and that the obstructions permanently destroy the way, a special injury is shown for which the municipality is liable.⁵⁴ So a property owner having a right of access to a street upon which the property does not abut, whose *property is entirely cut off from access to the public streets*, while the street is being constructed, suffers a special and peculiar damage for which he is entitled to compensation.⁵⁵ And where the ingress and egress to and from a building is interfered with by a change of grade in the street, the owner is entitled to recover the expense incurred in making alterations in the building in order to make it as convenient of access as it was before the change.⁵⁶

§ 2000. Same—cost of restoration.

The measure of damages for injuries done to a building by the grading of a street is the cost of restoring the building to the same condition in which it was just before the damage was sustained.⁵⁷ The general rule

53. Trustees of the Wabash & Erie Canal v. Spears, 16 Ind. 441, 79 Am. Dec. 444; New Albany & Salem R. Co. v. Higman, 17 Ind. 594; Davenport v. Dedham, 178 Mass. 382, 59 N. E. 1029; Ryan v. Boston, 118 Mass. 248.

Not liable for the impairment or destruction of the incidental rights of ingress and egress, and of light and air which the street afforded. Bowden v. Jacksonville, 52 Fla. 216, 42 So. 394.

Light, air and view. § 1384 ante, vol. 3.

54. Cummins v. Seymour, 79 4 McQ.—80

Ind. 491, 41 Am. Rep. 618.

55. Munn v. Boston, 183 Mass. 421, 67 N. E. 312; § 1408 ante, vol. 3.

56. Lotze v. Cincinnati, 61 Ohio St. 272, 55 N. E. 828.

Cost of restoration. § 2000 post.

During progress of work. Interference with access to premises is not an element of damages. Sanitary District, etc. v. McGuirl, 86 Ill. App. 392.

57. Meyer v. Rosedale, 84 Kan. 302, 113 Pac. 1043.

is that, when the reasonable cost of repairing the injury by restoring the premises to their former condition as near as may be is less than the diminution in the market value of the property by reason of the injury, the cost of restoration is the proper measure of damages.⁵⁸

58. *Olson v. Albert Lea*, 107 Minn. 127, 119 N. W. 794; *Smith v. Kansas City*, 128 Mo. 23, 25, 30 S. W. 314, 316; *Tegeler v. Kansas City*, 95 Mo. App. 162, 68 S. W. 953; *Stroker v. St. Joseph*, 117 Mo. App. 350, 93 S. W. 860.

Cost of restoration—evidence. The measure of damages for injuries to property, arising from the negligent construction of a sewer, is the cost of repairing the damage and restoring the property to its former condition, unless the cost would equal or exceed the value of the property, in which case the value of the property would be the measure of damages. *Gift v. Reading*, 3 Pa. Super. Ct. 359, 4 W. N. C. 164.

Evidence as to the cost of adjusting premises to a changed grade of the street is admissible. *Smith v. Kansas City*, 128 Mo. 23, 30 S. W. 314.

Where a tract of land is below the grade of adjacent streets and the grade of one of the streets is raised so that the land is of an equal depth below the grade of all the street, evidence of what it would cost to fill the whole tract to the level of the changed grade is inadmissible on the question of damages from a change of grade. *Mead v. Pittsburg*, 194 Pa. St. 392, 45 Atl. 59.

Where surface of tract is irregular and street is run through,

leaving parts of the land higher and other parts lower than the street, evidence of how much grading would be necessary to make the property conform to the street is inadmissible in an action for damages for opening the street. *McCombs v. Pittsburg*, 194 Pa. St. 348, 45 Atl. 60.

In an action for damages for filling land to make it conform to a change of street grade, evidence is inadmissible that the owner, in accordance with the order of the board of health, had filled the land to a grade much below the grade at which he would have been obliged to fill, in order to use the land if the grade had not been changed. *Dana et al. v. Boston*, 176 Mass. 97, 57 N. E. 325.

In estimating damages to property occasioned by a change of the street grade the cost of adjusting the land and building thereon to the new grade, and damage to trees, if any, should be considered. *Seattle v. Board of Home Missions, etc.*, 138 Fed. 307, 70 C. C. A. 597; *Pickles v. Ansonia*, 76 Conn. 278, 56 Atl. 552; *Chicago v. Jackson*, 88 Ill. App. 130, aff'd in 196 Ill. 496, 63 N. E. 1013, 1135.

Change of the street grade, evidence of the cost of erecting a wall along the line of the lot to keep it from caving in is admissible. *Aurora v. Fox*, 78 Ind. 1; *Stroker*

§ 2001. Same—injury or destruction of shade trees.

The owner may recover damages for the unnecessary injury or destruction of shade trees along the sidewalk caused by a change of street grade,⁵⁹ or the construction of a sewer.⁶⁰ But where the trees are within the lines of the street or sidewalk on which grading is done, the municipality is not liable to abutting owner, should their destruction become necessary in the proper execution of the work.⁶¹ The question as to whether there is a necessity for the removal of shade trees to make room for the improvement is within the discretion of the municipal authorities with which the courts will not ordinarily interfere.⁶² However, if the city acts

v. St. Joseph, 117 Mo. App. 350, 93 S. W. 860; *Acker v. Knoxville*, 117 Tenn. 224, 96 S. W. 973.

"When, by a change of grade in the street, a change in the premises becomes necessary, either by cutting down or filling up the premises, then the cost of such cutting or filling is a legitimate item of damages." *Stowell v. Milwaukee*, 31 Wis. 523; *Church v. Milwaukee*, 31 Wis. 512; *Tyson v. Milwaukee*, 50 Wis. 78, 5 N. W. 914.

59. *Walker v. Sedalia*, 74 Mo. App. 70.

60. *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

61. *Colston v. St. Joseph*, 106 Mo. App. 714, 80 S. W. 590; *Scott v. Marshall*, 110 Mo. App. 178, 85 S. W. 98.

"The lot owner has a property interest in the shade trees standing in the street in front of his lot, and if they are so located as not to be an obstruction to the proper use of the roadway or sidewalk, the city may not arbitrarily

destroy or remove them. If, however, the city duly adopts a plan for the improvement of the street by grading or otherwise, and the execution of such plan necessarily requires the destruction of the trees, their removal in the prosecution of such work affords no cause of action to the lot owner." *Kemp v. Des Moines*, 125 Ia. 643, 644, 101 N. W. 474.

Illinois. Baker v. Normal, 81 Ill. 108.

Louisiana. Landry v. Lake Charles, 125 La. 210, 51 So. 120.

Maine. Wilson v. Simmons, 89 Me. 242, 36 Atl. 380.

Maryland. Frostburg v. Wine-land, 98 Md. 239, 56 Atl. 811.

North Carolina. Tate v. Greensboro, 114 N. C. 392, 19 S. E. 267, 24 L. R. A. 671.

62. *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267; *St. Mary's, etc. Church v. Barrows*, 124 N. Y. S. 571, 68 Misc. Rep. 545; *Chase v. Oshkosh*, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553, 29 Am. St. Rep. 898.

capriciously in the matter when it palpably appears that no public necessity for their removal exists, an injunction will be granted at the instance of the lot owner to prevent their removal.⁶³

§ 2002. Surface water.

In the absence of negligence in the performance of the work a municipal corporation is not liable for damage to private property resulting from improvements, as the construction of a street or the change of grade thereof, so as to cause surface water to accumulate on the property.⁶⁴ Likewise, in the absence of negligence, a municipality is not liable for injuries arising from the incidental interruption or change in the flow of surface water occasioned thereby.⁶⁵ But municipal liability exists for injuries occasioned by turning the waters of a creek into a channel which proved inadequate to hold the water which escaped and flooded plaintiff's land.⁶⁶

The municipality may protect its streets from water that accumulates thereon and to that end may construct drains, gutters, culverts and conduits, and may dis-

63. *Atlanta v. Holliday*, 96 Ga. 346, 23 S. E. 510.

See § 2004 *et seq.*, *post*.

64. *Missouri*. *Payne v. Kansas City, etc. R. Co.*, 112 Mo. 6, 20 S. W. 322; *St. Louis v. Gurno*, 12 Mo. 414; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Rychlicki v. St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651; *Wegmann v. Jefferson City*, 61 Mo. 55.

Pennsylvania. *Strauss v. Allentown*, 15 Pa. 96, 63 Atl. 1073; *Barret v. Minersville*, 38 Pa. Super. Ct. 78, 80.

Rhode Island. *O'Donnell v. White*, 24 R. I. 483, 53 Atl. 633.

Texas. *Taylor v. Houston (Tex. Civ. App., 1904)*, 80 S. W. 260.

Washington. *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859.

West Virginia. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

65. *Rychlicki v. St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651. See *McCormick v. Kan. C., St. Jos. & C. B. Ry. Co.*, 57 Mo. 433, 437; *Abbott v. Kan. C., St. Jos. & C. B. Ry. Co.*, 83 Mo. 271, 53 Am. Rep. 581; *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859.

66. *Willson v. Boise City*, 20 Idaho 133, 117 Pac. 115, 36 L. R. A. (N. S.) 1138; *Barnes v. Hannibal*, 71 Mo. 449; *Young v. Kansas City*, 27 Mo. App. 101.

charge the water into natural drains, but it has no right to discharge the water thus accumulated in a body upon adjacent lands.⁶⁷ That is, where surface water is collected by the municipality from the highway and discharged upon private property in substantially larger quantities and in a substantially different manner than it would flow naturally, the owner of such land is entitled to damages therefor.⁶⁸ So a municipality is liable for collection of water in holes in a street which, owing to the porous condition of the soil, flows in and under an abutting lot, causing the soil to slip and destroy a building.⁶⁹ To state the rule differently, if the municipality collects surface water and precipitates it in a body onto private property, where it was not accustomed to flow, liability exists.⁷⁰ And in such case it is not important

67. *Payne v. Kansas City, etc. R. Co.*, 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628; *Rychlicki v. St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234; *McCray v. Fairmont*, 46 W. Va. 442, 33 S. E. 245; *Carll v. Northport*, 42 N. Y. S. 576, 11 App. Div. 120.

68. *Iowa*. *Cech v. Cedar Rapids*, 147 Iowa 247, 126 N. W. 166. *Maryland*. *Guest v. Church Hill*, 90 Md. 689, 45 Atl. 882.

Rhode Island. *Johnson v. White*, 26 R. I. 207, 58 Atl. 658, 65 L. R. A. 250.

Washington. *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859.

West Virginia. *Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.

Where the accumulation of water upon land is the direct, immediate and unavoidable consequence of the change of grade of a street, the city is liable to the owner. *Cooper v. Scranton*, 21 Pa. Super. Ct. Rep. 17; *Mount Sterling v. Jephson*, 21 Ky. L. Rep. 1028, 53 S. W. 1046.

Where the city in improving a street removes a bulkhead placed therein by an abutting owner to keep water off his property, it is liable for damages caused by the flow of water into the property. *Fifty Associates v. Boston*, 201 Mass. 585, 88 N. E. 427.

69. *Kunst v. Grafton*, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201.

70. *Baker v. Akron*, 145 Ia. 485, 122 N. W. 926, 30 L. R. A. (N. S.) 619; *Payne v. K. C., St. J. & C. B. Ry. Co.*, 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628; *Rychlicki v. St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651;

that some of the water so collected consists of spring water, or drainage, or sewerage water.⁷¹

A municipality is not liable for damages caused merely by reason of failure to so grade a public street as to prevent surface water from flowing upon the lots of the adjoining proprietors.⁷² But municipal liability exists for filling up or damming back, or otherwise diverting, a stream of running water, so that it overflows its banks and flows upon the land of another.⁷³

A municipality which so constructs its streets and the gutters thereof as to divert into certain of these gutters the surface water of a large area, yet fails to provide sufficient means for the escape of the water thus collected on these gutters during ordinary rains, is lia-

Carson v. Springfield, 53 Mo. App. 289; Clay v. St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

71. Paddock v. Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

Liability for surface water in constructing sewers and drains, § 1442 *ante*, this volume.

72. Imler v. Springfield, 55 Mo. 119, 17 Am. Rep. 645; Stewart v. Clinton, 79 Mo. 603; Wood v. Tacoma, 66 Wash. 266, 119 Pac. 859.

73. Iowa. Wilber v. Fort Dodge, 120 Iowa 555, 95 N. W. 186.

Minnesota. O'Brien v. St. Paul, 25 Minn. 331, 33 Am. Rep. 470.

Missouri. Imler v. Springfield, 55 Mo. 119, 17 Am. Rep. 645; Young v. Kansas City, 27 Mo. App. 101.

Nebraska. Roe v. Howard, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. (N. S.) 831.

United States. Arn v. Kansas City, 14 Fed. 236.

And for damming gutters causing similar damage. Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; Hume v. Des Moines, 146 Ia. 624, 125 N. W. 846, 29 L. R. A. (N. S.) 126; McInery v. St. Joseph, 45 Mo. App. 296; Harper v. Milwaukee, 30 Wis. 365.

Damages are recoverable against city where injury is caused by discharge of sewage into stream passing through plaintiff's land. Joplin Consol. M. Co. v. Joplin, 124 Mo. 129, 135, 27 S. W. 406; Van De Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396.

A city, in pursuance of power conferred by its charter, caused the waters of a creek running through its limits to be turned into a new channel. This channel proved so inadequate that the waters escaped and flooded plaintiff's lot. Held that the city was liable. Barns v. Hannibal, 71 Mo. 449.

ble for the damages done to adjoining lands by the consequent overflow thereon of the surface water so collected.⁷⁴ But, since such cause of overflow can be readily remedied by the construction of suitable underground drains, or the enlargement of these gutters, the wrong will be treated as temporary in character, and consequently, in an action for the damages thus occasioned by overflows only the damages actually sustained at the date of the institution of the suit can be recovered.⁷⁵

A municipality is only liable for the want of ordinary care in providing and maintaining sufficient curbing, guttering, and sidewalks, but, if by reason of the want of such ordinary care and prudence, the curbing and guttering become defective and out of repair, and this defective condition becomes an active agent commingled with the act of God in producing damage to property, municipal liability exists.⁷⁶ But "while a city has no

74. *Carson v. Springfield*, 53 Mo. App. 289.

75. *Carson v. Springfield*, 53 Mo. App. 289; *Paddock v. Somes*, 51 Mo. App. 320.

76. *Haney v. Kansas City*, 94 Mo. 334, 7 S. W. 417.

If an unusual rainfall would have caused the breaking of a sewer which resulted in the flooding of private property, aside from defective construction of the sewer the city cannot be charged with negligence; but, on the other hand, if the breaking was caused by defective sewer construction and the concurring unusual rainfall the city is liable notwithstanding the unusual rainfall may have been one of the causes of the bursting of the sewer. In other words, if the defects in the construction of the sewer and the unusual rainfall were concurring

causes the city is liable for the resulting injury to private property. *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808, approving *Wolf v. Express Co.*, 43 Mo. 421; *Read v. St. Louis, etc. R. Co.*, 60 Mo. 199; *Pruitt v. Hannibal, etc. R. Co.*, 62 Mo. 527; *Davis v. Wabash, etc. R. Co.*, 89 Mo. 340, 1 S. W. 327; *Haney v. Kansas City*, 94 Mo. 334, 7 S. W. 417; *American Brewing Ass'n. v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538. Decision held not to be inconsistent with *Flora v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504, and *Turner v. Haar*, 114 Mo. 443, 21 S. W. 737.

Where the plaintiff claimed damages from a city for flooding his cellar by negligently grading a street and building a culvert too small to carry off the water, and it did not appear but that the

right to improve its streets in such a negligent manner as to cause injury to an abutting owner by throwing an unnecessary burden upon him or causing injury which he might have protected himself against if he had reasonable warning, it is unquestionably the right of the city to make its streets passable, and in doing so to provide for the passage of surface water in drains or culverts through or under them, and if the method adopted is reasonably suitable for the purpose, the abutting property owner cannot complain that he has not been relieved of a burden of drainage to which his land was already subjected, even though the improvement of the street operates to some extent to his detriment." 77

6. REMEDIES.

§ 2003. Judicial interference with public improvements.

The rule that the judiciary will not control the exercise of discretionary powers by municipal authorities ⁷⁸ and the limitations thereon,⁷⁹ and the distinction between discretionary and mandatory powers,⁸⁰ are fully explained and illustrated with reference to local improvement in an earlier volume. The doctrine is also

grading was done and the culvert built in accordance with an ordinance of the city, the plaintiff cannot recover. *Stewart v. Clinton*, 79 Mo. 603.

A city, in changing the grade of a street, is not bound to provide ditches or other conduits for the surface water flowing along the street so as to prevent it from running into the cellar of an abutting proprietor. Especially is this the case when the water can find its way into the cellar through a pipe laid into the street by the proprietor without leave. *Stewart v. Clinton*, 79 Mo. 603. Where, however, in grading a street, the city builds an embankment beyond the limits of the street on private

property, it is liable to the owner. *Payne v. Kansas City, St. J. & C. B. Ry. Co.*, 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628.

Further as to damages from surface water relating to public work, see *Jones v. St. Louis, I. M. & S. Ry. Co.*, 84 Mo. 151; *Benson v. Chicago & Alton R. Co.*, 78 Mo. 504; *Foster v. St. Louis*, 71 Mo. 157; *McCormick v. Kansas City, St. J. & C. B. R. R.*, 57 Mo. 433.

77. *Cech v. Cedar Rapids*, 147 Ia. 247, 126 N. W. 166.

See chapter on Municipal Liability for Torts, *post*, vol. 5, also Index.

78. §§ 376, 377 *ante*, vol. 1.

79. §§ 378, 379, *ante*, vol. 1.

80. §§ 380, 381 *ante*, vol. 1.

considered in appropriate places throughout this work,⁸¹ including prior sections of this chapter.⁸² The limitations of the general proposition that courts will not control the exercise of discretionary powers vested in municipal authorities should be further explained and illustrated as the decisions have developed the law touching public improvements.

The law is well settled that where bad faith, fraud, or corruption appear,⁸³ or manifest oppression or gross abuse is shown, as for example, unreasonable interference with private property rights,⁸⁴ or where the action is unlawful in violation of mandatory legal provisions designed to safeguard private property rights, the power of the courts may be invoked by appropriate action,⁸⁵ *e. g.*, *mandamus*,⁸⁶ or injunction.⁸⁷ But so long

81. See Index.
Interference with sewer construction. §§ 1439-1446 *ante*.

82. §§ 1834-1841 *ante*.

83. *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142, modifying decree of 117 Fed. 925; *Morris v. Salt Lake City*, 35 Utah 474, 101 Pac. 373.

It is only in case of palpable abuse that courts will interfere with questions of expediency. *Snyder v. Rockport*, 6 Ind. 237.

To justify judicial interference the abuses of discretion on the part of municipal authorities must be established beyond a reasonable doubt. *Morse v. Westport* (Mo., 1895), 33 S. W. 182.

84. The courts have no right to interfere with the determination of such body unless it clearly appears that it has abused its discretion. *Pierson v. People*, 204 Ill. 456, 68 N. E. 383; *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369; *Barfield v. Gleason*, 111 Ky. 491,

23 Ky. L. Rep. 128, 12 S. W. 964; *Duker v. Barber Asphalt Pav. Co.*, 25 Ky. L. Rep. 135, 74 S. W. 744; *Shammon v. Portland*, 38 Ore. 382, 62 Pac. 50; or has acted fraudulently. *Akers v. Kolkmeyer & Co.*, 97 Mo. App. 520, 71 S. W. 536.

85. Proceedings awarding a contract for paving, held not subject to the assessment of a tax, since such proceedings are neither judicial nor quasi judicial. *People v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768.

Held, in Illinois that in a proceeding to levy a special tax on property for a sidewalk the property owner having no opportunity to be heard until application is made for judgment of sale against his property he may then raise the question that the ordinance which is the basis of the special tax is void. *People v. Birch*, 201 Ill. 81, 66 N. E. 358.

86. § 1836 *ante*.

See Index.

87. § 2004 *et seq.*, *post*.

as the municipal authorities do not abuse their discretion by acting unreasonably or fraudulently,⁸⁸ courts will not review their actions,⁸⁹ provided they have conformed in substance to all charter, statutory and ordinance requirements that are mandatory, not directory

88. *Colorado*. *Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142.

Illinois. *Northwestern University v. Wilmette*, 230 Ill. 80, 82 N. E. 615; *Bloomington v. Chicago, etc. R. Co.*, 134 Ill. 451, 26 N. E. 366.

Indiana. *Rockbrandt v. Madison*, 9 Ind. App. 227, 36 N. E. 444, 53 Am. St. Rep. 348.

Louisiana. *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217, 9 So. 21.

Missouri. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559.

New York. *Re New York*, 49 N. Y. 150.

Ohio. *Johnson v. Avondale*, 1 Ohio Cir. Ct. R. 229, 1 Ohio Cir. Dec. 124.

United States. *Field v. Barber Asphalt Pav. Co.*, 117 Fed. 925, modified in 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

89. *Iowa*. *Platt v. Chicago, etc. R. Co.* (1887), 31 N. W. 883.

Kansas. *Topeka v. Hunton*, 46 Kan. 634, 26 Pac. 488; *Emporia v. Gilchrist*, 37 Kan. 532, 15 Pac. 532.

Louisiana. *Breman v. Sewerage, etc. Board*, 108 La. 569, 32 So. 563; *New Orleans v. Steinhart*, 52 La. Ann. 1043, 27 So. 586.

Michigan. *Kindinger v. Saginaw*, 132 Mich. 395, 93 N. W. 914,

9 Det. Leg. N. 650; *Bauman v. Detroit*, 58 Mich. 444, 25 N. W. 391; *Graham v. Grand Rapids*, 141 Mich. 612, 104 N. W. 983, 12 Det. Leg. N. 592.

New Jersey. *Suburban Land, etc. Co. v. Vailsburg*, 67 N. J. L. 461, 51 Atl. 469, aff'd 68 N. J. L. 311, 53 Atl. 388; *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24; *Stoudinger v. Newark*, 28 N. J. Eq. 446.

New York. *Birch v. New York*, 190 N. Y. 397, 83 N. E. 51; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Patchin v. Brooklyn*, 2 Wend. 377; *Van Doren v. New York*, 9 Paige 388; *Wiggin v. New York*, 9 Paige 16; *Whitney v. New York*, 1 Paige 548.

Ohio. *Scott v. Hamilton*, 29 Ohio Cir. Ct. R. 652; *Toledo v. Grasser*, 7 Ohio N. P. 396, 5 Ohio S. & C. P. Dec. 178.

Pennsylvania. *McHale v. Easton, etc. Transit Co.*, 169 Pa. St. 416, 32 Atl. 461; *Robinson v. Norwood Borough*, 27 Pa. Super. Ct. 481; *Bates v. Titusville*, 29 Leg. Int. 277.

Texas. *Crouch v. McKinney*, 47 Tex. Civ. App. 54, 104 S. W. 518.

United States. *Shumate v. Heman*, 181 U. S. 402, 21 Sup. Ct. 645, 45 L. Ed. 916, 922, aff'g *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559.

merely.⁹⁰ The only question for judicial cognizance is whether there has been any violation of legal principles or a neglect of prescribed formalities which are essential in entering into the engagement which is the subject of the controversy,⁹¹ for as stated above, it is only where the municipal authorities proceed illegally, fraudulently, unreasonably and beyond their corporate powers,⁹² and attempt to deprive a person of his property without due process of law, that courts will interfere. Mere mistakes in judgment of the authorities are insufficient.⁹³

If power exists the question whether a public improvement is necessary or expedient is considered a legislative one and is for the determination of the municipal legislative body, and the courts will not review their decision in this regard.⁹⁴ However, it has been held

90. *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132, rev'g 8 Paige 198; *Champlin v. New York*, 3 Paige (N. Y.) 573.

91. *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651.

92. *Merrill v. Brooklyn*, 3 Edw. Ch. (N. Y.) 421.

93. *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624.

When acting within their prescribed limits the action of municipal authorities in providing for improvements cannot be controlled by the courts. *Kemp v. Des Moines*, 125 Ia. 640, 101 N. W. 474.

Courts will not interfere except in cases of clear abuse of discretion. *Downing v. Des Moines*, 124 Ia. 289, 99 N. W. 1066.

94. *California*. *Symons v. San Francisco*, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453.

Illinois. *Louisville, etc. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962; *Dunham v. Hyde Park*,

75 Ill. 371; *Jones v. Chicago*, 213 Ill. 92, 72 N. E. 798; *Gardner v. Chicago*, 224 Ill. 254, 79 N. E. 624.

Indiana. *Keith v. Wilson*, 145 Ind. 149, 44 N. E. 13; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711; *Greencastle v. Hazelett*, 23 Ind. 186; *Coburn v. Bosset*, 13 Ind. App. 359, 40 N. E. 281; *Snyder v. Rockport*, 6 Ind. 237.

Iowa. *Brewster v. Davenport*, 51 Ia. 427, 1 N. W. 737; *Collins v. Keokuk*, 147 Ia. 233, 124 N. W. 601.

Kansas. *State v. Neodesha*, 3 Kan. App. 319, 45 Pac. 122; *Seward v. Rheiner*, 2 Kan. App. 95, 43 Pac. 423.

Kentucky. *Allen v. Woods*, 20 Ky. L. Rep. 59, 45 S. W. 106; *Henderson v. Sandefur*, 11 Bush 550.

Maryland. *Frostburg v. Wine-land*, 98 Md. 239, 56 Atl. 811, 64 L. R. A. 627, 103 Am. St. Rep. 399; *Alberger v. Baltimore*, 64 Md. 1, 20 Atl. 988.

that where the municipal officers claim authority to make an improvement, not from any express grant of power, but from the necessity of the improvement their decision as to its necessity is not conclusive upon the court.⁹⁵

In the absence of competent evidence to the contrary the presumption is in favor of the legality of the proceedings of the municipal authorities.⁹⁶ It will be presumed that they faithfully observe all provisions of the law relating to the improvement in question,⁹⁷ and that

Michigan. Hinchman v. Detroit, 9 Mich. 103.

Minnesota. Janeway v. Duluth, 65 Minn. 292, 68 N. W. 24.

Missouri. St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. 743; State v. Engelmann, 106 Mo. 628, 17 S. W. 759; Cape Girardeau v. Houck, 129 Mo. 607, 31 S. W. 933; Marionville v. Henson, 65 Mo. App. 397.

New Jersey. Piard v. Jersey City, 30 N. J. L. 148; Pope v. Union, 18 N. J. Eq. 282.

New York. Brady v. New York, 112 N. Y. 480, 20 N. E. 390, 2 L. R. A. 751; Goff v. Nolan, 62 How. Pr. 323; Waddell v. New York, 8 Barb. 95.

Ohio. Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89.

Pennsylvania. Clopper v. Greensburg Borough, 9 Pa. Dist. 598.

Texas. Adams v. Fisher, 75 Tex. 657, 6 S. W. 772.

Making provisions for a supply of water is a legislative act. Monroe Water Co. v. Heath, 115 Mich. 277, 73 N. W. 234.

Proceedings under certain statute for opening streets, held to be so far judicial as to be subject

to review by the supreme court (year of 1870). People v. Brighton, 20 Mich. 57.

95. Milwaukee, etc. R. Co. v. Faribault, 23 Minn. 167.

96. New Albany Gas Light, etc. Co. v. Crumbo, 10 Ind. App. 360, 37 N. E. 1062; Nevin v. Roach, 86 Ky. 492, 9 Ky. L. Rep. 819, 5 S. W. 546.

It is presumed that city officials will do their duty, and perform the work of improvement in a skillful manner. Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883.

In the absence of evidence to the contrary, it will be presumed that land sought to be condemned for a street is within the city limits. Illinois Cent. R. Co. v. Chicago, 169 Ill. 329, 48 N. E. 492.

The burden of proof is on the person asserting the invalidity of the proceedings. Tone v. Columbus, 1 Ohio Cir. Ct. R. 305.

97. Webber v. Gottschalk, 15 La. Ann. 376; Leonard v. Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; Waco v. Chamberlain, 92 Tex. 207, 47 S. W. 527; Davie v. Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145.

all legislation necessary to the validity of the action was duly passed.⁹⁸

§ 2004. Same—injunction.

Injunction will lie if the municipal corporation does not possess power to make the improvement,⁹⁹ or if it has not complied with the necessary prerequisites¹ and the proceedings are therefore invalid,² or fatally defective,³ as where an interested property owner has had no notice or opportunity to be heard,⁴ or if the municipi-

98. *Bluffton v. Silver*, 63 Ind. 262.

99. Attempt to build sewers in public streets will be enjoined where the municipal corporation does not possess power. *Schull v. Norristown*, 6 Leg. Cas. 157.

Injunction to restrain *ultra vires* proceedings in establishing a system of waterworks, denied where it appeared that the city had only passed a resolution directing the mayor and clerk to take steps after the awarding of contracts for such work. *Pedrick v. Ripon*, 73 Wis. 622, 41 N. W. 705, 3 L. R. A. 269.

1. *Converse v. Deep River*, 139 Ia. 732, 117 N. W. 1078.

2. *Indiana*. *Adams v. Shelbyville*, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484; *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989.

Iowa. *Burget v. Greenfield*, 120 Ia. 432, 94 N. W. 933.

Maryland. *Pascault v. Baltimore*, 1 Bland. (Md.) 584, note.

Missouri. *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429.

New York. *Copcutt v. Yonkers*, 83 Hun 178, 31 N. Y. S. 659, 64 Am. St. Rep. 286.

Ohio. *McGuire v. East Cleveland*, 25 Ohio Cir. Ct. R. 497; *Moore v. Cincinnati*, 9 Ohio Dec. (reprint), 587, 15 Cin. Law Bul. 196.

Pennsylvania. *Carroll v. Philadelphia*, 6 Pa. Dist. 397.

Wisconsin. *Allen v. Milwaukee*, 128 Wis. 678, 106 N. W. 1099, 5 L. R. A. (N. S.) 680, 116 Am. St. Rep. 54. See *Pedrick v. Ripon*, 73 Wis. 622, 41 N. W. 705, 3 L. R. A. 269.

Equity will enjoin the exercise of an unauthorized power on the part of a municipality. *Adams v. Shelbyville*, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484.

When the opening of a street across a railroad yard will render it practically useless, the municipal corporation may be enjoined in the absence of express power to open such street. *Ft. Wayne v. Lake Shore, etc. R. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. Rep. 277; *Long Island R. Co. v. Silverstone*, 19 N. Y. S. 140.

3. *Covington v. Nelson*, 35 Ind. 532; *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429.

4. *Buchanan v. Beaver Borough*, 171 Pa. St. 567, 33 Atl. 115.

pal corporation attempts to proceed under an illegal ordinance,⁵ or seeks to open a street through private property not according to law,⁶ or damages or is about to damage private property or rights incident thereto in the execution of the work.⁷ But mere inconvenience in

5. *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429.

6. *Alabama*. *Miller v. Mobile*, 47 Ala. 163, 11 Am. Rep. 768.

Florida. *McGourin v. De Funiak Springs*, 51 Fla. 502, 41 So. 541.

Pennsylvania. *Appeal of Curwensville Borough*, 129 Pa. St. 74, 18 Atl. 561.

West Virginia. *Yates v. West Grafton*, 33 W. Va. 507.

7. Remedy by injunction illustrated. When chancery may interfere to prevent multiplicity of suits or irreparable damages. *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132, rev'g *Meserole v. Brooklyn*, 8 Paige (N. Y.) 198.

Failure to show irreparable injury to the filling of ground will defeat injunction. *Blake v. Brooklyn*, 26 Barb. (N. Y.) 301.

Injunction may prevent the taking of land and opening and grading of streets thereon under particular facts. *Baldwin v. Buffalo*, 29 Barb. (N. Y.) 396.

Injunction, to prevent the construction of a sewer, granted where it appeared that injury would result. *Morgan v. Binghampton*, 32 Hun (N. Y.) 602, rev'd *Morgan v. Binghampton*, 102 N. Y. 500, 7 N. E. 424.

Injunction granted to restrain the diversion of flow of offensive matter upon plaintiff's land in proceeding to widen a sewer. *Woodward v. Worcester*, 121 Mass. 245,

distinguishing *Washburn & Moen Mfg. Co. v. Worcester*, 116 Mass. 458.

The city will be enjoined from extending a street so as to cross the tracks and yards of a railroad company where such extension would render them useless to the railroad company. Here there was no express law authorizing the extension. *Ft. Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 18 L. R. A. 367, 32 Am. St. Rep. 277, 32 N. E. 215.

Equity will not interfere with laying out and widening streets unless there is manifest injustice, oppression, or gross abuse of power. *Dunham v. Hyde Park*, 75 Ill. 371; *Brush v. Carbondale*, 78 Ill. 74.

Injunction to restrain opening of street allowed. *Schooling v. Harrisburg*, 42 Ore. 494, 71 Pac. 605.

Power of court of equity to review street opening proceedings, denied. *Whitney v. New York*, 1 Paige (N. Y.) 548; *Wiggin v. New York*, 9 Paige (N. Y.) 16; *Patchen v. Brooklyn*, 2 Wend. (N. Y.) 377; *Champlin v. New York*, 3 Paige (N. Y.) 573; *Merrill v. Brooklyn*, 3 Edw. Ch. (N. Y.) 421; *Van Doren v. New York*, 9 Paige (N. Y.) 388.

Injunction allowed to prevent the prosecution of a cloud on title. *Copcutt v. Yonkers*, 83 Hun (N.

the use of property is no ground for injunction.⁸ A property owner whose property might be affected by an illegal tax, charge, or assessment, is sometimes given the right by express statute "to enjoin any public officer, board or body from entering into any contract, or doing any act not authorized by law, that may result in the creation of any public burden, or the levy of any illegal tax, charge or assessment."⁹

No injunction will lie until the corporate discretion has been abused.¹⁰ Equity will not enjoin an improvement on the ground of mere want of necessity.¹¹ The

Y.) 178, 31 N. Y. S. 659, 64 N. Y. St. Rep. 286.

When property owners estopped from invoking injunction against improvement. *Depuy v. Wabash*, 133 Ind. 336, 32 N. E. 1016.

Where injunction is sought on ground of fraud some particular act of fraud or *prima facie* evidence of corruption must appear to authorize a preliminary injunction to stay the proceedings. *Champlin v. New York*, 3 Paige (N. Y.) 573.

8. *Georgia*. *Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89.

Indiana. *Mitchell v. Peru*, 163 Ind. 17, 71 N. E. 132; *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219; *Columbus v. Storey*, 33 Ind. 195.

Iowa. *Collins v. Keokuk*, 91 Ia. 293, 59 N. W. 200.

Michigan. *Schmolt v. Nagel*, 151 Mich. 502, 115 N. W. 411.

New York. *Ely v. Rochester*, 26 Barb. 133.

Pennsylvania. *McHale v. Easton*, etc. *Transit Co.*, 169 Pa. St. 416, 32 Atl. 461; *Goulden v. Scranton City*, 121 Pa. St. 97, 15 Atl. 483, 6 Am. St. Rep. 755; *McCune v. McKeesport*, 30 Pittsb. Leg. J.

(N. S.) 145; *Philadelphia*, etc. *R. Co. v. Philadelphia*, 11 Phila. (Pa.) 358.

United States. *Baltimore*, etc. *R. Co. v. Dennison*, 3 MacArthur 245.

9. *Bunker v. Hutchinson*, 74 Kan. 651, 87 Pac. 884.

Statute providing for injunction against street improvements, construed. *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219.

10. *Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305.

11. *Illinois*. *Walker v. Morgan Park*, 175 Ill. 570, 51 N. E. 636.

Indiana. *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768; *Bluffton v. Silver*, 63 Ind. 262.

Iowa. See *Gallaher v. Jefferson*, 125 Ia. 324, 101 N. W. 124.

Kentucky. *Hazegreen v. McNabb*, 23 Ky. L. Rep. 811, 64 S. W. 431.

Maryland. *Pascault v. Baltimore*, 1 Bland. (Md.) 584, note.

Charter power to obtain a supply of water for fire and domestic purposes, held discretionary with the voters, if exercised in good faith. Hence the question of ex-

fact that a city is indebted to the limit allowed by the constitution is no ground for enjoining the letting of a contract for street improvement.¹² Where the charter provides for making a new assessment in case an assessment has been declared illegal by any court of competent jurisdiction, an injunction will not lie to prevent a street improvement on the ground of inequality of assessment.¹³ If a city, after laying out a street, unreasonably delays to complete the work, it may be indicted therefor, but it cannot be enjoined from completing the street.¹⁴

Where all proceedings have been regular, equity cannot interfere.¹⁵ However it has been held that any ma-

pediency is for the municipality and not for the courts and an injunction will be denied to prevent the levy of a tax to increase the present supply of water where it is sufficient. *Lucia v. Montpelier*, 60 Vt. 537, 1 L. R. A. 169, 15 Atl. 321.

12. *Swan v. Indianola*, 142 Ia. 731, 121 N. W. 547.

13. *Bogert v. Jackson* Circuit Judge, 118 Mich. 457, 76 N. W. 983, 5 Det. Leg. N. 574.

14. *Nichols v. Salem*, 80 Mass. (14 Gray) 490.

15. *Kundinger v. Saginaw*, 132 Mich. 395, 93 N. W. 914, 9 Det. Leg. N. 650; *Meserole v. Brooklyn*, 8 Paige (N. Y.) 198; *Goulden v. Scranton*, 121 Pa. St. 97, 15 Atl. 483, 6 Am. St. Rep. 755; *Lucia v. Montpelier*, 60 Vt. 537, 15 Atl. 321, 1 L. R. A. 169.

Enjoining proceedings. It is no ground for an injunction against improving a street because the improvements were not made according to the contract awarded on the ground established by the

civil engineer. *McEneney v. Sullivan*, 125 Ind. 407, 25 N. E. 540.

A court of equity will not attempt to control municipal discretion relative to the question as to what streets shall be opened and worked and how and when. *Bauman v. Detroit*, 58 Mich. 444, 25 N. W. 391.

Injunction to prevent the grading and improving of land as a street, denied on proof of possession. The court was of the opinion that ownership should be shown. *Gleason v. Jefferson*, 78 Ill. 399.

Injunction to restrain the grading of a street denied on failure to show that the work would endanger freedom of access to the plaintiff's property. It appeared that access could be restored at a mere nominal expense. *Columbus v. Storey*, 33 Ind. 195.

Injunction to restrain the improvement of a street denied. *Sperry v. Albina*, 17 Ore. 481, 21 Pac. 453.

Injunction to prevent city from completing street after long delay,

terial departure from the requirements of the ordinance

denied. *Nichols v. Salem*, 14 Gray (80 Mass.) 490.

Injunction to restrain the repairs of a street denied upon a showing that the repairs stopped the cars on the street and thereby caused inconvenience to the inhabitants. *Philadelphia & Gray's Ferry Pass. Ry. Co. v. Philadelphia*, 11 Phila. (Pa.) 358.

The fact that under the law the property owners have partly graded a street will not prevent the council thereafter completing the street. In such case injunction against the council will be refused. *Morris v. Bayonne*, 25 N. J. Eq. 345.

Equity will not review discretion of municipal authorities in widening street. *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 48 Am. Dec. 540.

Injunction to prevent the construction of a sidewalk, denied. *Stewart v. Neodesha*, 3 Kan. App. 330, 45 Pac. 110; *Bluffton v. Silver*, 63 Ind. 262.

Injunction to enjoin the construction of a bridge denied. *Ely v. Rochester*, 26 Barb. (N. Y.) 133.

Injunction denied to restrain the enlarging of a culvert across a natural water course, although the culvert had stood at its present size for more than fifteen years. *Goulden v. Scranton*, 121 Pa. St. 97, 15 Atl. 483.

Injunction to restrain the laying out a street across railroad tracks denied. Legislative act authorized the exercise of the power. *Long Island Power Co. v. Silver-*

stone, 64 Hun (N. Y.) 634, 19 N. Y. S. 140.

Court cannot deprive city, by injunction, of its exclusive right to establish street grades. *McHale v. Easton & B. Transit Co.*, 169 Pa. 416, 32 Atl. 461.

Injunction denied to prevent city from putting down curb stones on a line other than what is claimed to be the true line. *Holmes v. Jersey City*, 12 N. J. Eq. 299.

An injunction denied to prevent the construction of a sewer because it was apprehended by a property owner that injuries from flood would occur and consequent sickness and damage. *Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89.

Injunction to restrain the construction of a sewer under the tracks of a railroad, denied on application of the railroad company. Here the bill was defective in material allegations. *Baltimore & P. R. Co. v. Dennison*, 3 McArthur (D. C.) 245.

Injunction to restrain the maintenance of an iron grating at the opening of sewer, denied. *Paine v. Delhi*, 116 N. Y. 224, 5 L. R. A. 797, 22 N. E. 405, distinguishing *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321.

Injunction to prevent the laying of a drain for the drainage of a street denied. *Collins v. Keokuk*, 91 Iowa 293, 59 N. E. 200.

Injunction to prevent street grading and the construction of drains, denied. The fact that the work would greatly increase the

authorizing the improvements, may be enjoined.¹⁶ Mere irregularities in proceedings is no ground for judicial interference by injunction.¹⁷ Ordinarily mere non-compliance with charter provisions in proceedings, to improve a street, does not entitle an adjoining property owner to an injunction before taxes have been levied or assessments made to pay for the improvement.¹⁸

A property owner cannot enjoin a city from improving its streets merely because the work is being defectively done.¹⁹ Nor will the work being done at the expense of abutting owners be enjoined because not done according to the contract nor on the established grade.²⁰ However, if carrying out of work provided for by irregular and defective proceedings will have the effect of damaging private property in such a way that a money judgment would be but inadequate compensation, the owner of such property may enjoin such unauthorized action of the council.²¹ But if it appears that

flow of surface water on the applicants land, held to be immaterial. *Heth v. Fond du Lac*, 63 Wis. 228, 23 N. W. 495, 53 Am. Rep. 279.

Construction of sewers enjoined, when. § 1446 *ante*.

Mandatory injunction, denied. § 1435 *ante*, p. 3037, n. 93.

16. *Wells v. Raymond*, 201 Ill. 435, 66 N. E. 210.

17. *Indiana*. *Balfe v. Lambers*, 109 Ind. 347, 10 N. E. 92.

Iowa. *Gallaher v. Jefferson*, 125 Ia. 324, 10 N. W. 124; *Dodge v. Council Bluffs*, 57 Ia. 560, 10 N. W. 886.

Kentucky. *Hazelgreen v. McNabb*, 23 Ky. L. Rep. 811, 64 S. W. 431.

Maine. *Baldwin v. Bangor*, 36 Me. 518.

New Jersey. *Cross v. Morristown*, 18 N. J. Eq. 305.

New York. *Patterson v. New York*, 1 Paige 114.

Oklahoma. *Paulsen v. El Reno*, 22 Okla. 734, 98 Pac. 958.

18. *Ballard v. Appleton*, 26 Wis. 67.

Noncompliance with certain statutory provisions by city entitles property owner to injunction. *Leibole v. Traster*, 41 Ind. App. 278, 83 N. E. 781.

19. *Dever v. Junction City*, 45 Kan. 417, 25 Pac. 861.

20. *McEneney v. Sullivan*, 125 Ind. 407, 25 N. E. 540.

21. *Burget v. Greenfield*, 120 Ia. 432, 94 N. W. 933.

Where part of a resolution for an improvement is void as *ultra vires*, so much of the improvement as is illegal will be enjoined. *Adams v. Shelbyville*, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484.

the property owner could have pursued other remedies if taken in time, he cannot enjoin the work for mere irregularities of the proceedings.²² In a word, where the law provides an adequate remedy (by an action for damages in some states), a property owner is not entitled to an injunction on account of irregular proceedings.²³ But this general rule is subject to certain exceptions. For example where a town undertook to construct a drain so that it would discharge water on private property and it was shown that without unreasonable expense it could be constructed so that it would not injure such property, the town was enjoined.²⁴ Injunction will lie to restrain a municipal corporation from constructing a sewer so as to discharge on one's property to the probable injury of his family's health.²⁵

Application for relief must be seasonably made. Thus where the work is practically finished it is proper to refuse an application for an injunction against the fulfillment of the contract therefor.²⁶

22. *Rockwell v. Bowers*, 88 Ia. 88, 55 N. W. 1.

23. *Caskey v. Greensburgh*, 78 Ind. 233.

Resort to equity cannot be had if there is an adequate remedy at law. *Taylor v. Crawfordsville*, 155 Ind. 403, 58 N. E. 490; *Shulz v. Albany*, 59 N. Y. S. 235, 42 App. Div. 437, aff'g 57 N. Y. S. 963, 27 Misc. Rep. 51.

Mere damage to property is not a ground for an injunction against an improvement as the owner has an adequate remedy at law in a suit for damages.

Indiana. *Taylor v. Crawfordsville*, 155 Ind. 403, 58 N. E. 490; *De Puy v. Wabash*, 133 Ind. 336, 32 N. E. 1016; *McEneaney v. Sullivan*, 125 Ind. 407, 25 N. E. 540.

Kansas. *Dever v. Junction City*, 45 Kan. 417, 25 Pac. 861.

Kentucky. *Hazelgreen v. Mc-*

Nabb, 23 Ky. L. Rep. 811, 64 S. W. 431.

New Jersey. *Holmes v. New Jersey*, 12 N. J. Eq. 299.

New York. *Blake v. Brooklyn*, 26 Barb. 301; *Ely v. Rochester*, 26 Barb. 133.

Ohio. *Re Pavement*, 5 Ohio S. & C. P. Dec. 573.

Pennsylvania. *Camp v. Port Alleghany*, 11 Pa. Co. Ct. 122.

South Carolina. *Kendall v. Columbia*, 74 S. C. 539, 54 S. E. 777.

See § 2006 *post*.

24. *Danbury, etc. R. Co. v. Norwalk*, 37 Conn. 109. See also, *Dilly v. Henderson* (Ia., 1908), 118 N. W. 750.

25. *Butler v. Thomasville*, 74 Ga. 570.

26. *Fisher v. Georgia Vitriified Brick, etc. Co.*, 121 Ga. 621, 49 S. E. 679.

§ 2005. Same—restraining preliminary steps—ministerial or legislative act.

The general doctrine concerning when courts will inquire into the motives of the members of the municipal legislative body is considered in an earlier volume;²⁷ and the principle is there deduced that such inquiry is restricted to ministerial or administrative acts as distinguished from the exercise of purely legislative powers.²⁸ As applied to the passage of ordinances, resolutions or orders for public improvements or for other purposes the prevailing rule is that courts possess jurisdiction to restrain by injunction action thereon, where it appears that the municipality has no power to act on the particular subject, or where the threatened act is not legislative, but essentially ministerial, or where the legislative body is clothed with certain powers, but threatens to go beyond them and thereby invade property or property rights, or where such body threatens to squander or divert some fund or property held by the municipality in trust for its taxpayers and inhabitants.²⁹ The courts will not interfere with the discretion of the council except in extreme cases.³⁰

§ 2006. Same—to prevent alteration of grade or width of street.

Courts are reluctant to interrupt public improvements at the instance of land owners damaged by change of street grade.³¹ Hence, ordinarily citizens cannot enjoin the alteration of a street on the ground that it will injure their property and business, and inconvenience the public.³² But it has been held that injunction is proper to prevent the change of grade of a street which will result in depriving the public of its convenient use.³³ So injunction will lie to restrain the estab-

27. § 703 *ante*, vol. 2.

28. § 704 *ante*, vol. 2.

29. § 705 *ante*, vol. 2.

30. *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107.

31. *Moore v. Atlanta*, 70 Ga. 611.

32. *Wootters v. Crockett*, 11 Tex. Civ. App. 474, 33 S. W. 391.

33. *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417, 2 Atl. 262.

lishment of a street grade which would not be beneficial to the public but which would render the street impassable and the place to which it leads inaccessible.³⁴

Where property owners have made improvements with reference to the grade of a street which has been maintained for a period of thirty-five years and the improvements by the land owners have been in existence for twenty years and made in conformity to the established grade, it has been held that the municipal corporation will be enjoined from changing the line of the street so as to interfere with such improvements.³⁵ But the mere showing that the ordinance authorizing the work is illegal is not sufficient to authorize an injunction but the plaintiff must show that he will be injured by such work.³⁶ And if it appears that a property owner

34. *Armstrong v. St. Louis*, 3 Mo. App. 151.

35. *Delashmutt v. Oskaloosa*, 94 Iowa 722, 62 N. W. 16.

Where the law requires the streets to be kept open to the width of one hundred feet, independent of any act of the municipal corporation, a proceeding to erect a market house in the center of a street will be restrained. *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

Injunction granted to restrain the building of a bridge which would result in changing the grade of the street and injury to the property owners. *Wilkin v. St. Paul*, 33 Minn. 181, 22 N. W. 249.

36. *Kearney v. Andrews*, 10 N. J. Eq. 70.

Injunction to restrain the contemplated change of street grade denied where no substantial injury is shown to plaintiff. *Kokomo v. Mahan*, 100 Ind. 242.

So injunction will not lie to re-

strain the narrowing of a sidewalk at the instance of an abutting owner in the absence of a showing of irreparable injury to him thereby. *Marion v. Skillman*, 127 Ind. 130, 11 L. R. A. 55, 26 N. E. 676.

Injunction denied to restrain changing an established street grade though it appeared that damage would result to an abutter owner. *Markham v. Atlanta*, 23 Ga. 402; *Moore v. Atlanta*, 70 Ga. 611.

In one case where it appeared that the change in the grade of a street would only leave twenty feet of the same as a drive way on grade of lots instead of thirty-six feet, held not sufficient damage to justify injunction. *Burlington Gaslight Co. v. Burlington C. R. N. Ry. Co.*, 91 Iowa 470, 59 N. W. 292.

Injunction to prevent the narrowing of a street allowed in particular case. *Lawrence v. New York*, 2 Barb. (N. Y.) 577.

has an adequate remedy at law (by action for damages in some jurisdictions) injunction will not lie to prevent the grading of a street notwithstanding actual injury would result to him thereby.³⁷

§ 2007. Same—to restrain vacation of street.

Usually, as fully explained elsewhere, the vacation of streets is discretionary with the municipal authorities, and such discretion will not be restrained when no material injury results from the exercise of the power, or unless there is a clear case of abuse or there has been fraud or collusion.³⁸ The closing of public streets, alleys and parks and the vacation of them is not a wrong of which persons who are simple resident freeholders of

Injunction brought by owners of unimproved lots abutting on a street to prevent change of grade, denied. *Leonard v. Cassidy*, 8 Ohio Cir. Ct. Rep. 529.

In particular case city restrained from changing grade of street. *Lull v. Chicago*, 68 Ill. 518.

In one case injunction was granted to prevent the raising of a level of a street in front of complainant's hotel where it appeared that the street was about to be raised three feet above the level of complainant's property. No law was shown which warranted such contemplated action. *Schaufele v. Doyle*, 86 Cal. 107, 24 Pac. 834.

In an application for an injunction the rights of complainants which are sought to be protected should be regarded, also the injuries which may result from the granting of the injunction. In a proceeding to change the grade of a street the amount of injury to

complainant, the solvency of the defendant, the character and importance of the public improvement, should all be considered. *McElroy v. Kansas City*, 21 Fed. 257.

37. *Fellows v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447.

Where a remedy by damages for change of grade of street is allowed, injunction will be denied. *Ridge Avenue Passenger Ry. Co. v. Philadelphia*, 10 Phila. (Pa.) 37, 30 Leg. Int. 148.

See § 2004 *ante*.

38. §§ 1403, 1404 *ante*, vol. 3; *Gray v. Iowa Land Co.*, 26 Iowa 387.

Vacation of street as "taking" property. § 1405 *et seq.*, *ante*, vol. 3; § 1473 *ante*.

The fact that the vacation of a street will damage a property owner will not entitle him to an injunction to restrain the passage of an ordinance authorizing the vacation. *Atkinson v. Wykoff*, 58 Mo. App. 86.

the town and not the owners of property abutting on the streets or parks affected can complain.³⁹

As a general rule injunction lies at the instance of one who will be specially injured to prevent the municipal authorities from vacating a street unlawfully, *e. g.*, enforcing an illegal order promulgated by the council.⁴⁰ In proceedings by injunction to restrain the vacation of a street it must be alleged and shown that the complainant will suffer some irreparable injury distinct or different in kind from that of the general public.⁴¹ Thus where the only injury resulting from the vacation of an alley is the making access to the rear of his lot less con-

39. *Kittle v. Fremont*, 1 Neb. 329.

40. *Spiegel v. Gansberg*, 44 Ind. 418; § 1413 *ante*, vol. 3.

Equity will not enjoin the passage of an ordinance establishing or vacating a street. Here a statute provided *certiorari* as the remedy to review the action. *Stuhenranch v. Neyenesch*, 54 Ia. 567, 569, 570, 7 N. W. 1.

41. *Whitsell v. Union Depot & R. Co.*, 10 Colo. 243, 15 Pac. 339; *Holm v. Windsor*, 38 Ill. App. 650.

The general rule is that the bill at the instance of an individual tax payer to enjoin the vacation of a public street can only be maintained upon proof of special damage to himself. *Hesing v. Scott*, 107 Ill. 600.

The fact that the complainant's property is specially assessed as benefited by the opening of the part of the street sought to be restrained is immaterial. *Chicago v. Union Building Association*, 102 Ill. 379, 40 Am. Rep. 598.

Injunction to prevent vacation of a street by a land owner outside the city limits on the ground

that the owner of a lot adjacent to such street objects to its vacation. *House v. Greensburg*, 93 Ind. 533.

In one case injunction was denied to prevent a municipal corporation from closing a vacated and unimproved alley where complainant's land was but a small part of the block through which the alley ran and he was the only person protesting against it. *Christian v. St. Louis*, 127 Mo. 109, 29 S. W. 996.

Injunction denied to restrain the enforcement of an ordinance vacating a street on which none of plaintiff's property abuts and where it appeared that plaintiffs suffer an inconvenience with all other persons. *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743.

In the absence of irreparable injury to complainant, injunction will be denied where it appears that the vacation of the street is an undeniable benefit to the public. *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, 11 Atl. 751, 45 N. J. Eq. 366, 19 Atl. 622.

venient vacation will not be restrained, since the injury differs from that of the general public in degree, not in kind.⁴² The nature of the injury to justify the awarding of damages for the vacation of streets and alleys is fully specified and illustrated in an earlier chapter.⁴³

§ 2008. Same—who entitled to injunction.

To entitle a person to an injunction to restrain the improving of land for a street, he must show that he is the owner of the land; merely being in possession,⁴⁴ or having a right to use the land is ordinarily insufficient.⁴⁵ So property owners on a street who paid for having the street paved have not such a property right therein as to entitle them to enjoin the municipality from removing the old pavement to be replaced with a new pavement.⁴⁶ So the mere fact that a sewer is being constructed in a street on which one owns property is no ground for enjoining the same at the suit of such person.⁴⁷

An unsuccessful bidder cannot enjoin an improvement, although he was the lowest bidder.⁴⁸ However, one liable to be assessed for improvements made under an illegal contract, may enjoin the same, even though his action is, under cover, taken in the interest of an unsuccessful bidder for the work.⁴⁹

Although the proceedings are regular, equity will enjoin the laying out of land for a street when it appears, even from extrinsic evidence, that the owner was given

42. *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473.

43. §§ 1405 to 1411 *ante*, vol. 3.

44. *Gleason v. Jefferson*, 78 Ill. 399. See also, *Greiner v. Sigourney* (Ia., 1902), 89 N. W. 1103.

Estate by *Curtésy* is sufficient under certain statute. *Schooling v. Harrisburg*, 42 Ore. 494, 71 Pac. 605, 9 Mun. Corp. Cas. 705.

45. *Union School Dist. v. Keene*, 63 N. H. 623, 7 Atl. 380.

46. *Burckhardt v. Atlanta*, 103 Ga. 302, 30 S. E. 32.

47. *Shulz v. Albany*, 59 N. Y. S. 235, 42 App. Div. 437, *aff'g* 57 N. Y. S. 963, 27 Misc. Rep. 51.

48. *Detroit v. Wayne Circuit Judges*, 128 Mich. 438, 87 N. W. 276, 8 Det. Leg. N. 710.

49. *Mazet v. Pittsburgh*, 137 Pa. St. 548, 20 Atl. 693.

a grossly inadequate value, *e. g.*, only about one twelfth of the value of his land.⁵⁰ An owner of land outside of and adjacent to the corporate boundary may enjoin the excavating for a drain which removes the lateral support to his land.⁵¹ So the owner of a toll bridge may enjoin the city from unlawfully laying it out as a highway.⁵² So a property owner may restrain the city from discharging water or sewage on his property.⁵³ But it has been held that a property owner cannot enjoin the municipality from placing a grating at the opening of a surface water sewer on the ground that it accumulates trash which causes the water to collect and overflow on his land.⁵⁴ After a property owner has conformed his sidewalk to the established grade, if the municipality proceeds to raise the grade of the street again so as to obstruct the access to his property, injunction is the proper remedy.⁵⁵

Where no petition was filed by the property owners as required, and the improvement would be of no value,

50. *Baldwin v. Buffalo*, 29 Barb. (N. Y.) 396.

51. *Covington v. Simball*, 14 Ky. L. Rep. 896.

52. *Central Bridge Corp. v. Lowell*, 70 Mass. (4 Gray.) 474. See also, *Boston Water Power Co. v. Boston, etc. Corp.*, 33 Mass. (6 Pick) 376; *Boston, etc. R. Co. v. Salem, etc. R. Co.*, 68 Mass. (16 Pick.) 512.

53. *Woodward v. Worcester*, 121 Mass. 245, distinguishing *Washburn, etc. Mfg. Co. v. Worcester*, 116 Mass. 458.

Held, in particular instance, that company using water from a stream was entitled to injunction restraining city from constructing a drainage ditch to empty into, and which would contaminate, the

stream. *Columbus v. Hydraulic Mills Co.*, 33 Ind. 435.

In a suit by a property owner to enjoin the maintenance of a viaduct in the street in front of his property, whether or not a legislative act will fairly compensate him therefor, is immaterial. *Sauer v. New York*, 85 N. Y. S. 636, 90 App. Div. 36, *aff'd* in 180 N. Y. 27, 72 N. E. 579, 70 L. R. A. 717, and *aff'd* in 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176.

54. *Paine v. Delhi*, 116 N. Y. 224, 22 N. E. 405, 5 L. R. A. 797, distinguishing *Seifert v. Brooklyn*, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664. See also, *Heth v. Fond du Lac*, 63 Wis. 228, 23 N. W. 495, 53 Am. Rep. 279.

55. *McGuire v. East Cleveland*, 25 Ohio Cir. Ct. R. 497.

a property owner may, for himself and others similarly situated, restrain the doing of the work.⁵⁶ So suit may be maintained by one property owner for himself and others similarly situated to restrain the making of an improvement under an ordinance illegally passed.⁵⁷ A *general taxpayer* has no right of action until the expenses of the improvement are attempted to be defrayed from the general funds of the city.⁵⁸

§ 2009. Same—sufficiency of complaint or petition.

The petition must set forth specifically the defects in the proceedings relied upon as ground for an injunction.⁵⁹ If it is based on want of jurisdiction to proceed it must allege facts showing a want of jurisdiction,⁶⁰ because in such case only jurisdictional questions can be so raised.⁶¹ A bill which shows on its face that the

56. *Covington v. Nelson*, 35 Ind. 532.

Where a property owner brings suit to enjoin the opening of an alley through his land without condemning the way according to law, a property owner similarly situated who was instrumental in procuring the opening of the alley may properly be joined as a party defendant. *Miller v. Aracoma*, 30 W. Va. 606, 5 S. E. 148.

57. *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429.

The contractor may, upon application, be made a party in a suit to enjoin the execution of a contract for a public improvement. *Walter v. McClellan*, 96 N. Y. S. 479, 48 Misc. Rep. 215.

58. *Merritt v. Duluth*, 103 Minn. 236, 114 N. W. 758.

59. *Illinois*. *Brush v. Carbondale*, 78 Ill. 74.

Indiana. *Mitchell v. Peru*, 163 Ind. 17, 71 N. E. 132; *Cason v.*

Lebanon, 153 Ind. 567, 55 N. E. 768; *Huntington v. Griffith*, 142 Ind. 280, 41 N. E. 9, 589; *Bluffton v. Silver*, 63 Ind. 262.

Massachusetts. *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

Texas. *Strauss v. Dallas*, 73 Tex. 649, 11 S. W. 872.

Washington. *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90.

Wisconsin. *Bekkedahl v. Westby*, 140 Wis. 230, 122 N. W. 727.

The unlawfulness of the change of grade of a street, held not sufficiently shown by the petition. *Kemper v. Campbell*, 45 Kan. 529, 26 Pac. 53.

60. *Gardiner v. Bluffton*, 173 Ind. 454, 89 N. E. 853, rehearing denied 90 N. E. 898.

61. *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321.

petitioner has an adequate remedy at law (in some jurisdiction by action for damages), is insufficient.⁶²

Ordinarily the petition must show that the petitioner is the owner of the land affected by the improvement.⁶³ Mere possession,⁶⁴ or a right to the use⁶⁵ of the property, is usually insufficient. But a curtesy interest (consummated) in land is sufficient.⁶⁶

§ 2010. Conclusiveness and collateral attack.

Mere irregularities in the proceedings for a public improvement cannot be collaterally questioned.⁶⁷ As

62. *Shulz v. Albany*, 57 N. Y. S. 963, 27 Misc. Rep. 51, aff'd 59 N. Y. S. 235, 42 App. Div. 437.

63. *Shields v. Savannah*, 55 Ga. 150; *Knapp, etc. Co. v. St. Louis*, 153 Mo. 560, 55 S. W. 104.

64. *Gleason v. Jefferson*, 78 Ill. 399. See *Greiner v. Sigourney* (Ia., 1902), 89 N. W. 1103.

65. *Union School Dist. v. Keene*, 63 N. H. 623, 7 Atl. 380.

66. *Schooling v. Harrisburg*, 42 Ore. 494, 71 Pac. 605, 9 Mun. Corp. Cas. 705.

Dissolution of injunction. In a suit to enjoin the widening of an alley, if the answer contains a full, positive denial, sworn to, a temporary injunction will be dissolved. *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. 928.

The manner of doing the work cannot be considered in a suit to enjoin the improvement of a street. *McEneney v. Sullivan*, 125 Ind. 407, 25 N. E. 540.

Town maps showing name of streets, the dedication, etc., are competent evidence to inform the court, in a suit to enjoin a street improvement. *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219.

67. *Illinois*. *Jebb v. Sexton*, 84 Ill. App. 45.

Indiana. *Menzie v. Greensburg*, 42 Ind. App. 657, 85 N. E. 484; *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321; *Deyer v. Woods*, 166 Ind. 44, 76 N. E. 624; *Daly v. Higman*, 43 Ind. App. 357, 87 N. E. 669.

Iowa. *Owens v. Marion*, 127 Ia. 469, 103 N. W. 381.

Maine. *Gay v. Bradstreet*, 49 Me. 580, 77 Am. Dec. 272.

Massachusetts. *Stowell v. Ashley*, 184 Mass. 416, 68 N. E. 675; *Foley v. Haverhill*, 144 Mass. 352, 11 N. E. 554; *Fisk v. Springfield*, 116 Mass. 88; *Brimmer v. Boston*, 102 Mass. 19.

Michigan. *Scotten v. Detroit*, 106 Mich. 564, 64 N. W. 579.

Minnesota. *Carpenter v. St. Paul*, 23 Minn. 232.

Missouri. *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429.

New Jersey. *Camden v. Mulford*, 26 N. J. L. 49; *Martin v. Carron*, 26 N. J. L. 228.

New York. *Mansfield v. Lockport*, 52 N. Y. S. 571, 24 N. Y. Misc. Rep. 25.

mentioned in a prior section the decision of municipal authorities as to the necessity or utility of an improvement, and the manner in which it should be constructed, is usually conclusive and hence it is not open to collateral attack.⁶⁸

The prevailing rule is that public improvement proceedings and the recital of the record relative thereto are usually conclusive as against collateral attack.⁶⁹ But defects in such proceedings which go to the jurisdiction of the municipal authorities may be attacked collaterally.⁷⁰ Thus, where by statute a petition signed by a specified majority of the property owners in front feet is requisite to a valid levy of a special assessment, this is jurisdictional, and a petition not in fact complying with such statute is subject to collateral attack.⁷¹ The failure to comply with any essential requirement of the law in making the contract for the improvement nulli-

Oregon. But compare, *Allen v. Portland*, 35 Ore. 420, 58 Pac. 509.

Pennsylvania. *Hogsetts Appeal*, 2 Pa. Super. Ct. 265.

Rhode Island. *Hunt v. Gorton*, 20 R. I. 163, 37 Atl. 706.

68. § 1834 *ante*; *Palmer v. Stumph*, 29 Ind. 329; *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. 259; *Tipton v. Shelbyville*, 32 Ky. L. Rep. 1123, 107 S. W. 810; *Brown v. Saginaw*, 107 Mich. 643, 65 N. W. 601.

Except for fraud. *Shimmons v. Saginaw*, 104 Mich. 511, 62 N. W. 725; *Trotter v. Franklin*, 146 N. C. 554, 60 S. E. 509.

The erroneous acts of municipal authorities in making an improvement can only be vacated by a proper proceeding brought for that purpose, and until vacated they are operative against collateral attack. *Gay v. Bradstreet*, 49 Me. 580, 77 Am. Dec. 272.

Condemnation proceedings cannot be collaterally attacked. *Goodville v. Lake View*, 137 Ill. 51, 27 N. E. 15.

69. *Pittsburg, etc. R. Co. v. Crownpoint*, 150 Ind. 536, 50 N. E. 741.

Judgments in local improvement assessment cases cannot be collaterally attacked. *Hause v. St. Paul*, 94 Minn. 115, 102 N. W. 221.

70. *Kiefer v. Bridgeport*, 68 Conn. 401, 36 Atl. 801; *Menzie v. Greensburg*, 42 Ind. App. 657, 85 N. E. 484; *St. Louis v. Franks*, 78 Mo. 41, aff'g 9 Mo. App. 579; *Knopf v. Gilsonite Roofing, etc. Co.*, 92 Mo. App. 279; *Barber Asphalt Pav. Co. v. O'Brien*, 128 Mo. App. 267, 107 S. W. 25.

71. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

fies the proceedings, and hence they may be collaterally attacked.⁷² Accordingly void improvement proceedings may be attacked in a proceeding to enforce an assessment thereunder.⁷³

It is sometimes provided by statute or charter that the finding of the municipal legislative body as to certain facts relative to proceedings for an improvement shall be final and conclusive, *e. g.*, that the petition was signed by the requisite number of property owners;⁷⁴

72. *Brown v. New York*, 3 Hun (N. Y.) 685; *Whitten v. Haverhill*, 204 Mass. 95, 90 N. E. 409.

73. *Daly v. Gubbins*, 35 Ind. App. 86, 73 N. E. 833.

74. *Londoner v. Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103, *rev'g* 33 Colo. 104, 80 Pac. 117.

But held not conclusive on a court in a suit to restrain the collection of an assessment. *Armstrong v. Ogden*, 12 Utah 476, 43 Pac. 119, *aff'd* *Ogdon v. Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114.

Where the law requires a petition for the improvement as a condition precedent, proceedings without such petition are invalid. *Mulligan v. Smith*, 59 Cal. 206.

Sufficiency of petition. One whose land has been seized and sold for non-payment of tax for the improvement may show in ejectment that the petition for opening was not signed by the owners of the requisite amount or frontage. *Zeigler v. Hopkins*, 117 U. S. 683, 6 Sup. Ct. 919, 29 L. Ed. 1019.

The fact that the mayor certifies that the petition was signed

by the requisite number of property owners and the further fact that the court confirmed the report, etc., do not estop the city to deny the sufficiency of the petition. *Kahn v. San Francisco*, 79 Cal. 388, 21 Pac. 849, 25 Pac. 403.

Sufficiency of petition presumed under facts of a particular case. *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249; distinguishing *Mulligan v. Smith*, 59 Cal. 206; *Kahn v. San Francisco*, 79 Cal. 388, 21 Pac. 849; *O'Hara v. Blood*, 27 La. Ann. 57.

Some laws render the action of the council in determining the sufficiency of the petition conclusive. *Scranton v. Jermyn*, 156 Pa. St. 107, 27 Atl. 66; *Scranton v. Throop* (Pa., 1893), 27 Atl. 67.

Finding of a council that a majority of the property owners interested had petitioned for the improvement, held conclusive, under particular law. *People v. Rochester*, 21 Barb. (N. Y.) 656; *Re Kiernan*, 62 N. Y. 457.

Held, *contra*, that a finding that the petition had been signed by a majority of the property owners, whereas in fact it was not, was not a judicial but a ministerial act

and in the absence of such provisions it is generally held that their finding is at least *prima facie* evidence of the correctness of the facts so found;⁷⁵ and sometimes it is held conclusive, especially after the passage of the improvement ordinance.⁷⁶ If the council finds and declares that a special ordinance has been published for the time and in the manner required by statute, such finding and declaration are conclusive.⁷⁷ Where a

which might be attacked collaterally. *Miller v. Amsterdam*, 149 N. Y. 288, 43 N. E. 632, aff'g 78 Hun (N. Y.) 609, 28 N. Y. S. 1021, 60 N. Y. St. Rep. 510.

Action of board of town trustees that a petition was sufficient, held conclusive in a suit to enjoin the assessments. *McEneney v. Sullivan*, 125 Ind. 407, 25 N. E. 540.

Certificate of commissioners that the required number of proprietors on the street had assented to the paving, held not conclusive of the assent. *Henderson v. Baltimore*, 8 Md. 352.

Held, township not estopped to question that the petition had been signed by the requisite number of property owners as a defense to an action by the contractor for money due under his contract. *Collins v. Grand Rapids*, 108 Mich. 675, 66 N. W. 586.

75. *Cummings v. West Chicago Park Com'rs*, 181 Ill. 136, 54 N. E. 941, aff'd in *Lombard v. West Chicago Park Com'rs*, 181 U. S. 33, 21 Super. Ct. 507, 45 L. Ed. 731; *Farrell v. West Chicago Park Com'rs*, 182 Ill. 250, 55 N. E. 325, aff'd in 181 U. S. 398, 404, 21 Super. Ct. 609, 645, 45 L. Ed. 916, 924; *McManus v. People*, 183 Ill. 391, 55 N. E. 886; *Berry v. Chi-*

cago, 192 Ill. 154, 61 N. E. 498; *Chicago Union Traction Co. v. Chicago*, 202 Ill. 576, 67 N. E. 383.

76. *German Savings, etc. Socy. v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

77. *Barber Asphalt Pav. Co. v. Muchenberger*, 105 Mo. App. 47, 78 S. W. 280.

Notice of proceedings. The presumption will be invoked that the requisite notice of the proceedings was given. Rule applied in an action to enjoin the sale of property to pay the street improvement bonds. In such case the burden is upon plaintiff to prove that notice was not given. *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

In special assessment proceedings if the record shows that notices were duly sent as required by law the sending of such notices cannot be attacked collaterally. *West Chicago St. R. Co. v. People*, 156 Ill. 18, 40 N. E. 605.

In Massachusetts the question as to notices as required by law can be raised only by writ of *certiorari*. *Lowell v. Hadley*, 8 Met. (49 Mass.) 180.

The fact that the council irregularly designates an official newspaper in which the notice is published will not justify collateral

street can be improved only on petition of the adjoining property owners, unless unsafe, the question of its safety is jurisdictional and the finding of the council is not conclusive.⁷⁸ The property owner is bound by the record of the council only when it recites truthfully those things necessary to give jurisdiction.⁷⁹

§ 2011. Defects and objections.

Objections to proceedings relative to making an improvement which are founded upon the violations of mere directory provisions,⁸⁰ or failure to perform some matter of detail⁸¹ cannot prevail. But a substantial departure from mandatory provisions may invalidate the proceedings, as for example, where a resolution for a street improvement showed that no itemized estimate of cost had been made for submission to interested property owners as required.⁸²

attack of the proceedings. *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52.

78. *Smith v. Minto*, 30 Ore. 351, 48 Pac. 166.

79. *Knopf v. Gilsonite Roofing, etc. Co.*, 92 Mo. App. 279.

A declaration of a council that that is true which clearly is not true, is not conclusive on a court. *Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359.

Proof must be clear and satisfactory to establish a mistake in the proceedings of a city council for a public improvement. *Acklin v. Parker*, 29 Ohio Cir. Ct. R. 625.

The decision of a council that objections on behalf of property owners were on file may be attacked in an action to enjoin the collection of assessments. *Armstrong v. Ogden City*, 12 Utah 476, 43 Pac. 119.

Under a charter giving a ma-

jority of the property owners the right to file a remonstrance against the improvement with a particular board, held that the finding of the board that a remonstrance was not signed by the requisite number of property owners was not conclusive. *Fruin-Brambrick Construction Co. v. Geist*, 37 Mo. App. 509.

80. *Kingston v. Terry*, 53 N. Y. S. 652, 24 Misc. Rep. 616.

81. *Blair v. Cary*, 24 Ohio Cir. Ct. R. 560.

82. *Clarke v. Chicago*, 185 Ill. 354, 57 N. E. 15.

See § 1866 *ante*.

An abutter cannot complain of a provision in a street paving ordinance that a street car company shall pay for the paving of that part of the street between its tracks. *White v. Alton*, 149 Ill. 626, 37 N. E. 96; *Bell v. Alton*, 152 Ill. 170, 38 N. E. 556.

In the absence of express requirement of definite statement objections may be general,⁸³ but, of course, they should be sufficiently specific to indicate clearly the nature of the objection.⁸⁴ Manifestly objections cannot be entertained without competent evidence.⁸⁵

§ 2012. Who may question validity of proceedings.

Speaking generally objections to the validity of public improvement proceedings can only be made by persons whose property is directly affected thereby.⁸⁶ Thus, a

83. *Davidson v. Chicago*, 178 Ill. 582, 53 N. E. 367.

84. An objection that a provision for payment of assessment in installments is not according to law must be specifically made, else it is waived. *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794.

The question of a discrepancy between the ordinance and the estimate of cost of an improvement cannot be raised under a general objection that the estimate of cost is void. *Chicago Terminal Transfer Co. v. Chicago*, 178 Ill. 429, 53 N. E. 361.

85. Where the objection is that the ordinance was irregularly passed, but no proof of such fact is submitted, the municipal authorities are justified in proceeding as if the ordinance is valid. *People v. Board*, 56 N. Y. S. 334, 39 App. Div. 30.

86. *Symons v. San Francisco*, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; *Johnson v. Philadelphia*, etc. R. Co. (Del. Ch., 1905), 62 Atl. 86; *Heller v. Atchison*, etc. R. Co., 28 Kan. 625.

Who may object. In a proceeding to vacate a street one having no interest in abutting property cannot complain. *Arnold*

v. Welker, 55 Kan. 510, 40 Pac. 901.

In a proceeding to vacate a street the owner of a lot in another block, before which the street is left undisturbed and whose access to his lot is not interfered with, cannot complain, notwithstanding the vacation may probably result in turning the course of travel to another street instead of in front of such lot owner's land. *Heller v. Atchison, Topeka & S. F. R. Co.*, 28 Kan. 625.

See § 1410 *ante*, vol. 3.

Proceedings to lay out roads and public parks by commissioners cannot be called in question by a land holder and tax payer unless the natural and necessary consequences of the commissioners' acts will subject him to taxation or injuriously affect or interfere with his property or legal rights. *Kean v. Bronson*, 35 N. J. L. (6 Vroom.) 468.

Effect of failure to publish a resolution providing for the improvement under particular provision. *Moore v. New York*, 73 N. Y. 238, 29 Am. Rep. 134, rev'g 4 Hun (N. Y.) 545.

When owners of property against

mere trespasser on land cannot object to improvements that will appropriate such land to the use of a street for which it has been dedicated.⁸⁷ An assessment imposed by a municipal corporation for the purpose of improving a navigable river, may be challenged by any property owner whose property may be assessed.⁸⁸ Likewise, any property owner whose property must bear a part of the expense of the improvement may object.⁸⁹ But one whose property will not be damaged by, or assessed for, an improvement cannot object.⁹⁰

§ 2013. Waiver of defects and objections.

Mere defects and irregularities in improvement proceedings may be waived by property owners.⁹¹ But the objection that the municipality was wholly without jurisdiction to make an improvement, may be raised at any time in any kind of a proceeding.⁹²

which benefits of street opening is assessed, cannot object to proceedings. *Boussneur v. Detroit*, 153 Mich. 585, 117 N. W. 220, 15 Det. Leg. N. 568.

One personally served with notice of proceedings for an improvement cannot complain that notice was not published as required by law. *Charitan v. Holliday*, 60 Ia. 391, 14 N. W. 775.

Nor can one object to the notice served on another. *Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761.

Objections to proceedings for narrowing a street by individuals denied on account of defective service of notice upon a county affected. *Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761.

87. *Backman v. Oskaloosa*, 130 Ia. 600, 104 N. W. 347.

88. Any property owner affected by the contemplated widening of a navigable river may object on the ground of lack of mu-

nicipal power although no complaint is made in behalf of the government. *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855.

89. *Waukesha v. Randles*, 120 Wis. 470, 98 N. W. 237.

90. *Illinois. White v. Alton*, 149 Ill. 626, 37 N. E. 96; *Bell v. Alton*, 152 Ill. 170, 38 N. E. 556.

Kansas. Arnold v. Weiker, 55 Kan. 510, 40 Pac. 901; *Heller v. Atchison, etc. R. Co.*, 28 Kan. 625.

New Jersey. Kean v. Bronson, 35 N. J. L. 468.

New York. Moore v. New York, 73 N. Y. 238, 29 Am. Rep. 134, rev'g 4 Hun 545; *Re Woolsey*, 95 N. Y. 135.

Wisconsin. State v. Fond du Lac, 42 Wis. 287.

91. *Nixon v. Burlington*, 141 Ia. 316, 115 N. W. 239; *Boussneur v. Detroit*, 153 Mich. 585, 117 N. W. 220, 15 Det. Leg. N. 568.

92. *Andre v. Burlington*, 141 Ia. 65, 117 N. W. 1082.

Objections must be timely made otherwise they will be regarded as waived.⁹³ Generally it is considered too late after the improvement is made to object to irregularities in the proceedings, or slight variances between the requirements and the construction of the improvement.⁹⁴ However, the rights of property owners are not prejudiced by failure to attempt to have an illegal ordinance set aside until after the assessment is made.⁹⁵ Nor is a void ordinance rendered valid by acquiescence on the part of the property owners affected.⁹⁶ And acquiescence or ratification by a municipal corporation cannot cure a substantial defect of its authorities in laying out a sewer.⁹⁷

The manner and time of making objections prescribed

By objecting to the improvement, property owners do not thereby waive their right to object to the jurisdiction. *Dehail v. Morford*, 95 Cal. 457, 30 Pac. 593; *Re Central Park Com'rs*, 51 Barb. (N. Y.) 277, 35 How. Pr. 255.

93. After commissioners appointed to make an improvement and assessment therefor have completed their work, objections cannot be made to the manner of appointing them. Nor can the falsity of the resolutions of such commissioners be shown at such time. *Skinkle v. Clinton Twp.*, 39 N. J. L. 656.

After notice, completion, and payment of and for an improvement, objections cannot then be made to irregularities in the proceedings. *Youngster v. Paterson*, 40 N. J. L. 244.

94. *Iowa*. *Clifton Land Co. v. Des Moines*, 144 Ia. 625, 123 N. W. 340.

Kentucky. *Preston v. Roberts*, 75 Ky. (12 Bush) 570; *Fehler v.*

Cosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238.

New Jersey. *Cunningham v. Merchantville*, 61 N. J. L. 466, 39 Atl. 639; *Youngster v. Paterson*, 40 N. J. L. 244; *Skinkle v. Clinton Twp.*, 39 N. J. L. 656; *Vanatta v. Morristown*, 34 N. J. L. 445.

New York. *Re Lexington Ave.*, 3 Hun (N. Y.) 221, 5 Thomp. & C. 436.

Oregon. *Clinton v. Portland*, 26 Ore. 410, 38 Pac. 407.

95. *Ogden v. Hudson*, 29 N. J. L. (5 Dutch) 475.

96. *Woodward v. Boscobel*, 84 Wis. 226, 54 N. W. 332.

That a property owner allowed a sewer to be constructed without objection, did not estop him from resisting the enforcement of a tax bill, where the ordinance authorizing the improvement was void. *McCormick v. Moore*, 134 Mo. App. 669, 114 S. W. 40.

97. *Kidson v. Bangor*, 99 Me. 139, 58 Atl. 900.

by statute or charter should be followed in substance.⁹⁸ Objecting to the construction of an improvement without questioning the notice, is a waiver of the insufficiency of the notice;⁹⁹ and by acting upon an insufficient notice as though it had been perfect, one waives its defects.¹ But the filing of a remonstrance by property owners against a proposed improvement is not a waiver of the notice required by charter, since such requirement is regarded as a condition precedent to jurisdiction to make the improvement.² The failure of a property owner to object that assessment had not been made on adjacent property when he did appear and make other objections to the improvement constitutes a waiver thereof.³ The mere petitioning for the improvement will not necessarily preclude objections on the part of the petitioners,⁴ as, for example, that the proceedings were not in substantial conformity with the essential requirements of the charter.⁵ But a petitioner cannot thereafter object to a change in the improvement, *e. g.*, an enlargement of the district, where the effect is to benefit and not injure him, as where the cost charged against his property is rendered less.⁶

98. *McKusick v. Stillwater*, 44 Minn. 372, 46 N. W. 769; *Du Bois Opera House Co. v. Du Bois Borough*, 16 Pa. Co. Ct. 210.

99. *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107; *Andre v. Burlington*, 141 Ia. 65, 117 N. W. 1082.

1. *Michigan*. Auditor General *v. Huffman*, 132 Mich. 198, 93 N. W. 259.

New Jersey. *Forbes v. Elizabeth*, 42 N. J. L. 56.

Pennsylvania. *Beaumont v. Wilkes-Barre*, 142 Pa. St. 198, 21 Atl. 888; *Re Walnut St.*, 7 Kulp. (Pa.) 562.

Rhode Island. *Tingley v. Providence*, 9 R. I. 388.

One cannot affect the rights of others by waiving insufficiency of the notice. *State v. West Hoboken*, 53 N. J. L. 64, 20 Atl. 737.

2. *Bank of British Columbia v. Portland*, 41 Ore. 1, 67 Pac. 1112.

3. *Andre v. Burlington*, 141 Ia. 65, 117 N. W. 1082.

4. Right to object by one who petitions council for the improvement. *People v. Maher*, 9 N. Y. S. 124, 56 Hun 639.

5. *Strout v. Portland*, 26 Ore. 294, 38 Pac. 126.

6. *O'Dea v. Mitchell*, 144 Cal 374, 77 Pac. 1020.

§ 2014. Application of doctrine of estoppel.

It is well settled that the doctrine of estoppel is applicable to defects and objections in improvement proceedings.⁷ Thus, a property owner who stands by and

7. When the municipal corporation acts in its private, as distinguished from its governmental capacity it may be estopped by acts of its officers. Thus where the wrong plans and tracings are given to one who has a contract with it to furnish the iron work for a public building the doctrine may be invoked. *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263.

Contractor and surety. Where the work of improvement is completed and taxbills issued to the contractor for the work, the contractor and his surety cannot defend a suit brought to recover for material used in the improvement, on the ground that the contract is void. *Kansas City v. Schroeder*, 196 Mo. 281, 93 S. W. 405.

Estoppel in pais. A property owner cannot quietly permit money to be expended in work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract. *Hellenkamp v. Lafayette*, 30 Ind. 192, 194.

If the property owner denies the power of the corporate authorities to order the improvement, he must test the question before the work is done. *Palmer v. Stumph*, 29 Ind. 329.

Property owner who stands by and sees a contractor expend money in a street improvement by which his property is benefited will be estopped from deny-

ing the right of the city to make a contract. *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723.

Cannot, after the improvement is finished, object to the ordinance because passed without notice. *Manufacturers Land, etc. Co. v. Camden*, 78 N. J. L. 247, 73 Atl. 77. Also, *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125.

A water franchise ordinance which fails to receive the requisite number of votes and which is nevertheless assumed to have been adopted by the water company and the city, held binding on the city to pay the price of water furnished in pursuance thereof. *Illinois Trust and Savings Bank v. Arkansas City Water Co.*, 67 Fed. 196.

Objections to the improvement ordinance on the ground of informalities in its enactment will not be sustained where it appears that the objector had full knowledge of the proposed improvements and had a reasonable time in which to object. *Young v. Phillipsburg*, 6 N. J. L. J. 213.

The members of a city council constitute the agents of the property owners. Hence, property owners who suffer the improvements to proceed to completion without remonstrance will be held to have confirmed the acts of their agents. *People v. Utica*, 65 Barb. 9, 45 How. Pr. 289.

"A failure to make objection to an improvement, as against a con-

without objection, sees an improvement made which he knows will be charged against his property is estopped from denying the validity of the proceedings,⁸ unless there is a total want of jurisdiction on the part of the municipality.⁹ So aiding the passage of an improvement ordinance may estop the property owner from objecting to mere irregularities.¹⁰ But it has been held that where the charter requires that a copy of the improvement order and a notice that the municipality would make the improvement at his expense if he does not, be served on him, a property owner may object that such was not done in an action to recover from him the value of the improvement, even though he knew the improvement was being made and said nothing.¹¹

tractor who is acting in good faith and under color of law, is an acquiescence in what is being done, and such person will be denied an injunction to prevent the enforcement of an assessment." *Menzie v. Greensburg*, 42 Ind. App. 657, 85 N. E. 484, 488.

One who waited until the plan of a sewage board had been adopted by the voters at an election, it was held could not object to the validity of the contract because the city did not own the land at the time of the election on which it was proposed to locate a disposal plant. The city could acquire the land by condemnation. *Frelinghuysen v. Morristown*, 77 N. J. L. 493, 70 Atl. 77.

Estoppel by acts. Where one took part in an election to provide for electric lighting and made no objection, and voted on the sum of money to be raised for lighting, he is estopped to question the regularity of the election because of insufficient notice. *Brown v.*

Street Lighting Dist., 69 N. J. L. 485, 55 Atl. 1080, *aff'd* in 70 N. J. L. 762, 58 Atl. 339.

One who surrendered property condemned for street purposes and received his award, cannot maintain ejectment for the possession of the property. *Binghampton Opera House Co. v. Binghampton*, 156 N. Y. 651, 51 N. E. 315.

8. *Towne v. Newton*, 169 Mass. 240, 47 N. E. 1029; *Rosell v. Neptune City*, 68 N. J. L. 509, 53 Atl. 199; *Tone v. Columbus*, 1 Ohio Cir. Ct. Rep. 305, 1 Ohio Cir. Dec. 168.

9. *Strout v. Portland*, 26 Ore. 294, 38 Pac. 126.

10. *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684; *Rowe v. East Orange*, 69 N. J. L. 600, 55 Atl. 649; *Moran v. Hudson*, 34 N. J. L. 531; *Lewis v. Utica*, 67 Barb. (N. Y.) 456; *Re Cooper*, 93 N. Y. 507.

11. *Walden v. Relyea*, 85 N. Y. S. 978, 89 App. Div. 241.

One who joins in the petition for the improvement is not necessarily estopped from objecting to defects in the proceedings.¹² However, it has been held that an owner who petitions for a certain kind of street paving cannot thereafter object that such paving material is patented which excludes competition therein.¹³ Likewise, where an owner signs a petition and is instrumental in procuring favorable action thereon by the municipal authorities, he cannot thereafter as a defense to the enforcement of a lien on his property for the improvement assert that the petition was not signed by the required number of owners.¹⁴

On the contrary, if the proceedings of the authorities indicate that the improvement is to be made at public expense, the fact that an owner stood by and saw the work done will not estop him from objecting to being assessed therefor.¹⁵ So the fact that one appears to protest against the improvement of a particular street will not estop him from remonstrating against the improvement of another street not embraced in the first proceeding, though subsequently attempted to be embraced therein.¹⁶

12. *People v. Maher*, 9 N. Y. S. 124; *Andrew v. Hamilton County*, 5 Ohio N. P. 123; *Locke v. Cincinnati*, 7 Ohio N. P. 318.

Property owner not estopped to attack proceedings, when. *Keifer v. Bridgeport*, 68 Conn. 401, 36 Atl. 801.

Knowledge of the work of improvement will not estop an owner from objecting to illegalities in the proceedings. *Steckert v. East Saginaw*, 22 Mich. 104.

One may object to the validity of an ordinance providing for paving at the cost of abutting owners, because not passed by the number of votes required by law, although before its passage he opposed the

paving of the street with stone as originally proposed expressing a preference for brick which the ordinance when passed provided for. *Bradford v. Fox*, 171 Pa. St. 343, 33 Atl. 85.

13. *Gurley v. New Orleans*, 124 La. 390, 50 So. 411.

14. *Beaver Borough v. Davidson*, 9 Pa. Super. Ct. 159, 43 W. N. C. 426.

15. *Walsh v. Newark*, 77 N. J. L. 181, 71 Atl. 39.

16. *Stephenson v. Salem*, 14 Ind. App. 386, 42 N. E. 44.

When petition to lay out a street will not estop petitioners from remonstrating laying out a street which will embrace a part of the

§ 2015. Review by appeal.

Some laws are construed as denying the right to review by appeal proceedings relating to certain public improvements, as in opening and widening streets.¹⁷ But whether an appeal may be taken from municipal action in providing for improvements must depend upon the proper construction of the local laws.¹⁸ Sometimes an appeal is not allowed unless private property rights are invaded, or the action is illegal, irregular or the result of mistake, collusion or fraud.¹⁹ Review by appeal

property mentioned in the first petition. *St. Paul v. Union Depot*, 30 Minn. 359, 15 N. W. 684.

Although one has petitioned for the improvement of a street he will not be estopped because of such petition to show in an action of trespass that the improvement was done out of the limits of the street. *Quinn v. Paterson*, 27 N. J. L. (3 Dutch.) 35.

17. Appeal from court order confirming the report of commissioners of estimates and assessment to open streets, denied. *Re One Hundred and Thirty-eighth St.*, 61 How. Pr. (N. Y.) 284.

Review of proceedings for opening and widening street, denied. *Bates v. Titusville*, 29 Leg. Int. 277.

Municipal action in laying out streets is not subject to judicial review by appeal. *Re Central Park Commissioners*, 50 N. Y. 493.

Appeal from action of municipal authorities in locating and laying out streets, denied in absence of express provision permitting. *Biddeford v. York County Com'rs*, 78 Me. 105, 3 Atl. 36.

Under a law providing that the report of the commissioners in a

street opening proceeding "shall be final and conclusive," no review is authorized. *Appeal of Houghton*, 42 Cal. 35.

Action of court of quarter session in proceedings to lay out, widen and straighten streets under Pennsylvania borough act, held conclusive. *Chartier's Appeal*, 4 Pa. Cas. 464, 8 Atl. 181; *Appeal of Rogers*, 138 Pa. St. 264, 22 Atl. 22; *Re Sheridan Ave.*, 138 Pa. St. 264, 22 Atl. 22.

18. *Biddeford v. York County*, 78 Me. 105, 3 Atl. 36; *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513; *Re Ellsworth*, 53 N. Y. 647; *Re Kingsbridge Road*, 4 Hun 599; *Re One Hundred and Thirty-eighth St.*, 61 How. Pr. 284; *Re Widening of Diamond St.*, 196 Pa. St. 254, 46 Atl. 428; *Re Plan No. 166*, 93 Pa. St. 221; *Chartier's Appeal*, 4 Pa. Cas. 464, 8 Atl. 181; *Re Reynoldsville Borough*, 22 Pa. Co. Ct. 461.

When no appeal is allowed the only remedy the property owner has is by application to the legislature. *Appeal of Houghton*, 42 Cal. 35.

19. A law providing that the report of commissioners in a pro-

is frequently permitted by express provision,²⁰ and in invoking such laws substantial observance is required.²¹ Generally one whose property is not affected by the improvement cannot appeal.²²

ceeding to widen and straighten streets shall when confirmed be "final and conclusive," held to apply to an appeal from such report but not to deny the right to appeal to have such report set aside upon motion for irregularity, mistake or fraud. *Re New York*, 49 N. Y. 150.

20. *Wannenwetsch v. Baltimore*, 111 Md. 32, 73 Atl. 701; *Lockwood v. Charlestown*, 114 Mass. 416; *Ferree v. Board of Surveyors*, 9 Phila. (Pa.) 518; *Appeal of Durning*, 30 Leg. (Pa.) 153; *Appeal of Duhring*, 10 Phila. (Pa.) 181.

Proceedings to lay out streets. *Morris v. Chicago*, 11 Ill. 650; *Hays v. Vincennes*, 82 Ind. 178; *Logansport v. Shirk*, 129 Ind. 352, 28 N. E. 538; *Re Kingsbridge Road*, 4 Hun (N. Y.) 599.

Ordinarily proceeding providing for local improvements that the expense be paid by property owners by special assessments or taxation are reviewable by the courts. *Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. 366.

Sometimes laws confer power on courts to review proceedings changing the width of sidewalks upon application by abutters. *Chartier's Appeal*, 4 Pa. Cas. 464, 8 Atl. 181.

The validity of ordinance for widening streets, etc., may be determined by the courts when statutes so authorize. *Re Frederick St.*, 155 Pa. St. 623, 26 Atl. 773.

Under a particular charter providing that in proceedings to open alleys the city may dismiss at any time before final action by the circuit court on the report of the commissioners, an appeal by the property owners from an order denying a new trial is premature where final action has not been taken on the report though at the time of the appeal the court was in position to take final action. *St. Louis v. Thomas*, 100 Mo. 223, 13 S. W. 685.

21. *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287; *Rissing v. Ft. Wayne*, 137 Ind. 427, 37 N. E. 328; *Re Seventeenth St.*, 189 Mo. 245, 88 S. W. 45.

Notice of appeal. *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287.

The appeal should be taken and notice thereof served in the manner prescribed. *Re Kingsbridge Road*, 4 Hun (N. Y.) 599.

The notice must be given and published in the manner prescribed. *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287.

On appeal the appellant is to complete the record. *Re Southworth*, 5 Hun (N. Y.) 55.

22. *Re Seventeenth St.*, 189 Mo. 245, 88 S. W. 45.

In a proceeding to widen a street any person interested who considers himself aggrieved may appeal under some charters. *Lexington v. Long*, 31 Mo. 369.

On appeal from the improvement proceedings objections must be stated sufficiently specific to ascertain in what way the municipal authorities acted improperly.²³ It may sometimes be necessary to ascertain whether a necessity existed to construct an improvement in the way proposed in order to determine the sufficiency of a remonstrance filed against the proceedings.²⁴ If it is necessary to the validity of a sidewalk improvement ordinance that the board of aldermen have an estimate of the cost, it will be assumed on appeal, in the absence of evidence to the contrary, that they had such estimate before them, where it was filed with the clerk.²⁵

23. General objection to the jurisdiction is insufficient. *Powell v. Greensburg*, 150 Ind. 148, 49 N. E. 955.

Questions affecting the constitutionality of statute or proceedings authorizing an improvement can only be raised by assignments of errors in sustaining demurrers, overruling motions for a new trial, etc., and not by way of independent assignments. *Pittsburgh, etc. R. Co. v. Wolcott*, 162 Ind. 399, 69 N. E. 451.

24. *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 397.

25. *Marshall v. Rainey*, 78 Mo. App. 416.

Question on appeal. Where the law authorizes an appeal but does not state the manner in which an appeal is to be prosecuted, held that the only questions that can be raised are such as relate to the jurisdiction of the council and the regularity of its proceedings. *Re Southworth*, 5 Hun (N. Y.) 55.

Motives of the municipal authorities cannot be considered. *Hunter v. Newport*, 5 R. I. 325.

Presumption of necessity of highway, held to arise, in absence of objections. *Bosworth v. Providence*, 17 R. I. 58, 20 Atl. 97.

Decision to be rendered on appeal under particular charter. *Banks v. Greenwich* (Conn., 1888), 15 Atl. 738.

In the absence of proof to the contrary, the requirements of an ordinance as to a public improvement will be considered necessary and reasonable in appeal. *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760.

Consideration of appeal. *Re Swanson St.*, 163 Pa. St. 323, 30 Atl. 207, 35 Wkly. N. Cas. 306.

Questions to be considered on appeal—practice. *Re Swanson St.*, 163 Pa. St. 323, 30 Atl. 207, 35 Wkly. N. Cas. 306; *Appeal of Morris*, 163 Pa. St. 323, 30 Atl. 207.

For an objection to be considered in the appellate court, it must have been made in the lower court. *Re Troubat Ave.*, 10 Pa. Super. Ct. 27, 44 W. N. C. 53.

§ 2016. Review by certiorari.

In some jurisdictions in appropriate cases *certiorari* may be invoked to review public improvement proceedings when the application for the writ is seasonably made.²⁶ Such proceedings may be set aside on *certiorari* for failure to give notice of the proposed improvement as required.²⁷ Where an ordinance for the construction of a sewer is regarded as a ministerial act of the council it is not reviewable by *certiorari*, but the contrary is true, it has been held, as to the estimate and assessment of the council in affirming the proceedings.²⁸

Usually *certiorari* will not lie where the municipal body has acted within its authority.²⁹ So mere failure of an order of a board of aldermen altering a street to state the proceedings were under a certain statute, does

26. *Hancock v. Boston*, 42 Mass. (1 Met.) 122; *Stone v. Boston*, 43 Mass. (2 Met.) 220; *Powers v. Springfield*, 116 Mass. 84; *Dwight v. Springfield*, 70 Mass. (4 Gray) 107; *Cunningham v. Merchantville Borough*, 61 N. J. L. 466, 39 Atl. 639; *Read v. Camden*, 54 N. J. L. 347, 24 Atl. 549; *Woodruff v. Elizabeth*, 30 N. J. L. (1 Vroom.) 176; *People v. Rochester*, 21 Barb. (N. Y.) 656.

See § 705, p. 1535 *ante*, vol. 2.

When *certiorari* will lie. Where the record of a city board of officers in proceedings to lay out and alter ways may be amended, defects in the proceedings do not constitute ground for *certiorari*. *Chase v. Springfield*, 119 Mass. 556.

Certiorari will lie to review proceedings to lay out streets. *Starr v. Rochester*, 6 Wend. (N. Y.) 564.

Proceedings for opening and

grading streets. *People v. Brooklyn*, 8 Hun (N. Y.) 56.

Proceedings to determine grade of streets. *People v. Gilon*, 121 N. Y. 551, 24 N. E. 944.

An ordinance for opening a street will be set aside on *certiorari* where the record of the proceedings takes no notice of an application for such street, or of the advertisement thereof. *Pope v. Union*, 32 N. J. L. 343.

Certiorari to quash the proceedings of municipal authorities in discontinuing a portion of a street, denied. *Pillsbury v. Augusta*, 79 Me. 71, 8 Atl. 150.

Held, not to lie to review proceedings of village authorities to lay out a street. *Starr v. Rochester*, 6 Wend. (N. Y.) 564.

27. *Beam v. Paterson*, 47 N. J. L. 15.

28. *People v. New York*, 5 Barb. (N. Y.) 43.

29. *Pillsbury v. Augusta*, 79 Me. 71, 8 Atl. 150.

not authorize *certiorari*.³⁰ A defect which may be amended is not ground for *certiorari*.³¹ Proceeding of a municipal public improvement commission in awarding a contract for improving a street, it has been held, are neither judicial nor *quasi* judicial, and hence not subject to review by *certiorari*.³²

A petitioner for *certiorari* must act within a reasonable time, and if he stands by with full knowledge until the work is completed or nearly completed, his petition will be denied.³³ The writ is not one of right, and, even though there is no statutory limitation of time within which to apply for the writ, the court may, in its discretion refuse it, and may quash it where it has been improvidently granted.³⁴ The mere fact, however, that a contract has been made for the work, does not necessarily bar *certiorari*, in the absence of a statute so providing.³⁵ Thus it has been held that the writ will lie to set aside public improvement proceedings although a contract has been made for the work, if the proceed-

30. *Jones v. Boston*, 104 Mass. 461.

31. *Chase v. Springfield*, 119 Mass. 556.

32. *People v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768, dismissing appeal, 73 N. Y. S. 1144, 67 App. Div. 625.

Under the New York statute, the certificate of the board of assessors that the petition of property owners for a street improvement was signed by a majority of the property owners which represented two-fifths of the frontage, and that the land had not been divided to effect such majority, is not reviewable by *certiorari*, in the absence of fraud or bad faith. *People v. Buffalo*, 193 N. Y. 248, 86 N. E. 466, rev'g 111 N. Y. S. 924, 127 App. Div. 851, 948.

33. Work completed and the writ denied. *State v. Rutherford*, 52 N. J. L. (23 Vroom.) 499, 19 Atl. 972.

Work nearly completed and writ denied. *Noyes v. Springfield*, 116 Mass. 87; *Hopewell v. Flemington*, 69 N. J. L. 597, 55 Atl. 653.

Delay in applying for *certiorari*. *Dwight v. Springfield*, 4 Gray (70 Mass.) 107.

34. *People v. Brooklyn*, 8 Hun (N. Y.) 56.

35. *Van Anglen v. Bayonne*, 56 N. J. L. (27 Vroom.) 463, 29 Atl. 168.

In proceedings to raise the grade of a street *certiorari* allowed when applied for before work was done under the proceeding. *Powers v. Springfield*, 116 Mass. 84,

ings were so irregular that there was no authority for making the contract.³⁶ A statute prohibiting *certiorari* to set aside any improvement ordinance after the contract has been awarded thereunder, it has been held, is reasonable and valid.³⁷

Where a court has sustained an ordinance for an improvement and found that the petition therefor was signed by the requisite number of property owners, the evidence cannot be reviewed by *certiorari* to determine whether the petition was signed by a sufficient number.³⁸

36. *Green v. Jersey City*, 42 N. J. L. 118.

37. *Cunningham v. Merchantville Borough*, 61 N. J. L. 466, 39 Atl. 639; *Rosell v. Neptune City*, 68 N. J. L. 509, 53 Atl. 199; *Gillman v. Bloomfield*, 78 N. J. L. 67, 73 Atl. 604.

38. *Re Widening of Diamond St.*, 196 Pa. St. 254, 46 Atl. 428.

Practice on *certiorari*. *Re East*

Grant St., 121 Pa. St. 596, 16 Atl. 366.

Writ should not be allowed without cause shown by affidavit. *Bogert v. New York*, 7 Cow. (N. Y.) 158.

How *certiorari* should be directed. *Bogert v. New York*, 7 Cow. (N. Y.) 158.

Sufficiency of return. *Woodruff v. Elizabeth*, 30 N. J. L. (1 Vroom.) 176.

